ARTICLES

THE HISTORICAL CONTINUITY OF PUNITIVE DAMAGES AWARDS: REFORMING THE TORT REFORMERS*

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INTRODUCTION: IS THERE A PUNITIVE DAMAGES CRISIS?

On November 30, 1992, the U.S. Supreme Court granted certiorari in *TXO Production Corp. v. Alliance Resources Corp.*[1] to review the constitutionality of a punitive damages award that was 526 times the actual damages.[2] The Court will determine whether a high ratio of punitive damages to actual damages violates a defendant's substantive due process rights in light of *Pacific Mutual Life Insurance Co. v. Haslip*.[3] The Court will also determine whether West Virginia's

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1. 419 S.E.2d 870 (W. Va.), *cert. granted*, 113 S. Ct. 594 (1992).

2. TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870, 874 (W. Va.), *cert. granted*, 113 S. Ct. 594 (1992).

3. 111 S. Ct. 1032 (1991). In *Haslip*, the Supreme Court upheld the constitutionality of an award of punitive damages in an Alabama bad faith insurance case, holding that Alabama's system of judicial controls provided adequate safeguards to the defendant's right to due process. Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1044-46 (1991). The Court observed that a punitive damages award made with "unlimited jury . . . or . . . judicial discretion, [might fall] into the area of constitutional impropriety." *Id.* at 1043, 1046. The ratio of punitive damages to compensatory damages in *Haslip* was four to one, and the Court stated that this ratio was large and might also be "close to the line" of constitutional acceptability. *Id.* at 1046. Since the *Haslip* opinion, a majority of courts have upheld state procedures for assessing punitive damages awards. *See, e.g.*, Glasscock v. Armstrong Cork Co., 946 F.2d 1085, 1095-97 (10th Cir. 1991) (rejecting argument that 20-to-1 ratio of punitive to actual damages was excessive and per se unreasonable under Texas law), *cert. denied*, 112 S. Ct. 1778 (1992); Burke v. Deere & Co., 780 F. Supp. 1225, 1237-38 (S.D. Iowa 1991) (denying motion for new trial because punitive damages award was not result of passion and prejudice where punitive damages were eight times amount of actual damages, but reducing award from $50 million to $28 million); Wolf v. Goodyear Tire & Rubber Co., 808 S.W.2d 868, 874 (Mo. Ct. App. 1991) (finding no due process violation under *Haslip* analysis of award and review procedures where ratio of punitive damages to actual damages was almost 3-to-1).

A few states, however, have either struck down punitive damages awards as violative of due process or announced new guidelines for controlling these awards. A Maryland court struck down a punitive damages award with a ratio of 160-to-1. Alexander & Alexander, Inc. v. B. Dixon Evander & Assocs., Inc., 596 A.2d 687, 710-11 (Md. Ct. Spec. App. 1991), *cert. denied*, 605 A.2d 137 (Md. 1992). The court stated that "[i]f the $840,000 awarded in *Haslip* came 'close to the line' in terms of the actual loss suffered, this surely crosses that line." *Id.* at 710-11. In the end, the court assessed $250,000 in actual damages and $12.5 million in punitive damages. *Id.* at 703. Rather than strike down a punitive damages award, the West Virginia Supreme Court of Appeals created new guidelines for the awarding of punitive damages that did not have retroactive application to the award in *TXO Production*. Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897, 899-900, 908-10 (W. Va. 1991). The appellate court stated that trial courts, when instructing juries, should carefully explain the factors to be considered in awarding punitive damages. *Id.* at 908-09. Following the principles set forth in *Haslip* and other Supreme Court cases, the West Virginia Supreme Court of Appeals held:

(1) Punitive damages should bear a reasonable relationship to the harm that the defendant's actions caused or would be likely to cause;
(2) The jury should take into account how long the defendant continued his [or her] actions, whether he [or she] was aware of his [or her] actions' effect or

method of assessing punitive damages violated the defendant's procedural due process rights.

The petitioner, TXO Production Corp. (TXO), was a subsidiary of a Fortune 500 firm, the USX Corporation,[4] which is the successor corporation to U.S. Steel. The respondent, Alliance Resources Corp. (Alliance) is a successor corporation to a corporation that leased oil and gas rights.[5] The punitive damages award stemmed from TXO's fraudulent scheme to slander Alliance's title in order to reduce royalties owed on gas and oil leaseholds.[6]

In 1985, TXO Production Corp., an oil and gas production company,[7] acquired Alliance's lease interest in the Blevins tract of land in McDowell County, West Virginia, to explore for oil.[8] Alliance retained an interest in the oil and gas royalties.[9] TXO then obtained a quitclaim deed granting it any rights a third party might have had and filed suit to quiet title.[10] TXO claimed that it was filing the quitclaim deed to the Blevins tract because of its well-grounded suspicion that the land had been conveyed to a third party.[11] Alliance contended that TXO's act of filing the quitclaim deed was a strategic ploy to place a cloud on its title in order to avoid paying millions of dollars in royalties.[12]

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potential effect, whether he [or she] attempted to conceal his [or her] conduct or the resultant harm; whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to reach a fair and prompt settlement. Specific instruction as to each element is not required if doing so would cause undue prejudice to the defendant;

(3) If the defendant profited from his [or her] conduct, the punitive damages award should be in excess of the profit (so as to deter future bad acts by the defendant);

(4) As a matter of fundamental fairness, the punitive damages should bear a reasonable relationship to compensatory damages; and

(5) The financial position of the defendant is relevant.

Id. at 909. According to the West Virginia Supreme Court of Appeals, a trial court's review of a punitive damages award must consider, in addition to the factors explained to the jury: (1) the costs of litigation; (2) any criminal sanctions imposed on the defendant for his or her conduct (for mitigation of the award); (3) any other civil actions against the defendant for the same conduct (also for mitigation of the award); and (4) the appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. *Id.* In addition, the trial court must thoroughly set out the reasons for changing or not changing a punitive damages award. *Id.* at 910.

4. TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870, 875 (W. Va.), *cert. granted*, 113 S. Ct. 594 (1992).

5. *Id.* The plaintiff, Alliance Resources Corporation, is a successor in interest to Virginia Crews Coal Company, which is the assignee of oil and gas rights from Tug Fork Land Company. *Id.*

6. *Id.* at 875-77.

7. *Id.* at 875.

8. *TXO Prod.*, 419 S.E.2d at 875.

9. *Id.*

10. *Id.* at 877.

11. *Id.* at 880.

12. *Id.*; *see also* Brief of Respondents, TXO Prod. Corp. v. Alliance Resources Corp. (U.S.

TXO called a conference with Alliance to iron out the difficulties between the parties.[13] After an unfruitful meeting, TXO filed a declaratory judgment suit, ostensibly to settle ownership of the Blevins tract.[14] Alliance counterclaimed for slander of title,[15] contending that the actual purpose of TXO's "title concerns" was to steal title for itself.[16] Alliance contended that TXO devised the clandestine plan to build title for itself in order to recapture the multimillion-dollar expected royalty interests retained by Alliance.[17] Alliance sought to recover damages sustained by reason of TXO's allegedly malicious publication of false statements about third-party rights in the Blevins tract.[18] Alliance contended that its chain of title was unambiguous and that TXO was placing a cloud of title on the Blevins tract for the sole purpose of misappropriating expected gains of between $5 million and $8.3 million in royalties projected for Alliance.[19]

TXO lost its declaratory judgment action.[20] The court agreed with Alliance that TXO's quitclaim deed was a nullity.[21] A jury handed down a verdict of $19,000 in compensatory damages and $10 million in punitive damages predicated upon Alliance's counterclaim for slander of title.[22] TXO appealed to the Supreme Court of Appeals of West Virginia, which affirmed the lower court.[23] The West Virginia Supreme Court found that TXO had knowingly and intentionally filed its declaratory judgment against Alliance as part of a secret plan to reduce the royalty payments owed under the 1,002.74-acre oil and gas lease.[24]

The West Virginia Supreme Court held that the jury properly

Mar. 3, 1992) (No. 92-479), *available in* LEXIS, Genfed Library, Briefs File [hereinafter Brief of Respondents] (explaining that TXO was attempting to misappropriate $5.0 to $7.3 million in royalties). In the brief, Alliance contended that TXO sought to "build a phony chain of title" to the Blevins tract. Brief of Respondents, *supra*. Thus, TXO first sought to demonstrate to Alliance that the oil and gas rights to the Blevins tract had been conveyed to a third party before Alliance received those rights. *Id.* Then, by purchasing a quitclaim deed from the third party, TXO could claim that it owned the oil and gas rights. *Id.* If successful in its plan, TXO would have effectively divested Alliance of any rights in the Blevins tract and would therefore no longer be required to pay Alliance any royalties under their agreement. *Id.*

13. *TXO Prod.*, 419 S.E.2d at 877.
14. *Id.*
15. *Id.*
16. *Id.* at 880-81.
17. Brief of Respondents, *supra* note 12.
18. *TXO Prod.*, 419 S.E.2d at 879-81.
19. Brief of Respondents, *supra* note 12.
20. *TXO Prod.*, 419 S.E.2d at 877.
21. *Id.*
22. *Id.*
23. *Id.* at 877, 890.
24. *Id.* at 875-81.

weighed the conflicting evidence in its finding that TXO had committed "unsavory and malicious practices."[25] The court found ample support in the record that TXO's action "was not an isolated incident . . . but rather part of a pattern and practice by TXO to defraud and coerce those in positions of unequal bargaining power *vis à vis* TXO's superior legal firepower."[26] The court also held that the trial court properly admitted evidence of TXO's similar fraudulent activities in Louisiana, Texas, and Oklahoma.[27] The other bad acts evidence was relevant, the court found, because it tended "to disprove TXO's good faith defense and to show that this case was but part of a pattern and practice of deception and chiseling by TXO."[28] TXO also contended that the trial court violated West Virginia's procedures for reviewing punitive damages awarded by a jury.[29]

In *Pacific Mutual Life Insurance Co. v. Haslip*,[30] the Court had held that a state's procedure for awarding punitive damages satisfies due process as long as it provides "meaningful constraints on the discretion of . . . factfinders."[31] In *TXO Production*, Chief Justice Richard Neely examined all of the appellate cases decided since *Haslip* to see which type of case was most likely to be upheld.[32] Neely focused on the relationship between compensatory and punitive damages.[33] He found that punitive awards at a high ratio to compensatory damages correlate to intentional, deliberate, and malicious wrongdoing.[34] "Really mean" defendants who set out to deliberately injure plaintiffs received the greatest punishment.[35] Merely "stupid" defendants received a more sympathetic hearing from appellate courts because their actions were careless rather than mean spirited.[36]

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25. *Id.* at 880.

26. *Id.* at 881.

27. *Id.* at 881-86.

28. *Id.* at 883. TXO objected to the introduction of testimony by several lawyers that was intended to establish TXO's lack of good faith. *Id.* TXO maintained that the testimony was irrelevant, inappropriate character evidence and inadmissible hearsay. *Id.* at 881-86. The court found against TXO on all points. *Id.*

29. *Id.* at 886.

30. 111 S. Ct. 1032 (1991).

31. Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1045 (1991).

32. *TXO Prod.*, 419 S.E.2d at 887.

33. *See id.* at 889-90 (maintaining that in cases of "intentionally committed mean-spirited and harmful acts," reasonable relationship between compensatory and punitive damages depends on "what it reasonably takes to attract the defendant's attention").

34. *Id.* at 889.

35. *Id.*

36. *Id.* at 888. The Chief Justice maintained that punitive damages give "individual plaintiffs a sword with which to fight well-armored, bureaucratic defendants." *Id.* Punitive damages provide a significant incentive to middle managers of large corporations to prevent and correct "really stupid" behavior. *Id.* Unlike small businesses, where owners directly

Judge Neely reasoned that TXO's actions were mean spirited.[37] TXO maliciously plotted "to use the purported cloud [on title] as leverage for increasing its interest in the oil and gas rights."[38] He further maintained that "[w]here the defendant has intentionally committed mean-spirited and harmful acts . . . even punitive damages 500 times greater than compensatory damages are not *per se* unconstitutional under *Haslip*."[39]

In its brief to the Supreme Court, TXO argued that its "punishment was meted out by a single jury, exercising near-absolute discretion."[40] It further argued that "the $10 million punitive award assessed against TXO is so grossly excessive that it constitutes a deprivation of property without due process of law."[41] TXO also argued that "West Virginia's procedure for awarding punitive damages in this case failed to satisfy the requirements of procedural due process."[42] TXO based its principal due process arguments on vague jury instructions.[43] TXO argued that "the jury instructions served affirmatively to misguide the jury by encouraging it to place emphasis on a largely irrelevant and highly prejudicial factor, the wealth of TXO and its corporate affiliates."[44]

Alliance, the respondent, argued that "the award does not violate substantive or procedural due process."[45] The respondent argued that the punitive damages award easily met the standard set forth in *Haslip*.[46] TXO's secretive scheme to steal Alliance's property rights was calibrated against expected as well as actual harm, the degree of repressibility, expected gain, TXO's financial position, and the other *Haslip* factors.[47] The respondent also argued that the jury instructions, post-trial review, and appellate review procedures satisfied procedural due process standards.[48] The Court heard arguments in *TXO Production* on March 31, 1993. *TXO Production*

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oversee day-to-day management, mid-level managers at large corporations would otherwise have less incentive to correct problems caused by "stupid" decisionmaking. *Id.*

37. *Id.* at 889-90.

38. *Id.* at 877.

39. *Id.* at 889.

40. Brief of Petitioner, TXO Production Corp. v. Alliance Resources Corp. (U.S. Jan. 22, 1993) (No. 92-479), *available in* LEXIS, Genfed Library, Briefs file [hereinafter Brief of Petitioner].

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. Brief of Respondents, *supra* note 12.

46. Brief of Respondents, *supra* note 12.

47. Brief of Respondents, *supra* note 12.

48. Brief of Respondents, *supra* note 12.

may be the case that radically restructures the procedural and substantive limits on due process.

The Court has previously shown concern about the lack of clear standards in this area.[49] Justice Sandra Day O'Connor, in the dissenting portion of her opinion in *Browning-Ferris Industries v. Kelco Disposal, Inc.*,[50] wrote that "punitive damages are skyrocketing."[51] She observed that "[a]s recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was $250,000. Since then, awards more than 30 times as high have been sustained on appeal."[52] In calling for maximum-allowable ratios on punitive damages awards, TXO echoes the proposal of the now-defunct President's Council on Competitiveness to cap punitive damages at no more than actual damages.[53]

Multimillion dollar punitive damages awards have caused an out-

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49. *See, e.g.*, Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 281, 282-83 (1989) (Brennan, J., concurring) (urging stricter scrutiny of punitive awards made in absence of statutory or common law standards); *id.* at 282-83 (O'Connor, J., concurring in part and dissenting in part) (expressing concern over juries given "unbridled discretion" to impose punitive damages); Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 87 (1988) (O'Connor, J., concurring in part and concurring in the judgment) (asserting that jury's "wholly standardless discretion . . . appears inconsistent with due process"); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 270-71 (1981) (noting financial, and hence public, risk posed by broad jury discretion in assessing punitive damages as factor in holding municipalities immune from such awards).

50. 492 U.S. 257 (1989).

51. Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor's subsequent dissenting opinion in *Haslip* shows that she has not changed her mind about the potential constitutional infirmities of punitive damages. She wrote that "[r]ecent years . . . have witnessed an explosion in the frequency and size of punitive damage awards." Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1066 (1991) (O'Connor, J., dissenting). She noted further that punitive damages have combined with "other significant legal developments, [which] include the advent of product liability and mass tort litigation" to create a litigation crisis. *Id.* As evidence, she cited a law review article that complained, "Today, hardly a month goes by without a multimillion-dollar punitive damage verdict in a product liability case." *Id.* (citing Malcolm Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 ALA. L. REV. 919, 919 (1989)).

52. *Browning-Ferris*, 492 U.S. at 282.

53. *See* PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 22-23 (Aug. 1991) [hereinafter AGENDA FOR CIVIL JUSTICE REFORM]. Hewlett-Packard Chief Executive Officer John Young founded the President's Council on Competitiveness (Council or Council on Competitiveness) in 1987 in order to forge closer links between business and government. Kevin Phillips, *U.S. Industrial Policy: Inevitable and Ineffective*, HARV. BUS. REV., July-Aug. 1992, at 104. The Council presented recommendations to the White House on various issues including tort reform, environmental pollution, government regulation, and other issues of interest to the business community. *See, e.g.*, Stephen Budiansky, *Technological Tunnel Vision*, U.S. NEWS & WORLD REP. Nov. 9, 1992, at 83 (relaying to Council criticism of National Aeronautics and Space Administration and Department of Energy for retarding technology transfer through excessive rules); John H. Cushman, *Pact Is Reached To End Delays on Cleaner Air*, N.Y. TIMES, Nov. 26, 1992, at A19 (noting influence of Council on environmental regulation); *Facing One Last Assault on Wetlands*, CHI. TRIB., Nov. 14, 1992, at 22 (noting Council attempt to obtain relaxed definition of wetlands); Senator Connie Mack, *Ruinous Political Quackery*, WASH. TIMES, July 10, 1992, at F3 (remarking on Council efforts to streamline process by which new drugs receive Food and Drug Administration approval). One of President

cry that this remedy is out of control.[54] Former Vice President Dan Quayle has also expressed his concern about the fundamental fairness of very large punitive damages awards in product liability cases.[55] He claims that reforms are urgently required because "the current approach to punitive damages [continues] to generate disproportionately high awards in a random and capricious manner."[56] Vice President Quayle believes that unless a ceiling is placed on these unbalanced awards, the remedy will continue to "develop without restriction."[57]

This Article contends that the awarding of punitive damages is a necessary remedy against the abuse of power by economic elites. Justice Neely's taxonomy of punitive damages defendants as being either "mean" or "really stupid" accounts for almost all punitive damages awards since the remedy's inception. Justice Neely's para-

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Clinton's first presidential acts was to disband the Council. *White House Memorandum on Council on Competitiveness*, U.S. Newswire, Jan. 22, 1993, *available in* LEXIS, Nexis Library, Allexe File.

54. This outcry is led by powerful business lobbies such as the Citizens for Civil Justice Reform (CCJR). Wayne Valis, the Executive Director of CCJR, describes his organization as "a broad-based, bi-partisan coalition of key business, public interest, state and municipal, and civil organizations dedicated to restoring fairness, efficiency and integrity to the American legal system." Letter from Wayne Valis, Executive Director of the Citizens for Civil Justice Reform, to Michael Rustad, Professor of Law, Suffolk University Law School (Sept. 23, 1992) (on file with *The American University Law Review*). The membership list of this corporate "public interest" group includes Adams and Reese, Aetna Life and Casualty Co., Allstate Insurance Company, American Association of Advertising Agencies, American Association of Blood Banks, American Business Conference, American College of Osteopathic Surgeons, American Consulting Engineers Council, American Corporate Counsels Association, American Furniture Manufacturers Association, American Home Products Corporation, American International Group, American Legislative Exchange Council, American Medical Association, American Petroleum Institute, American Re-Insurance Company, American Tort Reform Association, Amusement & Music Operators Association, Amway Corporation, Associated Builders & Contractors, Associated General Contractors, Chevron Corporation, Cigna Corporation, Citizens for a Sound Economy, Coldwell Banker Real Estate Group, Court Security Systems Inc., Crosby Group, Deloitte & Touche, The Doctors' Company, The Dwyer Group, Electronic Industries Association, FMC Corporation, Federation of American Health Systems, GTE Corporation, General Dynamics, Georgia Pacific Corp., Glaxo Inc., Golden Rule Insurance Company, Great American Insurance Company, Humana, Inc., Insurance Information Institute, International Mass Retail Association, Eli Lilly & Co., Mayberry & Associates, Milliken & Company, Morgan Stanley & Co., National Accounting & Finance Council (ATA), National-American Wholesale Grocers' Association, National Association of Independent Insurers, National Coal Association, National Federation of Independent Business, National Paint & Coatings Association, National Printing Equipment & Supply Association, National Society of Professional Engineers, Nationwide Insurance, Natural Gas Supply Association, New York Life Insurance Co., Norfolk Southern Corporation, Parker Hanifin Corporation, Pharmaceutical Manufacturers Association, Philip Morris Companies Inc., Reliance Insurance Group, Riverside Canoes, Riverside Group, RJR Nabisco, Rockwell International, S & S Specialty's Inc., Skadden, Arps, Slate, Meagher & Flom, Tamaron Investments, Inc., Texaco, Inc., Transamerica Insurance Group, and U.S. Business and Industrial Council.

55. *See* Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559, 564-65 (1992) (arguing that to reduce threat of runaway jury verdicts, assessment of punitive damages should be restricted through standard of proof requiring "intent," caps on awards, and bifurcated proceedings with judge, not jury, determining amount of award).

56. *Id.* at 564.

57. *Id.*

digm, however, neglects to address the asymmetrical power relationships between plaintiffs and defendants that foster the conduct he describes. The behavior punished in *TXO Production* is consistent with the historical and contemporary uses of punitive damages. Extreme power discrepancies breed arrogant and highhanded conduct. The doctrine of punitive damages is one of the few remedies that can constrain a giant corporation that is willing and able to take advantage of its less powerful "adversaries." Lopsided ratios between punitive and compensatory damages awards are often necessary for the punishment and deterrence of powerful corporations. The remedy's effectiveness in doing so stems from its unpredictability. Capping punitive damages would undermine the deterrent effect of the remedy by making it possible for corporations to calculate their maximum exposure and therefore make a profit-based determination as to whether "really mean behavior" is good business practice. The remedy has served America well historically; courts and legislatures should permit it to continue to punish and deter abusive and dangerous conduct.

Former Vice President Quayle wishes to undermine punitive damages precisely because such damages constrain big business. He attacks only those provisions of the civil justice system that impede the activities of economic elites.[58] In an article in *The American University Law Review*,[59] Vice President Quayle based his recommendations for punitive damages reforms on the Model State Punitive

58. *See id.* at 562-67 (proposing reforms in areas of notice, discovery, punitive damages, expert testimony, and attorney fees). The business community has several major criticisms of punitive damages. First, the community claims that awards are a "wild card" in the judicial process that may be played in unpredictable ways. Daniel B. Moskowitz, *Punitive Damages: Setting Standards for Legal Wild Card*, WASH. POST, Oct. 1, 1990, at F26. Second, it believes that a fear of large punitive damages awards hampers the development of beneficial products. Stacy Adler, *High Courts Review Punitive Damages; Justices To Consider Award Limits*, BUS. INS., Oct. 1, 1990, at 1. Third, it maintains that courts impose punitive damages awards arbitrarily. *Punitive Damages, Unpunished*, N.Y. TIMES, Mar. 9, 1991, at 22; *see also* Sheila L. Birnbaum & Malcolm Wheeler, *Punitive-Damages Law Paves Way for Massive Design-Defect Awards*, NAT'L L.J., Nov. 17, 1986, at 40 (noting that jury is told that it may award punitive damages to punish or to deter but receives literally no additional guidance); Myrna Oliver, *U.S. Tort System Is Wrongly Perceived, Rand Study Says*, L.A. TIMES, Nov. 24, 1987, at 3 ("[O]ut of control juries grant primarily million-dollar-plus verdicts."). Fourth, the business community claims that the huge potential payoff for plaintiffs results in needless litigation, a depiction even the public has come to accept. *See* Bruce Keppel, *Poll Backs Insurance Industry Priority; Public Wants Civil Suit Reforms, Survey Says*, L.A. TIMES, Mar. 9, 1987, § 4, at 2 (discussing poll of American citizens that indicated that civil justice system is being abused). Moreover, the corporate community has launched a full-scale attack on punitive damages, arguing that the indeterminate penalties permitted under the doctrine places firms at the mercy of populist juries that see companies merely as "deep pockets." *See* Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda-Building*, LAW & CONTEMP. PROBS., Autumn 1989, at 269, 273 (emphasizing role of crisis rhetoric and sources of attacks on jury competence).

59. Quayle, *supra* note 55, at 559-69.

Damages Act[60] proposed by the President's Council on Competitiveness.[61] The six-part Model Act provides for: (1) the elimination of *ad damnum* clauses in punitive cases;[62] (2) a heightened standard of proof based on clear and convincing evidence;[63] (3) proof that

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60. MODEL STATE PUNITIVE DAMAGES ACT (Office of the Vice President 1992) [hereinafter MODEL ACT]. Former Vice President Quayle introduced the statute as a reform "proposed by the President's Council on Competitiveness in its report 'Agenda for Civil Justice Reform in America.' . . . The President urges that punitive damages be reformed in order to eliminate randomness and unpredictability in the system, while continuing to punish egregious and intentional misconduct." Dan Quayle, *Introduction* to MODEL ACT, *supra*.

61. *Compare* Quayle, *supra* note 55, at 564-65 (relying on Model Act to argue for limitations to restrict punitive damages awards) *with* AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 53, at 22-23 (containing 50 recommended changes to current civil litigation system, including tort reforms). A special working group established by the President's Council on Competitiveness prepared the recommendations set forth in the report. AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 53, at 28. Then-Solicitor General Kenneth W. Starr chaired the working group, which included representatives from the Departments of Commerce, Energy, Justice, and Treasury, the Office of the White House Counsel, the Office of Management and Budget, the Environmental Protection Agency, the Counsel to the Vice President, the White House Office of Policy Development, the Council of Economic Advisers, the Domestic Policy Council, and the President's Council on Competitiveness. *Id.*

62. MODEL ACT, *supra* note 60, § 4(c). Section 4 provides for a number of restrictions on pleading punitive damages. Section 4(c) provides that "[t]he plaintiff shall not specifically plead an amount of punitive damages, only that such damages are sought in the action." *Id. Damnum* is the Latin word for "damage." The initial declaration as to the amount of damages claimed is referred to as the amount of the *ad damnum* declaration. *See* Illinois Cent. R.R. v. Heath, 81 N.E. 1022, 1024 (Ill. 1907) (referring to jury instruction regarding elements of damages and size of fair compensation as "*ad damnum* declaration").

Legislatures began placing limitations on *ad damnum* declarations in the mid-1970s. *See, e.g.*, FLA. STAT. ch. 798.042 (1991) (eliminating *ad damnum* clauses); *see also* Thomas R. Tedcastle & Marvin A. Dewar, *Medical Malpractice: A New Treatment for an Old Illness*, 16 FLA. ST. U. L. REV. 535, 539 (1988) (discussing impact of Florida's 1988 tort reform legislation on medical malpractice insurance). New York also prohibits *ad damnum* clauses in medical malpractice cases. N.Y. CIV. PRAC. L. & R. 3017(c) (McKinney 1991).

The policy justification for eliminating *ad damnum* clauses is to avoid juries' premature evaluation of punitive damages claims. *See* Jean A. Macchiaroli, *Medical Malpractice Screening Panels: Proposed Model Legislation To Cure Judicial Ills*, 58 GEO. WASH. L. REV. 181, 246 & n.353 (1990) (noting that elimination of *ad damnum* clauses removes plaintiffs' incentive to falsely increase size of claims in attempts to mislead juries). It is possible that the intensive publicity surrounding suits involving large requests for punitive damages has, in fact, misled the public as to the size and frequency of these awards. *Cf.* PETER HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM 182 (1991) (noting that people tend to believe what courts say, "especially when they say it with money").

63. MODEL ACT, *supra* note 60, § 6. Section 6 states: "Before a plaintiff may recover punitive damages in any civil action, that plaintiff must establish, by clear and convincing evidence, all of the facts that are relied upon to support the recovery of punitive damages." *Id.*

Twenty-four states have either passed statutes requiring plaintiffs to prove punitive damages by the heightened standard of "clear and convincing evidence," or have dictated the heightened standard through case law. The following states have enacted such legislation: ALA. CODE § 6-11-20 (Supp. 1992); ALASKA STAT. § 09.17.020 (Supp. 1992); CAL. CIV. CODE § 3294(a) (West Supp. 1993); COLO. REV. STAT. § 13-21-102.5(3) (1987) (requiring proof beyond reasonable doubt); FLA. STAT. ANN. ch. 768.73(1)(b) (Harrison Supp. 1991); GA. CODE ANN. § 51-12-5.1(b) (Michie Supp. 1992); IOWA CODE ANN. § 668A.1 (West 1987) (requiring evidence that is "clear, convincing and satisfactory"); KAN. STAT. ANN. §§ 60-3701(c) to -3702(c) (Supp. 1991); KY. REV. STAT. ANN. § 411.184 (Baldwin 1991); MINN. STAT. ANN. § 5549.20(a) (West 1988); MONT. CODE ANN. § 27-1-221(5) (1992); NEV. REV. STAT. § 42.005(1) (1991); N.D. CENT. CODE § 32-03-07 (1987) (requiring prima facie evidence as

the defendant acted with malice and intent to cause serious harm;[64] (4) bifurcated trials where courts award punitive damages only after a separate trial specifically establishing punitive liability;[65] (5) judge-

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threshold support for motion to amend pleadings to allow exemplary damages claim); OHIO REV. CODE ANN. § 2307.80 (Anderson 1991); OKLA. STAT. ANN. tit. 23, § 9A (West 1987); ORE. REV. STAT. § 30.925(1) (1991); S.D. CODIFIED LAWS ANN. § 21-1-4.1 (1987); UTAH CODE ANN. § 78-18-1(1)(a) (1992). Six states, on the other hand, established the clear and convincing evidence standard through case law. Linthicum v. Nationwide Life Ins. Co., 723 P.2d 675, 681 (Ariz. 1986); Masaki v. General Motors Corp., 780 P.2d 566, 575 (Haw. 1989); Ragsdale v. K-Mart Corp., 468 N.E.2d 524, 527 (Ind. Ct. App. 1984); Tuttle v. Raymond, 494 A.2d 1353, 1362-63 (Me. 1985); Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633, 657 (Md. 1992); Wangen v. Ford Motor Co., 294 N.W.2d 437, 458 (Wis. 1980).

64. MODEL ACT, *supra* note 60, § 6. Section 6 further states that "[t]he plaintiff must establish that the defendant's actions showed malice. This burden of proof may not be satisfied by proof of any degree of negligence including gross negligence." *Id.* Similarly, former Vice President Quayle argues that "[b]ecause punitive damages are 'quasi-criminal,' any award should be predicated on a standard of proof requiring some element of intent." Quayle, *supra* note 55, at 565.

Eleven states statutorily require that plaintiffs establish the existence of malice on the part of defendants before state courts will sustain punitive damages awards. *See* ARIZ. REV. STAT. ANN. § 12-653.02-.03 (1992) (requiring actual malice in action for libel or slander); CAL. CIV. CODE § 3294(a) (West Supp. 1993) (requiring oppression, fraud, or malice in action for breach of noncontractual obligation); DEL. CODE ANN. tit. 18, § 6855 (Supp. 1992) (requiring malice or willful or wanton misconduct in health care malpractice insurance action); MONT. CODE ANN. § 27-1-221 (1991) (requiring finding of actual malice or actual fraud); NEV. REV. STAT. § 41.337 (1991) (requiring actual malice to support punitive damages award in libel or slander action); NEV. REV. STAT. § 42.005(1) (requiring oppression, fraud, or malice, express or implied, in action for breach of noncontractual obligation); N.J. REV. STAT. ANN. § 2A:58C-5 (West 1987) (requiring in product liability actions that tortious conduct be actuated by actual malice or accompanied by wanton and willful disregard of safety of product users or others who foreseeably might be harmed by product); N.D. CENT. CODE § 32-03-07 (Supp. 1991) (requiring oppression, fraud, or actual or presumed malice in actions for breach of noncontractual obligation); OHIO REV. CODE ANN. § 2315-21 (Baldwin 1992) (requiring that acts or omissions of defendant demonstrate malice, aggravated or egregious fraud, oppression, or insult); R.I. GEN. LAWS § 28-5-29.1 (Supp. 1992) (requiring conduct to be motivated by malice or ill-will and that such conduct involves reckless or callous indifference to statutorily protected right of others); S.D. CODIFIED LAWS ANN. § 21-1-4.1 (1987) (requiring willful, wanton, or malicious conduct on part of defendant); VA. CODE ANN. § 8.01-52 (Michie 1992) (allowing recovery of punitive damages for willful or wanton conduct or recklessness evincing conscious disregard for safety of others).

South Dakota's statutory standard may be satisfied by establishing presumed malice (willfulness, wantonness) or actual malicious conduct. Dahl v. Sittner, 474 N.W.2d 897, 900 (S.D. 1991). Under Virginia's statutory standard, the plaintiff must show that the defendant intended all of the conduct that created an exceptional risk and that the defendant was aware of or had sufficient information to recognize the degree of risk. El-Meswari v. Washington Gas Light Co., 785 F.2d 483, 489 (4th Cir. 1986). The plaintiff must also prove that the defendant responsible for the risk responded to it with "purposeful carelessness, deliberate inattention to known danger, or any intended violation of the rights of others." *Id.*

Maine and Maryland require proof of malice through case law. *See* Firth v. City of Rockland, 580 A.2d 694, 697 (Me. 1990) (finding malice sufficient to justify claim of punitive damages when defendant defaulted in answering complaint filed in court regarding conduct committed with express or implied malice); Tuttle v. Raymond, 494 A.2d 1353, 1361-62 (Me. 1985) (establishing requirement of express or implied malice to support award of punitive damages); Owens-Illinois v. Zenobia, 601 A.2d 633, 653 (Md. 1992) (requiring actual malice to support punitive damages award); *see also* RICHARD L. BLATT ET AL., PUNITIVE DAMAGES: STATE BY STATE GUIDE § 3.2, at 57-58 (1991) (noting that proof of malice requires showing of intent to harm injured party).

65. MODEL ACT, *supra* note 60, § 5(a)-(d). Section 5(a) requires that "[a]ll actions tried before a jury involving punitive damages shall, if requested by any defendant, be conducted in

rather than jury-determined punitive damages;[66] and (6) a cap on

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a bifurcated trial before the same jury." *Id.* § 5(a). Section 5(b) requires that "[i]n the first stage of a bifurcated trial, the jury shall determine liability for compensatory damages and the amount of compensatory damages or nominal damages. Evidence relevant only to the issues of punitive damages shall not be admissible in this stage." *Id.* § 5(b). Section 5(c) states that "[p]unitive damages may be awarded only if compensatory damages have been awarded in the first stage of the trial. An award of nominal damages cannot support an award of punitive damages." *Id.* § 5(c). Section 5(d) states that "[i]n the second stage of a bifurcated trial, the jury shall determine if a defendant is liable for punitive damages." *Id.* § 5(d).

The Council on Competitiveness proposed that trials be bifurcated, with the first phase confined to compensatory damages liability and amount and the second reserved for establishing liability for punitive damages. AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 53, at 22. Once the jury finds that the defendant's conduct warrants the assessment of punitive damages, the trial judge determines the amount of punitive damages to be awarded. *Id.* Bifurcation of these different aspects of a case would prevent the introduction of evidence, relevant only to the punitive damages issue, that might contaminate the jury's determination of compensatory damages liability. 1 JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE § 5.36, at 47-53 (1985 & Supp. 1991).

Eleven states have enacted statutes requiring bifurcation. CAL. CIV. CODE § 3295 (West Supp. 1993); CONN. GEN. STAT. ANN. § 52-240(b) (West 1991); GA. CODE ANN. § 51-12-5.1(d) (Michie Supp. 1992); KAN. STAT. ANN. §§ 60-3701 to -3702 (Supp. 1991); MINN. STAT. ANN. § 549.20(4) (West Supp. 1993); MO. ANN. STAT. § 510.263 (Vernon Supp. 1992); MONT. CODE ANN. § 27-1-221(4) (1992); NEV. REV. STAT. § 42.005(3) (1991); N.J. STAT. ANN. § 2A:58C-56 (West 1987); OHIO REV. CODE ANN. § 2315.21 (Baldwin Supp. 1987); UTAH CODE ANN. § 78-18-1(2) (1992). Maryland established bifurcation through caselaw. Owens-Illinois v. Zenobia, 601 A.2d 633, 659 (1992).

66. MODEL ACT, *supra* note 60, § 5(f). Section 5(f) states:

> In all cases involving an award of punitive damages, the court, in determining the amount of punitive damages, shall include in its consideration prior damage awards for the same wrongful act, the effect on other potential claimants of a punitive damages award, the deterrent provided by compensatory damages in the case, and the potential or prior criminal and administrative penalties against the defendant for the same wrongful act.

Id.

In 1983, then-Senator Quayle cosponsored a bill that would have replaced jury awards of punitive damages with awards determined by judges. *See* S. 44, 98th Cong., 2d Sess. § 12(c) (1983) (requiring that liability, for and amount of, compensatory damages be established in separate proceeding prior to jury determination of liability for punitive damages); *see also Reform Bill Again Offered by Kasten in Senate*, Daily Rep. for Exec. (BNA), DER No. 19, at A-9 (Jan. 23, 1983), *available in* LEXIS, Nexis Library, NWLTRS File (discussing elements of proposed federal tort reforms for product liability actions). In 1978, the Federal Interagency Task Force on Product Liability recommended a model product liability law. *See, e.g.*, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, U.S. DEP'T OF COMMERCE, FINAL REPORT VII-1 to -2 (1977) (proposing modification of some basic product liability rules to provide greater rationality and stability to tort litigation system); 1 INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, U.S. DEP'T OF COMMERCE, PRODUCT LIABILITY: FINAL REPORT OF THE LEGAL STUDY 32 (1977) (recommending that uniform standards be set by federal legislation on product liability); 1 INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, U.S. DEP'T OF COMMERCE, PRODUCT LIABILITY: FINAL REPORT OF THE INSURANCE STUDY 4-88 (1977) (urging development of proposed model tort legislation in response to insurance study findings); *see also* MODEL UNIFORM PRODUCT LIABILITY ACT § 120(B) (U.S. Dep't of Commerce 1979) (stating different factors courts must consider in determining amounts of punitive damages).

Three states have adopted judge-assessed punitive damages measures. CONN. GEN. STAT. ANN. § 52-240b (West 1991) (noting application to product liability actions); KAN. STAT. ANN. §§ 60-3701(a)-(b), -3702(a)-(b) (1987) (providing that court "shall determine the amount of exemplary or punitive damages to be awarded and shall enter judgment for that amount"); OHIO REV. CODE ANN. § 2315.21(b) (Baldwin Supp. 1987) (stating that "the amount of those [punitive or exemplary damages] shall be determined by the court"). A number of academics also favor judge-assessed punitive damages in order to control the size of punitive damages awards. *See, e.g.*, Griffin B. Bell & Perry E. Pearce, *Punitive Damages and the Tort System*, 22 U.

punitive damages at no more than the total compensatory award.[67]

RICH. L. REV. 1, 2 (1987) (asserting that judges should not hesitate to reduce excessive jury awards); David Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1320 (1976) (recommending shifting determination of size of awards from jury to trial judge); Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 302 (1983) (pointing out judges' experience in making policy judgments and determining awards as factors favoring judicial determination of punitive damages).

67. MODEL ACT, *supra* note 60, § 7. Section 7 states that "[n]o award of punitive damages shall exceed the amount of total compensatory damages awarded to the plaintiff in the action." *Id.*

There are three types of punitive damages ceilings: fixed ratios, fixed amounts, and hybrids. A fixed-ratio ceiling sets punitive damages at a fixed ratio to the amount of compensatory damages. Five states employ fixed-ratio limitations: Colorado, Florida, Nevada, Oklahoma, and Texas. None of the fixed-ratio state ceilings are as inflexible and conservative as the one-to-one punitive damages-to-actual damages ratio proposed by President Bush's Council on Competitiveness. *See* AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 53, at 22. For example, Colorado and Oklahoma limit jury imposed exemplary damages to actual damages. COLO. REV. STAT. § 13-21-102(1)(a) (1991); OKLA. STAT. ANN. tit. 23, § 9A (West 1987). In Colorado, however, courts have discretion to raise punitive damages awards to three times the actual damages if, during a trial, the wrongful conduct continues or the defendant knowingly aggravates the plaintiff's damages. COLO. REV. STAT. § 13-21-102(3). An Oklahoma court, on the other hand, has discretion to lift the cap in egregious circumstances. OKLA. STAT. ANN. tit. 23, § 9A. The court may lift the ceiling where it finds clear and convincing evidence that the defendant's conduct evinces "wanton or reckless disregard for the right of another, oppression, fraud or malice." *Id.*

Florida, Nevada, and Texas have far more generous ratios than the one-to-one ceiling proposed by the Council. In Florida, punitive damages may not exceed three times the amount of compensatory damages unless the plaintiff can produce "clear and convincing evidence" to support a larger punitive award. FLA. STAT. ANN. ch. 768.73 (Harrison Supp. 1991). Nevada limits punitive damages to $300,000 in cases where compensatory damages are less than $100,000 and up to three times compensatory damages when these awards are $100,000 or more. NEV. REV. STAT. § 42.005 (1991). This cap, however, does not apply to product liability actions. *Id.* Texas limits punitive damages to four times the amount of actual damages, or $200,000, whichever is greater. TEX. CIV. PRAC. & REM. CODE ANN. § 41.007 (West Supp. 1992).

Alabama and Virginia take a different tack, capping punitive damages at fixed amounts. Alabama sets maximum allowable punitive damages at $250,000 in nonwrongful death cases. ALA. CODE § 6-11-21(1) (Supp. 1992). Virginia caps punitive damages at $350,000. VA. CODE ANN. § 8.01-38.1 (Michie 1992). Kansas has a hybrid model, limiting punitive damages to the lesser of five million dollars or "defendant's highest gross annual income earned for any of the five years immediately before the act for which such damages are awarded." KAN. STAT. ANN. § 60-3701(e) (Supp. 1991). The plaintiff can circumvent this cap by proving that the defendant expected to make a profit exceeding the maximum damage award. *Id.* § 60-3701(f). If the plaintiff qualifies for the exception, damages may be set at one and one-half times this expected profit. *Id.*

The President's Council on Competitiveness proposed that punitive damages be no greater than actual damages. AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 53, at 22. One empirical study of punitive damages awards in product liability litigation calls that proposal into question, however, because the study found only 208 cases in which punitive damages exceeded compensatory damages. *See* Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 50-51 (1992) (reporting punitive-to-compensatory ratios for nonasbestos product liability cases). The median size of punitive damages awards for all product liability verdicts was $625,000. *Id.* Actual damages, of which the median award was $500,000, exceeded punitive damages in 36% of the cases. *Id.* Punitive damages were 10 or more times actual damages in only about 10% of the cases. *Id.*

In nonasbestos product liability verdicts with punitive damages, one in 10 verdicts had a ratio 10 or more times greater than actual damages. Rustad, *supra*. Actual damages were larger than punitive damages in more than one-third of the nonasbestos punitive awards. *Id.* In slightly under one in five cases, punitive damages were greater than four times actual damages. *Id.* The median ratio of punitive damages to compensatory damages awarded at trial

Vice President Quayle justified his proposals as necessary to protect the competitiveness of American firms.[68]

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was 1.67 to 1, which provides little support for the perception of disproportionate punitive awards. *Id.*

Some commentators argue that capping punitive damages will lessen the deterrent value of the remedy by permitting firms to conduct cost-benefit analyses in order to determine whether to trade safety for profits. *See, e.g.*, Jimmie O. Clements, Jr., *Limiting Punitive Damages: A Placebo for America's Ailing Competitiveness*, 24 ST. MARY'S L.J. 197, 218-19 (1992) (asserting that punitive damages cap would cause extremely heinous conduct to go undeterred and unpunished); Sylvia M. Demarest & David E. Jones, *Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest?*, 18 ST. MARY'S L.J. 797, 825 & n.156 (1987) (criticizing punitive damages caps as arbitrarily imposed, thereby creating disproportionate results); Amelia J. Toy, Comment, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 EMORY L.J. 303, 335 (1991) (stating that statutory punitive damages caps, by allowing potential tortfeasors to calculate maximum expected costs, sacrifice goals of punitive damages).

68. Quayle, *supra* note 55, at 560-61. The former Vice President also asserted that U.S. product liability law has a chilling effect on product innovation and on the willingness of the medical community to adopt new technologies and treatments. *See* Michael Bradfor, *Tort Reform Proponents See Boost from Bush Plan*, BUS. INS. Feb. 17, 1992, at 2 (quoting former Vice President Quayle's argument that "[w]e cannot permit the continued withdrawal from the market of excellent, competitive American products simply because of the incalculable threat of excessively large law suit costs and awards").

The general public has also grown increasingly disenchanted with punitive damages. *See, e.g.*, Jason S. Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law*, 87 COLUM. L. REV. 1385, 1386-87 (1987) ("Increasing popular disenchantment with our current tort system has paralleled academic criticism. Virtually no aspect of current tort doctrine has been immune to criticism and legislative reform. However, attention has been focused on spectacular punitive damages cases.").

A major theme of the business critique of punitive damages is that firms are being victimized by overly sympathetic juries. *See supra* note 58 (discussing business community criticisms of punitive damages). The popular wisdom is that juries are motivated to "overcompensate" plaintiffs by handing down large punitive damages awards. *See* Stephen Daniels & Joanne Martin, *Jury Verdicts and the "Crisis" in Civil Justice*, 11 JUST. SYS. J. 321, 324-26 (1987) (describing tort reformers' use of apocryphal punitive damages stories to arouse public support and confirm notion of biased juries); Amanda E. Haiduc, Note, *A Tale of Three Damage Caps: Too Much, Too Little and Finally Just Right*, 40 CASE W. RES. L. REV. 825, 830 (1990) (asserting that noneconomic damages are susceptible to manipulation by juries sympathetic to plaintiffs). One journalist portrayed punitive damages as "unpredictable bolts of lightning wielded by vengeful juries inflamed by prejudice versus large corporations, untutored in how to calculate the appropriate fine and egged on by greedy plaintiffs' lawyers salivating at the prospect of huge contingency fees." Ruth Marcus, *Are Punitive Damage Awards Fair to Firms? Supreme Court Finally Agrees To Referee High-Stakes Dispute*, WASH. POST, Sept. 23, 1990, at H1.

Insurance firms argue that the explosive growth of tort damages awards causes spiraling insurance rates. *See, e.g.*, Edith Greene et al., *Jurors' Attitudes About Civil Litigation and the Size of Damage Awards*, 40 AM. U. L. REV. 805, 806 (1991) (discussing insurance industry's publicity campaign directed toward insurance crisis); Franklin W. Nutter, *The Fight for Civil Justice Reform*, INS. REV., Nov.-Dec. 1984, at 2, 6 (asserting that effect of tort litigation on health care industry is increased costs of malpractice insurance). The long-standing belief is that "poor jurors will gouge relatively wealthy defendants." Alan H. Scheiner, Note, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142, 164 n.118 (1991). Another commonly held belief is that juries consider the plaintiff's attorney's fees when assessing punitive damages. *Id.* at 167. While evidence exists that juries assess higher damages against "deep pocket" defendants, such a tendency may be consistent with the jury instructions. *Id.* Hence, a jury, on either moral or factual grounds, may "find" greater wrongdoing. *Id.*

This set of beliefs is rampant "[d]espite empirical evidence suggesting that any increase in the size or frequency of punitive damages has been limited to a few geographical areas." Johnston, *supra*, at 1387; *see* Daniels & Martin, *supra*, at 323 (noting that little evidence exists

The former Vice President's article makes it appear that the remedy of punitive damages in product liability is an aberration that creates substantial harm to American firms and therefore should be radically diminished.[69] Nowhere in his article, however, is there any discussion about the historic role that punitive damages awards have

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concerning actual jury verdicts awarding punitive damages). Moreover, corporate America continues to exhort consumers to join its crusade against "lawsuit abuse." Greene et al., *supra*, at 806.

A recent study of jurors, however, provides little evidence that juries are pro-plaintiff in personal injury cases. *Id.* Several Washington-state researchers conducted an experimental study of 213 experienced or potential jurors at the King County Courthouse in Seattle, Washington during the fall of 1986. *Id.* at 810. One purpose of the study was to assess the impact of the tort reform campaign against "lawsuit abuse" on jurors' attitudes. *Id.* at 808. One question the researchers asked was whether jurors accepted insurance industry claims that high damage awards lead to spiraling insurance costs. *Id.* Ninety percent of jurors agreed that there are "too many lawsuits." *Id.* at 814. Thirty-seven percent of the respondents agreed with the statement, "No one deserves more than a million dollars in damages." *Id.* The researchers found a "significant positive correlation between the jurors' total attitude score . . . and their damage awards in [a mock] personal injury case." *Id.* at 816. This study suggests that tort reformers are highly effective in shaping public opinion and casts doubt on the hypothesis that juries are pro-plaintiff. *See id.* at 816-18 (maintaining that jurors have not been "snowballed" by claims made by insurance industry).

69. *See* Quayle, *supra* note 55, at 560-61 (portraying greedy plaintiffs' attorneys as hovering over every new product in hopes of convincing juries that product causes some ill-defined malady or other specious injury); *see also* HUBER, *supra* note 62, at 92-96 (citing cases in which plaintiffs' experts contend that environmental pollutants cause "chemical AIDS" as well as variety of other "invented" causes of action). Other examples Huber cites are the soothsayer who loses her psychic powers due to a CAT scan, HUBER, *supra* note 62, at 4, spermicide causing birth defects, *id.* at 174, the sudden acceleration of the Audi 5000 automobile, *id.* at 57-74, and slip-and-falls causing cancer. *Id.* at 39-41. Huber, in fact, seems to be the prod behind the former Vice President's reform stampede. *See* Quayle, *supra* note 55, at 565 (calling Huber "a leading observer of American courtrooms").

These "Huberian" tales apparently cause some firms to withhold products even when they are reasonably certain that the products pose no danger to the consuming public. A survey by The Conference Board reported that potential liability concerns caused 47% of U.S. manufacturers to withdraw products from the market. E. PATRICK MCGUIRE, THE CONFERENCE BOARD, INC., RESEARCH REP. NO. 908, THE IMPACT OF PRODUCT LIABILITY 20 (1988). A quarter of all U.S. firms discontinued some forms of product research and 15% of U.S. companies laid off workers as a direct result of product liability fears. *Id.* Indeed, when 2000 Chief Executive Officers were surveyed, they reported that fear of product liability resulted in "useful products . . . being discontinued, decisions not to develop new product lines or not to continue product research, and a fear to innovate." *Id.* at 19. Similarly, a representative of the Pharmaceutical Manufacturers Association testified that concerns about punitive damages "have caused manufacturers to withdraw beneficial products from the market and to reduce research and development activities." *Product Liability Reform Act: Hearings on S. 1400 Before the Subcomm. on the Consumer of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 2d Sess. 466 (1990) (statement of Richard Kingham, industry representative, Pharmaceuticals Manufacturers Association) [hereinafter *Hearings on S. 1400*].

Interestingly, the fourth-ranked top story of 1990, as selected by corporate risk managers, was the Supreme Court's decision to review the constitutionality of excessive punitive damages. James M. Burcke, *Risk Managers Pick Series of Court Rulings on Pollution Coverage*, BUS. INS., Dec. 31, 1990, at 3. Business leaders compare the problem to "a plague of locusts," complaining that "U.S. lawyers with their clients have descended on America and are suing the country out of business." Marc Galanter, *The Life and Times of the Big Six; or, The Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921, 939 (1988) (noting that insurance industry's "grim prognosis" rests on assumption that product liability actions involve thousands of products and thus jeopardize American industry).

played in protecting ordinary citizens against oppression by powerful interests. Justice Scalia underscored the long-standing existence of punitive damages at the oral arguments in *Pacific Mutual Life Insurance Co. v. Haslip*[70] when he commented to Pacific Mutual's counsel that the awarding of punitive damages has "been going on since 1791 as I understand it. Who said . . . its [sic] been going on so long and now, after 200 years, it violates due process?"[71] Nowhere in Vice President Quayle's article can one find the sustained historical and empirical study that would answer Justice Scalia's question.

The petitioner in *TXO Production* also turns to history for support of its argument that a punitive award violated due process.[72] TXO contended that "[t]he $10 million penalty assessed against TXO is so clearly excessive and strays so far from the traditional notions of fairness established by 'history and wide practice,' that it violates fundamental fairness."[73] To support this hypothesis, it is necessary to embark on sustained analysis of the history of punitive damages.

This Article will review the social history of punitive damages and the functions this remedy has played since its inception. The punitive award has been a "settled doctrine in England and in the general jurisprudence of this country" for more than two hundred years.[74] The Article concludes that the flexible remedy of punitive damages serves a variety of positive functions that would be crippled if the Supreme Court places arbitrary limits on the size of punitive damages awards or institutes other strictures similar to former Vice President Quayle's reform proposals. There is simply no empirical evidence supporting Vice President Quayle's or TXO's contention that there is a punitive damages crisis warranting the radical revamping of the remedy.

I. THE HISTORY OF PUNITIVE DAMAGES

Former Vice President Quayle's call for punitive damages reform must be examined through an historical and empirical lens, not as if

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70. 111 S. Ct. 1032 (1991).

71. *Punitive Damages*, 59 U.S.L.W. 3315, 3316 (Oct. 30, 1990) (No. 89-1279) (discussing oral arguments before Court in *Haslip*).

72. Brief of Petitioner, *supra* note 40.

73. Brief of Petitioner, *supra* note 40.

74. *See* THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 39 (Arno Press 1972) (1847) (recounting history of punitive damages); *see also* GEORGE W. FIELD, A TREATISE ON THE LAW OF DAMAGES 66 (2d ed. 1881) (finding support for doctrine of punitive damages "by a great preponderance of authorities, both in England and in this country"). In England, the doctrine of exemplary damages was formulated in Wilkes v. Wood, 95 Eng. Rep. 768 (K.B. 1763) and Huckle v. Money, 95 Eng. Rep. 768 (K.B. 1763). *See infra* notes 90-105 and accompanying text (reviewing rise of exemplary damages in England).

the remedy descended out of the thin, rarefied air of legal heaven.[75] As Justice Holmes instructed us, "[i]n order to know what [the law] is, we must know what it has been, and what it tends to become."[76] The history of the rise of the doctrine of punitive damages is a part of the struggle of individuals to preserve their rights against the mighty.[77]

The doctrine of punitive damages has an ancient lineage.[78] The Babylonian Hammurabi Code,[79] Hindu Code of Manu,[80] and the Bible[81] all contain precursors to the modern remedy of punitive damages. The Roman law of multiple damages blended compensation with punishment.[82] The Twelve Tables dating from 450 B.C. contained numerous examples of multiple damages.[83] One commenta-

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75. *See* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809 (1935) (comparing legal formalism to "legal heaven" where concepts descend from heavens rather than from society). Legal realists argue that the focus of legal analysis must be on empirical behavioral studies, not on abstract doctrine. *See* Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236-38 (1931) (presenting legal realism as "movement in thought and work about the law" within which certain points of departure are common); *see also* Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 697 (1931) (discussing approach of legal realists as requiring "faithful adherence to the actualities of the legal order as the basis of a science of law").

76. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

77. The history of the doctrine of punitive damages has been one of struggle. *See* RUDOLPH VON JHERING, THE STRUGGLE FOR LAW 73-77 (John J. Laler trans., 2d ed. 1915) (asserting that defense of one's legal rights against injustice is not only defense of "authority and majesty of the law," but protection of civil order itself). This section draws on one of the authors' theses, which is contained in Michael Rustad, The Social Functions of Punitive Damages and the Law of Evidence (1986) (unpublished LL.M. thesis, Harvard University Law School, on file with author).

78. *See* 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES 3 (2d ed. 1989) (noting existence of multiple damages documented as early as 2000 B.C.); *see also* James Sales & Kenneth Cole, *Punitive Damages: A Relic That Outlived Its Origins*, 37 VAND. L. REV. 1117, 1119 (1984) (noting that statutory remedy of multiple awards, providing for awards in excess of actual damages, existed in Hindu Code of Manu and Code of Hammurabi).

79. *See* 1 SCHLUETER & REDDEN, *supra* note 78, at 3 n.1 (documenting multiple damages in Code of Hammurabi).

80. *See* Sales & Cole, *supra* note 78, at 1119 (noting that multiple damages existed in Hindu Code of Manu); *see also* THE ORDINANCES OF MANU (Andrew C. Burnell trans., Oriental Books Reprint Corp. 2d ed. 1971) (1884) (providing ancient code of Indian law, containing multiple damages, as set forth in *Mañava-Dharma-Çastra*).

81. *Exodus* 23:2 (stating that "thou shalt not follow multitude to do evil"); *id.* 22:4 (requiring double restitution for crime of theft); *Deuteronomy* 22:8 (declaring that builder brings guilt of bloodshed on his house if someone falls from his roof); *Luke* 19:8 (relaying that Zaccheus agreed to restitution of four times damages caused as penalty for fraud or theft).

82. *See* BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 210 (1975) (noting essential distinction under Roman law between penal actions, which commonly result in payment of more than compensation, and "repersecutary" actions, which commonly result in payment of compensation only). The punitive or vindictive character of the penal action, however, made possible joint and several liability. *Id.*; *see also* W.W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW 598 (3d ed. 1966) (noting that punitive damages were assessed in *res deiectae vel effusae* actions "[w]here something was thrown from a dwelling on a way commonly used to the damage of a passer or property"). *But see* W.W. BUCKLAND & ARNOLD B. MCNAIR, ROMAN LAW AND COMMON LAW 344-48 (2d ed. 1965) (arguing that multiple damages were not functional equivalent of today's punitive damages).

83. *See* BUCKLAND, A TEXT-BOOK OF ROMAN LAW, *supra* note 82, at 168 (providing exam-

tor noted the need for Roman multiple damages to constrain wealthy elites:

> The laws of the XII Tables declared that whoever should do a personal injury to another should pay twenty-five asses, a considerable sum at the time. At a later time, however, when money abounded, this penalty became so insignificant that one Lucius Veratius used to amuse himself by striking those whom he met in the streets in the face, and then tendering them the legal amends, from a wallet which a slave carried after him for the purpose.[84]

The early Romans apparently employed multiple damages to mediate social relations between patricians and plebeians and to punish those who injured or killed slaves.[85] Multiple damages were found in later Roman legal systems as well.[86] Quadruple damages were a creditor's remedy against debtors who did not pay their debts after a lapse of a year.[87] More recently, the defendant in *Browning-Ferris Industries v. Kelco Disposal, Inc.*[88] argued that punitive damages were prefigured in the thirteenth century English institution of "amercements."[89]

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ple of double damages assessed against tutor who embezzled his ward's property). The Twelve Tables, enacted about 450 B.C., were a comprehensive collection of rules, perhaps the first express legislation in the Roman State to alter private law. *Id.* at 1.

84. *Vindictive Damages*, 4 AM. L.J. 61, 75 (1852) (arguing that to allow only compensatory damages would be to put law under control of wealthier classes). Modern American civilization, with its great increase in wealth concentrated in a few hands, deprives compensatory damages of any vindictive character. *Id.* at 74-75. The result is that a wrongful act is a "mere question of profit and loss." *Id.* at 75.

85. The study of Roman law resembles archeology in that inferences must be drawn from fragmentary legal reports. One scholar maintained that multiple damages played an insignificant role in Roman law. *See* 1 THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 355, at 701 (9th ed. 1912) (maintaining that "[i]n the Roman and Civil Law, exemplary damages seem to have been unknown").

86. *See* 1 SCHLUETER & REDDEN, *supra* note 78, at 5 (discussing development under Roman law of *delictal* actions, which sought vengeful remedy for private injury); *see also* NICHOLAS, *supra* note 82, at 210 (noting that *delictal* actions, those which were matter of private law, had distinct penal character that rendered multiple payment of damages irrelevant). Theft, robbery, loss wrongfully caused, and insult were four types of *delictal* action. *Id.*

87. 4 S.P. SCOTT, CORPUS JURIS CIVILIS: THE CIVIL LAW 320 (1932) (translating XVII ENACTMENTS OF JUSTINIAN tit. 2). The *Corpus Juris Civilis* is the codification of the law of ancient Rome, comprising constitutions, juristic law, and writings compiled under the orders of the Emperor Justinian in the sixth century A.D. NICHOLAS, *supra* note 82, at 1, 38-42. The version of the Code that survives today was promulgated in A.D. 534. *Id.* at 42. The Code provides multiple damages against defaulting debtors:

> If I commit the transaction of my business to a party who is liable to me in an action for quadruple damages (within a year), and, after the lapse of the year, for only simple damages; even though I should begin suit against him on mandate after the year has elapsed, he will be bound to pay me quadruple damages; because a party who undertakes the management of another's business is required to pay him what he would have been compelled to pay others.

SCOTT, *supra*, at 320.

88. 492 U.S. 257 (1989).

89. Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 268 (1989). "Amercements" were civil fines that were paid into the King's treasury. 3 WILLIAM S. HOLDSWORTH, A

A. The Rise of English Exemplary Damages

The poet Oliver Goldsmith wrote in *The Traveller* that "[l]aws grind the poor, and rich men rule the law."[90] At the time Goldsmith wrote his poem, the poor man had at least one remedy to sting the rich and powerful for abuses of power: the doctrine of exemplary damages. Just as Roman Senators might have paid multiple damages when they oppressed private citizens,[91] the English courts could punish powerful elites for acts of oppression against the common people.

Eighteenth-century English cases required intentional aggravated misconduct as a predicate to the awarding of exemplary damages.[92] The companion cases of *Wilkes v. Wood*[93] and *Huckle v. Money*[94] stemmed from the oppressive conduct of government agents in suppressing *The North Briton*,[95] a newspaper critical of King George II's

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HISTORY OF ENGLISH LAW 399 (3d ed. 1923); FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF THE ENGLISH LAW 513-15 (2d ed. 1923). Pollock and Maitland noted:

> The amercement marks an advance in the theory and practice of punishment. A basis for arbitrary [penal fines payable to the King] had thus been found, and in the course of time [people] began to see that arbitrary [penal fines]—if they be not oppressively used—are far more equitable than the old fixed penalties. Account can now be taken of the offender's wealth or poverty, of the provocation that has been given him [or her], of all those "circumstances of the particular case" that the rigid rules of ancient law had ignored.

POLLOCK & MAITLAND, *supra* at 514.

The defendant in *Browning-Ferris* argued that punitive damages verdicts were like amercements and were therefore covered by the Eighth Amendment's prohibition against excessive fines. *Browning-Ferris*, 492 U.S. at 268. The Supreme Court rejected this argument, holding "on the basis of the history and purpose of the Eighth Amendment, that its Excessive Fines Clause does not apply to awards of punitive damages in cases between private parties." *Id.* at 260. Justice Blackmun, writing for the majority, found the meaning of "fine," as used in the Eighth Amendment, to be "a payment to a sovereign as punishment for some offense" and therefore inapplicable to punitive damages awards. *Id.* at 265.

90. Oliver Goldsmith, *The Traveller*, *in* THE TRAVELLER, THE DESERTED VILLAGE AND OTHER POEMS BY OLIVER GOLDSMITH 48 (Samuel G. Goodrich ed., 1819).

91. *See* 3 THOMAS A. STREET, THE FOUNDATIONS OF LEGAL LIABILITY: A PRESENTATION OF THE THEORY AND DEVELOPMENT OF THE COMMON LAW 13-21 (1906) (discussing significance of ancient Roman *legis actiones* in history of remedial law).

92. By the time Sir William Blackstone wrote his *Commentaries on the Law of England*, penal damages "were expressly recognized in the form of damages by a statute of no less importance than the English Habeas Corpus Act." 3 WILLIAM BLACKSTONE, COMMENTARIES 1683 n.16 (William C. Jones ed., 1916).

93. 98 Eng. Rep. 489 (K.B. 1763).

94. 95 Eng. Rep. 768 (K.B. 1763).

95. In *Wilkes v. Wood*, John Wilkes, the publisher of *The North Briton*, sued a member of Parliament for trespass. Wilkes v. Wood, 98 Eng. Rep. 489, 489-99 (K.B. 1763). The English social historian A.S. Turberville described the background leading to the first punitive damages award as follows:

> It was during the Bute administration in 1762 that John Wilkes, assisted by the satirical poet Charles Churchill, started his scurrilous newspaper *The North Briton*, which first became famous for the violence of its attacks upon the favourite and all his compatriots. In May 1763 a new ministry came into office, its outstanding member being George Grenville. At the prorogation of Parliament the King had made the customary speech from the throne. In No. 45 of his paper, published on 23rd

Secretary, Lord Halifax.[96] The editor of the newspaper received exemplary damages,[97] a remedy that traces its roots to the thirteenth-century concept of multiple damages.[98] In *Huckle*, a false imprison-

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April, Wilkes had severely criticized the passages in the speech relating to the Peace of Paris and especially a reference to what the King of Prussia had gained from the treaty. Wilkes bluntly declared that the King had given "the sanction of his sacred name to the most odious measures and to the most unjustifiable public declarations from a throne ever renowned for truth, honour, and unsullied virtue." Speeches from the throne in Parliament are always regarded as the declarations of the ministers; but it was characteristic of George III to regard this criticism as an accusation of falsehood and as being therefore a gross personal libel. He insisted on the prosecution of the author, and the new ministers were nothing loathe to acquiesce. As the article was anonymous the Government issued a "general warrant, mentioning no specific names for the apprehension of 'the authors, printers, and publishers' of the North Briton," and under this warrant Wilkes was arrested, together with forty-eight other persons, who were suspected, some of them quite wrongly, to have been concerned in the issuing of No. 45. Wilkes stigmatized the general warrant as illegal and "a ridiculous warrant against the whole English people."

A.S. TURBERVILLE, ENGLISH MEN AND MANNERS IN THE 18TH CENTURY 44-46 (2d ed. 1957). The Chief Justice in *Wilkes* opined that the Government's practices, "which had been produced since the Revolution, are no justification of a practice in itself illegal, and contrary to the fundamental principles of the constitution." *Wilkes*, 98 Eng. Rep. at 499.

96. In *Wilkes*, the publisher of *The North Briton* asked for "large and exemplary damages" in his suit because actual damages would not punish or deter this type of misconduct. *Wilkes*, 98 Eng. Rep. at 490. The jury awarded him 1000 pounds. *Id.* In *Huckle*, the publisher's employee sued for false imprisonment, trespass, and assault. Huckle v. Money, 95 Eng. Rep. 768, 768 (K.B. 1763). The Chief Justice stated:

> [T]he personal injury done to him was very small, so that if the jury had been confined by their oath to consider the mere personal injury only, perhaps 20 [pounds] damages would have been thought damages sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light. . . . I think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject.

Id. at 768-69. This landmark decision introduced the term "exemplary damages" as a legal doctrine to explain an award that exceeded actual damages in order to punish outrageous actions. *Id.* Scholars sometimes attribute the rise of exemplary or vindictive damages as the product of juries departing significantly from simple compensation. For example, Theodore Sedgwick argued:

> In actions of tort, when gross fraud, wantonness, malice, or oppression appears, the jury [is] not bound to adhere to the strict line of compensation, but may, by a severer verdict, at once impose a punishment on the defendant, and hold him [or her] up as an example to the community. It might be said, indeed, that the malicious character of the defendant's intent does, in fact, increase the injury, and the doctrine of exemplary damages might thus be reconciled with the strict notion of compensation. . . . [T]he idea of compensation is abandoned and that of punishment introduced.

1 SEDGWICK, *supra* note 85, § 347, at 687.

97. *Wilkes*, 98 Eng. Rep. at 499; *Huckle*, 95 Eng. Rep. at 769. After exemplary damages were awarded in the cases, the debate shifted to the House of Commons. The Commons voted that "No. 45 was 'a false, scandalous, and seditious libel,' and ordered that it should be burnt by the common hangman." TURBERVILLE, *supra* note 95, at 46. When ordered to appear before the Commons, Wilkes retired to France, but the Commons nevertheless found him guilty of libel in absentia. *Id.* at 48.

98. *See* BLACKSTONE, *supra* note 92, at 1607-08, 1647-48, 1655-56, 1699-1700, 1782-83, 1804-05 (reporting on assessment of exemplary damages for intentional torts executed by means of malicious or wanton acts such as waste of real property, willful battery, mayhem, willful taking of personal property, and willful trespasses of real property).

ment and trespass action against agents of the King, Lord Camden's introduction of the term "exemplary damages" comprised the first use of the phrase as a formal legal doctrine.[99] English courts employed the remedy from that point on to punish and deter the misuse of wealth[100] and power[101] that threatened the eighteenth-

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99. *See Huckle*, 95 Eng. Rep. at 769. Lord Camden stated:

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

Id.

100. *Vindictive Damages*, *supra* note 84, at 75. The article stated:

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

Id.

101. *See, e.g.*, Leith v. Pope, 96 Eng. Rep. 777, 777-78 (K.B. 1779) (awarding exemplary damages to victim of malicious prosecution); Sharpe v. Brice, 96 Eng. Rep. 557, 557 (K.B. 1774) (awarding exemplary damages to victim of illegal search); Benson v. Frederick, 97 Eng. Rep. 1130, 1130 (K.B. 1766) (assessing exemplary damages against militia colonel for whipping common soldier out of personal animus); Beardmore v. Carrington, 95 Eng. Rep. 790, 793-94 (K.B. 1764) (awarding exemplary damages to victim of illegal search, seizure, and imprisonment).

Courts also awarded exemplary damages to make examples of social affronts such as the seduction of servants, the debauchery of daughters, indecent assaults, and ravishments. In *Tullidge v. Wade*, Chief Justice Wilmot condoned a jury's exemplary damages award against the seducer of the plaintiff's daughter in his own house. Tullidge v. Wade, 95 Eng. Rep. 909, 909 (K.B. 1769). "Actions of this sort," he wrote, "are brought for example's sake; and although the plaintiff's loss in this case may not really amount to the value of twenty shillings . . . the jury have done right in giving liberal damages." *Id.* Similarly, an English court assessed exemplary damages against an employee of a "poor house" for maliciously cutting off the hair of a female pauper. Forde v. Skinner, 172 Eng. Rep. 687, 687 (Horsham Assizes 1830); *see* Grey v. Grant, 95 Eng. Rep. 795, 795 (C.P. 1764) (awarding damages for assault and battery accompanied by insult). Professor Charles McCormick cited exemplary damages as a remedy used to assuage injured feelings and the sense of outrage created by the arrogance of powerful economic and political elites. CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 286-92 (1935). An award of exemplary damages sent a signal to those who violated social norms and whose actions would otherwise likely go unprosecuted by the criminal authorities. *Id.*

Demonstrating malicious intent was often the requisite standard for awarding exemplary damages in early English cases. The defendant in *Emblen v. Myers* purchased two old houses adjoining the plaintiff's premises and employed laborers to tear them down. Emblen v. Myers, 158 Eng. Rep. 23, 23-24 (Ex. 1860). In doing so, the defendant deliberately destroyed the roof on the plaintiff's stable. *Id.* at 24. The defendant was eager to acquire the land of the plaintiff and had recklessly and hastily torn down his own house in order to injure his neighbor's buildings. *Id.* at 24-25. The judge instructed the jury that the defendant had acted willfully and with a view to deprive the poor man of his possession. *Id.* at 24. The jury responded by awarding the plaintiff 75 pounds. *Id.* at 26.

In *Merest v. Harvey*, a highhanded aristocrat who also was a member of the House of Lords felt the sting of the shilling. Merest v. Harvey, 128 Eng. Rep. 761, 761 (C.P. 1814). The plaintiff in *Merest* was engaged in recreational shooting on his estate in a field adjoining a public way. *Id.* While passing along the road and upon seeing the plaintiff, the defendant, a banker and a member of Parliament, asked to join the shooting party. *Id.* He was rebuffed by the plaintiff, and in response, the defendant used "very intemperate language [and]

century English social order.[102]

As the eighteenth century came to a close, exemplary damages were firmly entrenched in the Anglo-American tradition.[103] Clarence Morris believed that the remedy functioned as "an orderly, legal retaliation . . . to be preferred to . . . private vengeance which will disturb the peace of the community."[104] The aim was to deter crude forms of self-help such as dueling and feuding, which were aptly described by historian William Holdsworth as "bastard" manifestations of feudalism.[105]

B. Punitive Damages in the United States

The doctrine of exemplary damages was exported to America soon after its birth in England. The first reported American punitive damages case, *Genay v. Norris*,[106] was decided in 1784. In *Genay*, the South Carolina Supreme Court awarded what it called "vindictive damages" against a physician.[107] The plaintiff and defendant, both intoxicated, prepared to settle a quarrel with dueling pistols.[108] The defendant proposed that he and the plaintiff drink a reconcilia-

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threaten[ed] to arrest the plaintiff in his capacity as a magistrate, and defied him to bring a trespass action." *Id.* The defendant's conduct also involved an abuse of his parliamentary status. *Id.* Chief Justice Gibbs wrote that the jury verdict for the plaintiff would not be overturned "unless we were to lay it down that the jury are not justified in giving more than the absolute pecuniary damage that the plaintiff may sustain." *Id.* Justice Heath agreed, noting that the case was a natural outgrowth of the use of exemplary damages to restore societal peace:

> I remember a case where a jury gave 500 [pounds] damages for merely knocking a man's hat off; and the Court refused a new trial. There was not one country gentleman in a hundred who would have behaved with laudable and dignified coolness which this plaintiff did. It goes to prevent the practice of dueling, if juries are permitted to punish insult by exemplary damages.

Id.

102. *See* 1 STREET, *supra* note 91, at 477 (" 'Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.' ") (quoting Wilkes v. Wood, 98 Eng. Rep. 498, 498 (K.B. 1763)).

103. *See, e.g.*, Murphy v. Hobbs, 5 P. 119, 119 (Colo. 1884) ("The rule allowing under certain circumstances in civil actions based upon torts, exemplary . . . or vindictive damages, for the purpose of punishing the defendant, *has taken deep root in law.*") (emphasis added).

104. Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1198 (1931). Malicious acts warranting the imposition of exemplary damages were wrongful acts done intentionally without just cause or excuse. Exemplary damages were intended to prevent revenge-seeking against such acts. In *Sears v. Lyons*, a defendant laid poisoned barley on the plaintiff's premises for the sole purpose of destroying his poultry. Sears v. Lyons, 171 Eng. Rep. 658, 658 (K.B. 1818). The judge instructed the jury that it could award greater damages than the mere value of the fowl destroyed. *Id.* Specifically, the jury could punish the defendant for his malicious intent, whether for insult or injury. *Id.* The jury awarded the plaintiff 50 pounds. *Id.* at 659.

105. 2 HOLDSWORTH, *supra* note 89, at 416-18.

106. 1 S.C.L. (1 Bay) 6 (1784).

107. Genay v. Morris, 1 S.C.L. (1 Bay) 6, 6 (1784).

108. *Id.*

tion toast.[109] The defendant secretly spiked the plaintiff's wine glass with a large dose of cantharides, causing him "extreme and excruciating pain."[110] The court instructed the jury that "a very serious injury to the plaintiff . . . entitled him to very exemplary damages, especially from a professional character, who could not plead ignorance of the operation and powerful effects of this medicine."[111]

Another early case was *Coryell v. Colbaugh*,[112] a 1791 New Jersey case. In *Coryell*, a jury awarded damages for "example's sake" against a defendant who breached his promise to marry the plaintiff.[113] The judge instructed the jury "not to estimate the damages by any particular proof of suffering or actual loss; but to give damages for example's sake, to prevent such offenses in the future."[114]

In these early American punitive damages cases, courts frequently premised awards on conduct that smacked of willful and wanton indignities.[115] For example, in *Boston Manufacturing Co. v.*

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109. *Id.*
110. *Id.* at 7.
111. *Id.*
112. 1 N.J.L. 77 (1791).
113. Coryell v. Colbaugh, 1 N.J.L. 77, 77 (1791).
114. *Id.*
115. *See, e.g.*, Bateman v. Goodyear, 12 Conn. 575, 575-77 (1838) (awarding treble punitive damages in trespass case where defendant broke into plaintiff's blacksmith shop).

In 1830, a commentator observed:

> It is said by elementary writers and by compilers, that circumstances, which do not affect the act complained of, may be given in evidence to mitigate damages; and also that circumstances which form no part of the actionable matter of a suit, may be given in evidence to aggravate damages. . . . And it is the purpose of this examination to show that neither on principle, nor by the preponderance of authority can damages be estimated by any other standard than the actual injury received. . . . Like most other positions, however, this has its exceptions; and they should be here noticed.

Theron Metcalf, *Damages* Ex Delicto, 3 AM. L. MAG. 270, 287 (1830). In *Day v. Woodworth*, Justice Grier wrote:

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

Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851). Similarly, in *Western Union Telegraph Co. v. Thompson*, a federal court explained:

> Sometimes the jury, for the good of society, when some outrageous lawlessness is committed, may award not only compensation to a party, but may go further for the benefit of the public, and say to the law-breakers: "I will sting you, and put a little more on you. I will chastise you and make you smart; and, although the injured party has not been damaged the whole amount, I will give the additional sum for the public good."

Western Union Tel. Co. v. Thompson, 144 F. 578, 586-87 (5th Cir. 1906). As in England, American courts used the punitive remedy chiefly against established elites. The remedy grew in importance with the increase in concentrations of wealth. Accordingly, a commentator remarked:

> [T]he great increase of wealth and its gradual accumulation in a few hands . . . have

Fiske,[116] a patent infringement case, the court considered whether to award punitive damages by analogizing the infringement issue to a case involving illegal capture at sea.[117] The use of punitive damages to protect the boundaries of social order closely resembled the use of exemplary damages in English cases of this kind during the same period.[118] A nineteenth-century commentator reported that these awards were:

> justified by the terms "exemplary damages," "vindictive damages," "smart-money," and the like, not infrequently used by judges, [and] seldom defined. But taken in the connexion in which these terms have been used, they seem to be intended to designate in general those damages . . . for mental anguish, or personal indignity and disgrace.[119]

Courts frequently assessed punitive damages against bullies who

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> necessarily introduced a corresponding change in the effect of judicial proceedings. . . . [W]hile the amount of wrong caused by an unlawful act remains very much the same, the case, at least among the richer classes, with which compensation can be made and the very trifling expense of a law suit, have deprived the latter of that vindictive character it once had, and rendered the former a mere question of profit and loss. . . . To seduce a man's wife . . . would then have [its] market value, and the only question to an offender as to how often the process should be repeated, would be how far he could afford it.

Vindictive Damages, *supra* note 84, at 64.

116. 3 F. Cas. 957 (C.C.D. Mass. 1820) (No. 1681).

117. Boston Mfg. Co. v. Fiske, 3 F. Cas. 957, 957 (C.C.D. Mass. 1820) (No. 1681). Justice Story stated:

> [I]t is far from being uncommon in the admiralty to allow costs and expences, and to mulct the offending parties, even in exemplary damages, where the nature of the case requires it. . . . Courts of admiralty allow such items, not technically as costs, but on the same principles as they are often allowed damages in cases of torts by courts of common law as a recompense for injuries sustained, as exemplary damages, or as a remuneration for expences incurred, or losses sustained, by the misconduct of the other party.

Id. Courts awarded something resembling exemplary damages in admiralty cases involving issues such as captives at sea. The Amiable Nancy, 16 U.S. (3 Wheat.) 546, 546 (1818).

118. *Cf.* William L. Murfee, Sr., *Exemplary Damages*, 12 CENT. L.J. 529, 530 (1881) (classifying early American exemplary damages cases by nature of injury, such as harm to plaintiff's domestic relations, reputational interests, property interests, and liberty interests, in similar fashion to method by which English exemplary damages cases of same period were classified).

Early American cases rarely imposed punitive damages for gross negligence, with the exception of product liability or medical products cases where a defendant's lack of due care threatened the public safety. For example, in *Fleet v. Hollenkemp*, the plaintiff became ill after ingesting snake root and Peruvian bark tea prescribed by his physician and concocted by the local drug store. Fleet v. Hollenkemp, 52 Ky. (1 B. Mon.) 219, 220 (1852). Cantharides had accidentally been mixed in with the tea concoction. *Id.* at 220-21. The court found the drug store agent "guilty of inexcusable negligence in compounding and putting up the medicine[]." *Id.* at 222. The court permitted the award of $1141.75 to stand because this was one of a "class of cases where exemplary damages may be given by the jury, though the action be case and not trespass—as for injury to health . . . [and] arising from negligence." *Id.* at 226.

119. *The Rule of Damages in Actions* Ex Delicto, 9 LAW REP. 529, 535 (1847).

oppressed the physically weak[120] and socially powerless.[121] Courts also awarded punitive damages to female plaintiffs for assault and battery, rape, and sexual harassment.[122] Judges and juries used the

120. *See, e.g.*, Hollins v. Gorham, 66 S.W. 823, 823 (Ky. 1902) (upholding $450 punitive damages award to 12-year-old boy assaulted by man in public park); Moore v. Fisher, 135 N.W. 1126, 1127 (Minn. 1912) (upholding $1500 punitive damages award to "small man over 50 years old struck by younger, larger, and much stronger man"); Nyman v. Lynde, 101 N.W. 163, 163 (Minn. 1904) (upholding $1500 punitive damages award against defendant who criminally abused minor child); Dix v. Martin, 157 S.W. 133, 134-36 (Mo. 1913) (upholding $200 punitive damages award to young female servant viciously lashed by adult with buggy whip); Cathey v. St. Louis & S.F.R.R. Co., 130 S.W. 130, 131-34 (Mo. 1910) (awarding punitive damages to male cripple kicked in face by railway employee); August v. Finnerty, 30 Ohio C.C. (n.s.) 330, 330-32 (1908) (upholding $450 punitive damages award against defendant who threw 16-year-old female down flight of stairs).

121. *See generally* GEORGE H. PARMELE, DAMAGE VERDICTS: EXCESSIVENESS OR INADEQUACY OF VERDICT IN ACTIONS FOR PERSONAL INJURIES, ASSAULT, DEATH (1927) (documenting punitive damages awards favoring women, children, invalids, and other socially disadvantaged plaintiffs over physically or socially more powerful defendants).

122. *See, e.g.*, Birmingham Macaroni Co. v. Tadrick, 205 Ala. 540, 540-42 (Ala. 1921) (upholding $3000 punitive damages award for female assault victim); Chicago Consol. Traction Co. v. Mahoney, 82 N.E. 868, 869-72 (Ill. 1907) (upholding $1250 punitive damages award against conductor who humiliated female passenger by using unnecessary force in ejecting her); McGee v. Vanover, 147 S.W. 742, 743-46 (Ky. 1912) (upholding $500 punitive damages award against defendant who assaulted pregnant woman causing miscarriage); Campbell v. Crutcher, 224 S.W. 115, 116-18 (Mo. 1920) (upholding $1000 punitive damages award against defendant whose assault upon woman caused her severe bodily injury and subsequent nervous breakdown); Flynn v. St. Louis S.W. Ry. Co., 190 S.W. 371, 371-72 (Mo. 1917) (upholding $1500 punitive damages award against conductor found guilty of fondling female passenger's breasts and making other improper sexual advances); Craker v. Chicago & N.W. Ry. Co., 36 Wis. 657, 657-58 (1875) (upholding $1000 punitive damages award against conductor found guilty of fondling female passenger).

Despite the growing prevalence of decisions upholding punitive damages awards against sexual assailants, not all courts were inclined in such a direction. In fact, many courts actually blamed the victim for instigating such attacks. For example, in *Palmer v. Brown*, a female plaintiff became pregnant as a result of the defendant's rape. Palmer v. Brown, 123 Ill. App. 584, 585 (1905). The lower court awarded the plaintiff $3500 in damages. *Id.* In reversing, the appellate court considered the plaintiff's age and experience and stated:

> It may fairly be presumed that [the plaintiff] had acquired the knowledge, experience and moral training ordinarily possessed by women of her years, education and social position. She therefore must have well understood the gross impropriety and immorality of her conduct, as well as the natural propensities and inclinations of the opposite sex. She was not despoiled of her virtue by artifice or intimidation, nor by the promise or expectation of marriage.

Id. at 591.

Other early opinions elaborated on the precise contours of sanctionable sexual conduct, focusing particularly on the conduct's effect on the plaintiff. For example, in *Wolf v. Trinkle*, an Indiana court upheld a $500 damages award against a defendant who "took improper liberties with [the plaintiff's] person." Wolf v. Trinkle, 3 N.E. 110, 111 (Ind. 1885). The judge permitted the jury to consider "the injury to Mrs. Trinkle's good repute, her social position, [her] physical suffering, bodily pain, anguish of mind, sense of shame, humiliation and loss of honor." *Id.* Although the court acknowledged that the damages awarded in the case were essentially compensatory in nature, commentators generally agree that there are compensatory aspects to punitive damages awards. *See infra* notes 268-72 and accompanying text (discussing compensatory function of punitive damages).

In other early cases, courts justify awards of punitive damages by recognizing the differences in physical strength and stature between men and women. For example, in *Powell v. Meiers*, the male defendant argued that the female plaintiff's initiation of the assault, which occurred by her throwing a hand towel in his face, justified his conduct. Powell v. Meiers, 209 N.W. 547, 548 (N.D. 1926). The court opined that "we are not impressed that [the] defend-

remedy not only to punish and deter sexual assault and harassment, but also to keep the social peace and uphold community mores.[123] Some courts attempted to use punitive damages, but with less success, as a means to stem racial violence.[124] One commentator of the late nineteenth century maintained that courts awarded punitive damages in cases of malicious injuries and trespasses accompanied by personal insult or oppressive and cruel conduct.[125] Courts also awarded punitive damages for the alienation of a spouse when such alienation was accompanied by malicious intent.[126]

Nineteenth-century judges and juries predicated punitive damages awards on the willful and gross disregard of a plaintiff's rights.[127] By the end of the nineteenth century, however, the doc-

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ant was in such grave danger of personal harm at the hands of Mrs. Powell that he was justified in hitting her and kicking her with the force disclosed by the record." *Id.* at 549. The record showed that the plaintiff suffered blows to her head and legs severe enough that her injuries were clearly visible at trial nearly two months after the assault. *Id.* If the defendant did experience "more pangs and fears than wars or women have, the record does not show it." *Id.* The court upheld a lower court's award of $500 in punitive damages. *Id.* at 548, 552.

123. *See, e.g.*, Redfield v. Redfield, 39 N.W. 688, 689-91 (Iowa 1888) (upholding $1000 punitive damages award against defendant who forcibly ejected infirm woman and her husband during period of extremely inclement weather); Murphy v. Pettitt, 251 S.W. 179, 180-82 (Ky. 1923) (upholding $700 punitive damages award against defendant found guilty of assault in feud-like dispute over ownership of pig).

124. *See* Kohut v. Boguslavsky, 239 P. 876, 876-77 (Colo. 1925) (reviewing plaintiff's award of $5000 compensatory and $10,000 punitive damages following racially motivated attack by several townspeople). The townspeople broke into the plaintiff's house, dragged her and her sick daughter into the street, and beat the plaintiff. *Id.* Although the court found "ample evidence to sustain a verdict for substantial damages," the actual amounts represented "inherent evidence of passion or prejudice," and thus the appellate court reversed the lower court's punitive award. *Id.*

125. CHARLES G. ADDISON, WRONGS AND THEIR REMEDIES: A TREATISE ON THE LAW OF TORTS 905-06 (2d ed. 1864).

126. *See generally* L.C. Warden, Annotation, *Punitive or Exemplary Damages in Action by Spouse for Alienation of Affections or Criminal Conversation*, 31 A.L.R.2D 713 (1953) (collecting cases where punitive damages were awarded for alienation of spousal affection). Some of the largest of these awards came when affluent individuals maliciously "alienated the affections" of wives of lower-income neighbors. *See* Mathies v. Mazet, 30 A. 434, 434-36 (Pa. 1894) (basing affirmance of trial court's large punitive damages award on fact that seducer/defendant's financial stature dwarfed that of victim/plaintiff), *overruled on other grounds by* Fadgen v. Lenkner, 365 A.2d 147 (Pa. 1976); *cf.* Eshelman v. Rawalt, 131 N.E. 675, 676-79 (Ill. 1921) (striking down $13,500 punitive damages award for "alienation of affection" as excessive).

127. ADDISON, *supra* note 125, at 905-06. The author of the first torts book, Francis Hilliard, argued that only acts contemplated in a spirit of mischief, wantonness, or criminal indifference to civil obligations or the rights of others justified exemplary damages. FRANCIS HILLIARD, THE LAW OF REMEDIES FOR TORTS 441 (1867). Courts imposed punitive damages as a way of punishing and deterring persons who committed torts in a manner emblematic of malicious motive. In an early New York case, a court assessed treble damages in a trespass action where "[i]t was proved that the defendant in the night time laid hold of the plaintiff's wagon and overturned it . . . [breaking it] in several places." Tifft v. Culver, 3 Hill 180, 181 (N.Y. 1842). The New York Court of Appeals upheld the treble damages award, finding it to be "a very moderate punishment for this wilful trespass." *Id.* Similarly, in *Bateman v. Goodyear*, a trial judge trebled a trial jury award in a forcible entry and detainer trespass action. Bateman v. Goodyear, 12 Conn. 575, 577 (1838). The Connecticut Supreme Court, however, reversed and remanded because it found that the trial judge abused his discretion by excluding evidence of the defendant's title to the premises. *Id.* at 581. And in *Day v. Woodworth*,

trine's application shifted away from powerful individuals to large corporations.[128] Pundits pointed to the questionable ethics of businesses as the cause of many of the nation's most serious economic, political, and social evils.[129] By century's end, most courts generally agreed that exemplary damages could be assessed against corporations.[130] One commentator, however, found a difference of judicial opinion with respect to whether courts could award punitive damages in conjunction with the doctrine of respondeat superior.[131]

Justice Grier described punitive damages as a controversial doctrine but an institutionalized remedy, being so well established that "the question [of its legitimacy] will not admit of argument." Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851).

128. *See, e.g.*, Lake Shore & Mich. S. Ry. Co. v. Prentice, 147 U.S. 101, 106 (1893) (questioning validity of trial court's jury instruction regarding punitive damages in trespass action against railroad company). The jury instruction stated: "If a public corporation, like an individual, acts oppressively, wantonly, [or] abuses power, and a citizen in that way is injured, the citizen, in addition to strict compensation, may have, the law says, something in the way of smart money; something as punishment for the oppressive use of power." *Id.* at 104. The Court concluded that "[t]he jury were thus told, in the plainest terms, that the corporation was responsible in punitive damages for wantonness and oppression on the part of the conductor, although not actually participated in by the corporation." *Id.* at 112. The court quoted with approval the Chief Justice of Rhode Island's view that " 'punitive or vindictive damages, or smart money, were not to be allowed as against the principal, unless the principal participated in the wrongful act of the agent, expressly or impliedly, by his [or her] conduct authorizing it or approving it, either before or after it was committed.' " *Id.* at 114 (quoting Hagan v. Providence & Worcester R.R., 3 R.I. 88, 90 (1854)).

In early punitive damages cases against corporations, courts typically held that the corporation was liable only if it either ordered the misconduct or condoned it by a refusal to take remedial steps. *See, e.g., Prentice*, 147 U.S. at 116 (discussing corporate punitive damages). The standard for corporate punitive liability, therefore, was functionally equivalent to that of individuals. *See supra* note 115 and accompanying text (discussing standard for individual punitive liability).

129. *See generally* Arthur M. Schlesinger, *The Rise of the City, 1878-1898*, *in* 10 A HISTORY OF AMERICAN LIFE (Arthur M. Schlesinger et al. eds., 1933) (documenting exploitation of workers and consumers resulting from aggregations of power and capital by large businesses); Ida M. Tarbell, *The Nationalizing of Business, 1878-1898*, *in* 9 A HISTORY OF AMERICAN LIFE (Arthur M. Schlesinger et al. eds., 1933) (documenting similar circumstances).

130. Seymour D. Thompson, *Liability of Corporations for Exemplary Damages*, 41 CENT. L.J. 308, 308 (1895).

131. *Id.* at 309. Thompson stated:

> While the American courts are almost unanimous in holding that exemplary damages may be awarded against a private corporation, there is . . . much diversity of opinion as to the circumstances under which damages may be awarded. There are two theories upon which all the courts . . . seem to agree: 1. That exemplary damages may be awarded against a corporation under circumstances where such damages would be awarded against an individual if the injurious act was previously authorized or subsequently ratified, by the board of directors or other governing body of the corporation—in which case the act is deemed to be the act of the corporation, in the same sense as when a natural person acts for himself [or herself] without the intervention of an agent. 2. Where the injurious act is done by a subordinate agent or servant, but is done under such circumstances that the rule of damages in the particular jurisdiction would, under like circumstances, authorize exemplary damages against an individual for an act done by his [or her] agent or servant. [Courts were in conflict over] the rule of *respondeat superior*, which makes a corporation liable for the malicious torts of its agents or servants, makes it liable in exemplary damages for such torts, whether the act were [sic] originally authorized or subsequently ratified by its governing body, or not. Stated in another way, this rule is, that the rule of *respondeat superior*

The rationale offered by the commentator for imposing punitive damages against corporations was as follows:

> A rule, not of logic, but of public safety; that the public know[s] the corporation only through its ministerial agents and servants; that the corporation touches the public only by the hands of these agents and servants; and that, consequently, so far as the public rights are concerned, they are to be regarded as the corporation,—precisely as the doctrine of *respondeat superior* identifies the principal and his [or her] agent for the purpose of protecting third persons.[132]

The awarding of exemplary damages was one of the few effective social control devices used to patrol large powerful interests unimpeded by the criminal law.[133] The cases against the railroads illustrate the use of punitive damages as a social control against quasi-

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applies . . . not only to their liability for damages for the malicious torts of their agents and servants, but equally in respect of the measure of damages for such torts. *Id.*

132. *Id.* at 312-13.

133. The sociologist Edward Alsworth Ross stated:

> The law . . . the most specialized and highly finished engine of control employed by society, has a double task. It must deal *repressively* with [people] in respect to acts of aggression; it must deal *compulsively* with them in respect to neglects which violate the relations of family or contract. . . . Still, when people trust their lives to the crew of a train or the keepers of a lighthouse, failure to coöperate becomes disastrous.

EDWARD A. ROSS, SOCIAL CONTROL: A SURVEY OF THE FOUNDATIONS OF ORDER 106 (1901). Professor Ross noted that the criminal law varies with the "measure of harm wrought" and "according to the badness of character they imply." *Id.* at 110. He observed that "[p]oisoning is more heinous than adulteration, because, while the poisoner will adulterate, the adulterator will shrink from poisoning." *Id.* The problem was that the criminal law was ill-equipped to control acts that were harmful to the public interest but whose protagonists did not have the requisite criminal state of mind. As Ross put it:

> The red slayings of hate are deemed worse than the pale slayings of greed. The trolley company, the quack-medicine man, the insurer of rotten ships, and the jerry-builder, despite their devastations, are not dealt with so sternly as the assassin, because they are morally superior to him. The cutthroat is more criminal than the train-wrecker by reason of his depravity; while the ravisher is marked off from the professional enticer of maidens, not by any greater harm in his deed, but by his greater moral hideousness.

Id. Ross further argued that "[i]n *exemplary damages* the idea becomes obvious, but is not allowed to appear as the ruling motive." *Id.* at 108. The exemplariness "is accomplished by allowing compensation for the sense of wrong and injury that acts of this sort are calculated to produce." *Id.* (citing ARTHUR G. SEDGWICK, ELEMENTS OF DAMAGES 16 (1896)). Courts often awarded damages beyond the measure of compensation where large and powerful institutions such as railways oppressed less powerful individuals such as passengers and bystanders.

Oppressive assault cases, where such exemplary or punitive damages are often awarded, can be divided into seven categories: (1) assault with weapons that are likely to produce serious injury; (2) assaults on women or on feeble or invalid persons; (3) assaults on children; (4) assaults by officers; (5) assaults by one as a member of a crowd or mob; (6) excessive force when removing trespassers; and (7) unauthorized surgical operations. R.E.H., Annotation, *Punitive or Exemplary Damages for Assault*, 16 A.L.R. 771, 843-56 (1922) [hereinafter *Punitive or Exemplary Damages*]. In all categories except assaults by officers and unauthorized surgical operations, the most frequently named defendants were railroads, streetcar companies, or other large corporate entities. *Id.*

official greed and oppression.[134] Theodore Sedgwick cites the following instances of oppressive conduct warranting punitive damages against railroads:

> Such, for instance, is abuse of process or wilful refusal to perform an official duty. A woman in delicate health is wrongfully turned out of her house at night in a storm. . . . A passenger wrongfully ejected from a railroad train with rudeness. . . . So exemplary damages may be recovered where the wrongful act is accompanied with circumstances of insult and outrage.[135]

The railroads were involved in innumerable suits brought on behalf of women, invalids, children, and other individuals who suffered oppression at the hands of conductors, porters, and other railway employees.[136]

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134. *See, e.g.*, Chesapeake & Ohio Ry. Co. v. Osborne, 30 S.W. 21, 22 (Ky. 1895) (upholding $1200 punitive damages award against conductor who forcibly ejected passenger from moving train); Missouri Pac. Ry. Co. v. Martino, 18 S.W. 1066, 1067 (Tex. 1892) (upholding $2025 punitive damages award against conductor who struck and threatened female passenger). Assaults on women, invalids, and feeble-minded people by conductors and other railroad staff were quite common. *See Punitive or Exemplary Damages*, *supra* note 133, at 848-51 (chronicling cases). For example, in Mississippi alone, courts assessed punitive damages against railroads for a variety of malicious actions, including: wrongfully ejecting passengers; carrying passengers past their stations; accosting patrons in insulting fashions; failing to stop when signaled; failing to care for known sick; refusing to carry the blind; allowing insults and fights; willful delaying of passengers; and obstructing the tracks. Alfred G. Nichols, Jr., Comment, *Punitive Damages in Mississippi—A Brief Survey*, 37 MISS. L.J. 131, 138 (1965). For an extensive discussion of punitive damages awards against railroads, see generally Smith v. Wade, 461 U.S. 30, 57-84 (1983) (Rehnquist, J. dissenting).

One jurisdiction enacted legislation facilitating punitive damages awards against railroads and other public carriers. *Cf.* James B. Sales, *The Emergence of Punitive Damages in Products Liability Actions: A Further Assault on the Citadel*, 14 ST. MARY'S L.J. 350, 357-58 (1983) (discussing Texas statute that remedied survivorship problem by allowing specific beneficiaries to initiate suits against railroads). Punitive or exemplary damages were then awarded in such suits when plaintiffs succeeded in demonstrating gross negligence by the defendant. *Id.*; *see also* JAMES WEINSTEIN, THE CORPORATE IDEAL IN THE LIBERAL STATE: 1900-1918 40 (1968) (citing Werner Sombart, *Study of the Historical Development and Evolution of the American Proletariat*, 6 INT'L SOCIALIST REV. 129 (1905)). Not only were the railroads recklessly indifferent to the safety of their workers, but they permitted their passengers to be exposed to needless cruelty and oppression by employees. *Id.* at 42. Punitive damages awards against railroads declined when the Federal Government provided plaintiffs other avenues for redress such as the Federal Employers' Liability Act (FELA). *See* 45 U.S.C. §§ 51-59 (1988); *see also* Barry v. Reading Co., 147 F.2d 129, 130 (3d Cir. 1944) (upholding verdict in favor of defendant/railroad in negligence case under FELA), *cert. denied*, 324 U.S. 867 (1945); Benton v. St. Louis S.F.R.R. Co., 182 S.W. 61, 63 (Mo. 1944) (finding same), *cert. denied*, 324 U.S. 843 (1945). The FELA legislation "was designed to put on the railroad industry some of the cost for the legs, eyes, arms and lives which it consumed in its operations." Wilkerson v. McCarthy, 336 U.S. 53, 68 (1948) (Douglas, J., dissenting).

135. 1 SEDGWICK, *supra* note 85, § 365, at 718-19.

136. *See generally* PARMELE, *supra* note 121 (chronicling railroad cases from last half of nineteenth century through early 1920s). Professor Charles McCormick cited the case of Stewart v. Cary Lumber Co., 59 S.E. 545 (N.C. 1907), where a North Carolina court assessed exemplary damages against a logging railway's engineer for making "the plaintiff's mule 'dance' by wantonly blowing the locomotive whistle." MCCORMICK, *supra* note 101, at 287.

In *Pine Bluff & Arkansas River Railway Co. v. Washington*, a woman passenger received $2000 in punitive damages after a railroad brakeman deliberately shot her in the arm. Pine Bluff & Ark. River Ry. Co. v. Washington, 172 S.W. 872, 873 (Ark. 1915). The court observed that

C. *The Nineteenth-Century War on Punitive Damages*

The assessing of punitive damages against powerful corporations in the nineteenth century led to an acrimonious debate over the legitimacy and doctrinal symmetry of the remedy.[137] The issues raised during the latter half of the 1800s were forerunners of the contemporary political and ideological attacks led by the Council on Competitiveness and other modern tort reformers. The nineteenth-century commentators made their objections to punitive damages on purely doctrinal grounds, rather than with respect to the impact of the remedy on corporate or other interests.[138]

The rise of a separate law of torts coincided with the rise of classical legal science that "emerged between 1850 and 1885 and flourished between 1885 and 1940."[139] Harvard Law School's Simon Greenleaf spearheaded the nineteenth-century movement to abolish punitive damages.[140] Professor Greenleaf argued that exemplary

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because it was the brakeman's duty to look after the comfort and safety of the passengers, he breached the public trust, thus warranting exemplary damages. *Id.*; *see* CHRISTOPHER S. PATTERSON, RAILWAY ACCIDENT LAW: THE LIABILITY OF RAILWAYS FOR INJURIES TO THE PERSON 471 (1886) (noting that exemplary damages can be recovered against railways when harm results from authorized or implicitly condemned misconduct of railway employees).

Streetcar companies were also frequent defendants in exemplary damages suits. *See, e.g.*, Mueller v. St. Louis Transit Co., 83 S.W. 270, 270-71 (Mo. 1921) (upholding $500 punitive damages award against street car conductor who refused to accept plaintiff's valid transfer and also forcibly detained him); Winston v. Lusk, 172 S.W. 76, 77 (Mo. 1914) (upholding $700 punitive damages award to streetcar passenger struck in face by brakeman in unprovoked assault).

137. The primary objections against punitive damages during this period were doctrinally based. The opponents of punitive damages argued that the remedy was logically inconsistent with the compensatory function of tort law. *See* 2 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 240 n.2 (16th ed. 1899) (asserting that punitive damages remedy abandons principle of compensation, which is purpose of tort action). Nineteenth-century commentators also questioned the social justice of punitive damages. In a letter to the editor of an 1878 edition of *The Central Law Journal*, a correspondent wrote: "It is difficult, in principle, to understand why, . . . if the tortfeasor is to be punished by exemplary damages, they should go to the compensated sufferer, and not to the public in whose behalf he [or she] is punished." Letter from G.K., Correspondent, to the Editor, *Central Law Journal, reprinted in* 6 CENT. L.J., 74, 74 (1878) [hereinafter Letter to the Editor] (citing Chief Justice Ryan's opinion in Bass v. Chicago & N.W. Ry. Co., 42 Wis. 654, 672 (1877)). The writer continued:

> The doctrine of allowing punitive damages rests, at least at the present time, on an unsound foundation. Eminent legal writers have long ago pronounced against it, and have contended that the rule is against the self-evidence and undisputable truth which has become a legal maxim, that a plaintiff ought to recover no more damages than he [or she] has actually sustained.

Id.

138. *See, e.g.*, Metcalf, *supra* note 115, at 287 (castigating several well-known scholars, including Blackstone, Littleton, and Coke for advocating admissibility of evidence showing malicious motives and intentions of defendants in aggravated damages cases).

139. Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America*, 3 RES. IN L. & SOC. 3, 3 (1980). The late nineteenth century also marked the rise of "doctrinal writings." PERRY MILLER, THE LIFE OF THE MIND IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR 156 (1965) (attributing to Roscoe Pound use of term "doctrinal writings" in reference to classical law-as-science).

140. *See* 2 GREENLEAF, *supra* note 137, § 253, at 240 (arguing that exemplary damages

damages were not a part of the Anglo-American tradition and were without doctrinal basis.[141] He opposed punitive damages because the conduct it punished was in the borderland between public and private law.[142] Under Greenleaf's "science of law," doctrines were either public or private, never straddling the two.[143] In nineteenth-century American Jurisprudence, academics thought of legal doctrine as clearly separated into public or private spheres. Any substantive area was to fit into only one of these clearly defined categories.[144] In an 1834 lecture at Harvard Law School, Greenleaf proposed that law students adopt the methodology of the physical scientist. This positive methodology required the student to classify legal doctrine into categories much as botanists would create a taxonomy of plant life.[145] The sole purpose of civil remedies was compensation; punitive damages had no doctrinal precedent to support it as a remedy.[146] "Damages," opined Greenleaf, "are given as a

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should only be awarded in cases where traditional methods of damage assessment are inapplicable).

141. *See* 2 GREENLEAF, *supra* note 137, § 253, at 240 n.2 (arguing that exemplary damages are alien to compensatory tort law as established in traditional jurisprudence). The Anglo-American tradition of separating all doctrines into public and private law has its origins in the natural-rights liberalism of John Locke, and was brought into the center of American legal and political theory in the nineteenth century with the emergence of the market as a central legitimating institution. *See generally* Morton J. Horowitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982). A goal of nineteenth-century legal thought was to create a clear separation between public law (incorporating constitutional, criminal, and regulatory law) and private law (including torts, contracts, property, and commercial law). *See id.* at 1424 (stating that public/private split became "the fundamental conceptual and architectural division" of classical legal theory). An example of the efforts of late nineteenth-century theorists to create a sharp distinction between public and private law is evident in the effort to eliminate punitive damages in tort cases. *See id.* at 1425 ("Because the purpose of punitive damages was to use the tort law to regulate conduct, not merely to compensate individuals for injuries, their imposition was regarded as a usurpation of the public law function of the criminal law."). The private/public split became the basis for all nineteenth-century critiques of the punitive damages doctrine. *See* Letter to the Editor, *supra* note 137, at 74-75 (arguing that award of punitive damages is illogical because such award melds public and private realms).

142. *See* 2 GREENLEAF, *supra* note 137, § 253, at 240 n.2 (asserting that punitive damages blurred distinction between public and private law by utilizing public remedies for private injuries); *see also* MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960 113 (1992) (noting widespread opposition to punitive damages on ground that they allowed private law to serve purposes thought relegated to public sphere).

143. *See* 2 GREENLEAF, *supra* note 137, § 253, at 240 n.2 (articulating common law theory that all laws are either public or private). Greenleaf asserted that because all laws were categorically either public or private, the law could be approached scientifically and hence could be rightfully labeled the "science of law." *Id.*; *see also* MILLER, *supra* note 139, at 159 (describing development of scientific theory of law).

144. *See* HOROWITZ, *supra* note 142, at 10-11 (noting existence of nineteenth-century "move to create a sharp distinction between what was thought to be a coercive public law—mainly criminal and regulatory law and a non-coercive private law of tort, contract, property and commercial law").

145. MILLER, *supra* note 139, at 159 (quoting Professor Greenleaf and noting "that 'adjudicated cases are to the legal student what facts are to the natural scientist . . . [and] by the process of induction, [the student's] mind ascends to the higher regions of science' ").

146. *See generally* 2 GREENLEAF, *supra* note 137, §§ 253-254, 266-267, 272, at 240-51, 264-

compensation, recompense, or satisfaction to the plaintiff, for an injury actually received by him [or her] from the defendant. They should be precisely commensurate with the injury, neither more nor less; and this whether it be to his [or her] person or estate."[147]

The supporters of punitive damages found their most capable spokesperson in Theodore Sedgwick, an editor of a law reporter as well as a practitioner.[148] Sedgwick was the exemplar of a more pragmatically oriented group of lawyers.[149] He " 'ridiculed the logic-chopping of the textbooks . . . declaring that the lawyer's science was entirely practical.' "[150] The dispute was often emotionally charged.[151] "Oppression, brutality or insult in the infliction of a wrong is a cause for the allowance of exemplary damages," wrote Sedgwick in a treatise entitled *The Measure of Damages*.[152] The mean-

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67, 270-72 (discussing appropriate types of damages and dismissing punitive damages as without basis).

147. 2 GREENLEAF, *supra* note 137, § 253, at 240.

148. Sedgwick chastised Professor Greenleaf for ignoring the fact that punitive damages performed well-recognized social functions. *See* Theodore Sedgwick, *The Rule of Damages in Actions* Ex Delicto, 10 LAW REP. 49, 53 (1847) (asserting that community, as well as individual, can benefit from imposition of damages). Sedgwick further contended that the theoretical distinction between public and private law was too formalistic and removed from reality. *Id.* The editor of *The Monthly Law Reporter* wrote of Sedgwick:

> Mr. Sedgwick is well known to the profession by his valuable book on the measure of damages, a book which, although it advanced some doctrines which we considered unsupported by principal and authority, and against which, we, at the time of its publication, entered our protest, it is undoubtedly of great value, as reducing the law upon this important subject to order and system, and it has had a wide circulation and a deserved success both in this country and in England.

Notices of New Publications: A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law, 20 MONTHLY L. REP. 175, 175-76 (July 1857); *see* 1 SEDGWICK, *supra* note 85, § 474, at 904 (asserting that, in principle, exemplary damages may be awarded in every case).

149. Jeremy Bentham's apt metaphor of "nonsense on stilts" best describes Sedgwick's disdain for the academically oriented scientists of law. Sedgwick stated, " 'It is only by an intimate acquaintance with its application to the affairs of life, as they actually occur, that we can acquire that sagacity requisite to decide new and doubtful cases. Arbitrary formulae, metaphysical subtleties, fanciful hypothesis, aid us but little in our work.' " MILLER, *supra* note 139, at 184 (quoting Sedgwick).

150. MILLER, *supra* note 139, at 184 (quoting Sedgwick).

151. Thomas Street characterized the debate between Greenleaf and Sedgwick in the following way:

> The affirmative view was supported by Professor Greenleaf. The negative was maintained by Mr. Sedgwick. As is often the case in controversies of this kind, it will be found that each of these opposing views has its element of truth. But as a matter of practical fact, the weight of authority is with Mr. Sedgwick. The view which treats compensation as the exclusive object of the law of civil injury presupposes a theoretical unity in the principles underlying the law of damages which does not exist. It is generalization pushed too far.

1 STREET, *supra* note 91, at 478-79. Professor Street continued that "[t]he great weight of authority in this country, as in England, is to the effect that exemplary damages may be awarded." *Id.* at 481. Punitive damages were deemed to be available " 'where the wrongful act is characterized by gross fraud, malice, or oppression, or by wanton disregard of the rights of the plaintiff.' " *Id.* (quoting Theodore Sedgwick).

152. 1 SEDGWICK, *supra* note 85, § 365, at 718-19.

ing of exemplary damages through the first decades of the century was that "in actions of tort, when gross fraud, wantonness, malice or oppression appears, the jury . . . may, by a severer verdict, at once impose a punishment on the defendant and hold him [or her] up as an example to the community."[153]

Judges frequently cited the Greenleaf-Sedgwick debates in judicial decisions,[154] but few jurisdictions repudiated the doctrine of punitive damages.[155] Justice Foster of the New Hampshire Supreme Court thundered that awarding punitive damages is a "monstrous

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153. 1 SEDGWICK, *supra* note 85, § 347, at 687. In an earlier version of his treatise, Sedgwick found firm precedent for assessing punitive damages:

> Where either of [the elements of fraud, malice, gross negligence, or oppression] mingle in the controversy, the law, instead of adhering to the system or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms punitory, vindictive, or exemplary damages; in other words, blends together the interest of society and the aggrieved individual, and gives damages not only to recompense the sufferer but to punish the offender.

SEDGWICK, *supra* note 74, at 39; *see also* HILLIARD, *supra* note 127, at 440-41 ("In the absence of aggravation, compensation is the proper measure of damages . . . . Exemplary damage[s] [are] such . . . as would be a good round compensation, and such as might serve for a wholesome example to others.").

154. *See, e.g.*, Bass v. Chicago & N.W. Ry. Co., 42 Wis. 654, 672 (1877). In *Bass*, Chief Justice Ryan of the Wisconsin Supreme Court accepted what Professor Greenleaf refused to acknowledge, that punitive damages were fully institutionalized in Anglo-American jurisprudence, but expressed his dislike for the doctrine nonetheless. *Id.* He noted:

> I have always regretted that this Court adopted the role of punitory damages in actions of tort. In the controversy between Prof. 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. . . . The reasons against punitory damages are peculiarly applicable in this state, since the just and broad rule of compensatory damages [was] sanctioned by this court. . . . But the rule was adopted as long ago as 1854 . . . and has been repeatedly affirmed since. It is therefore too late to overturn it by judicial decision. That could well be done by legislative enactment only.

Id. New Hampshire's Justice Foster took a bolder, more vituperative stand against punitive damages in Fay v. Parker, 53 N.H. 342, 350-62 (1872). Justice Foster devoted 40% of his opinion to dismantling each of the precedents relied on by Sedgwick and agreeing with the soundness of Greenleaf's view. *Fay*, 53 N.H. at 363-83. He stated:

> Undoubtedly many of the cases, cited and relied upon by Mr. Sedgwick in support of his doctrine, sustain to the fullest extent, the position assumed by him . . . but some of them fall so short of affording such support, as would seem to indicate a misconception of their true import and meaning.

Id. at 363; *see also* Murphy v. Hobbs, 5 P. 119, 120 (Colo. 1884) (superseded by statute) (finding that while both Sedgwick's and Greenleaf's positions were well respected, Colorado would not allow punitive damages).

155. The early movement to abolish punitive damages was victorious in only a few states, including Connecticut, Massachusetts, New Hampshire, Washington, and the civil law jurisdiction of Louisiana, which refused to allow punitive damages absent statutory authorization. *See, e.g.*, O'Reilly v. Curtis Publishing Co., 31 F. Supp. 364, 364 (D. Mass. 1940) (refusing to award punitive damages in Massachusetts); Hanna v. Sweeney, 62 A. 785, 785 (Conn. 1906) (declaring punitive damages inapplicable in Connecticut); Gugert v. New Orleans Indep. Laundries, 181 So. 653, 656 (La. App. 1938) (noting that punitive damages were not recoverable under civil law); Burton v. Leavitt Stores Corp., 179 A. 185, 186 (N.H. 1935) (noting that penalties are not considered in damages); Anderson v. Dalton, 264 P.2d 853, 855 (Wash. 1952) (holding that punitive damages cannot be recovered except when explicitly allowed by statute).

heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law."[156] The Colorado Supreme Court was more measured, holding that punishment and compensation should be kept "separate and distinct."[157]

Constitutional arguments in the late nineteenth century and early twentieth century prefigured today's constitutional challenges to the punitive damages doctrine.[158] Early attacks on the remedy focused on the facts that punitive damages were paid to private individuals,[159] that the reasonable doubt standard was replaced by the preponderance of the evidence standard,[160] and that juries had unfettered discretion to award punitive damages.[161] For example, Justice Foster argued that the evil of punitive damages was the absence of procedural safeguards.[162]

The reluctance of courts to utilize punitive damages in the nineteenth century is evident in medical malpractice cases, which were largely, but not always, unsuccessful.[163] In contrast, punitive or ex-

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156. *Fay*, 53 N.H. at 382. The symmetry referred to is the public/private distinction that dominated legal thinking at the time. *See supra* notes 141-42 and accompanying text (discussing public/private distinction).

The editor of *The Central Law Journal* wrote of Justice Foster's opinion:

> As Sir Lucius O'Trigger might say: "It is a very petty quarrel as it stands"—and we do not intend to meddle with it. We are warned by the example of Mr. Justice Foster of New Hampshire, who, after an exhaustive discussion of this subject in *Fay v. Parker* says: "We may venture no further in this direction." The learned judge likens the controversy to that very undesirable place, at the entrance of which all hope must be left behind; but as the similitude is couched in the "choice Italian" of Dante, it is less shocking to the sensibilities than if bluntly expressed in the vernacular.

Murfee, *supra* note 118, at 530.

157. Murphy v. Hobbs, 5 P. 119, 125 (Colo. 1884) (superseded by statute).

158. *See, e.g.*, Charles T. McCormick, *The Measure of Damages for Defamation*, 12 N.C. L. REV. 121, 134-43 (1933) (discussing applicability and constitutional ramifications of awarding special damages for defamation).

159. Letter to the Editor, *supra* note 137, at 74. The letter stated:

> Let the breaker of the public peace and the offender of the laws make his [or her] fine to the state, the duty of which it is to protect, and which pays for the administration of justice but not to the injured person, who when compensated liberally for his [or her] individual loss, has no further claim on his [or her] opponent.

Id.

160. *See, e.g.*, *Murphy*, 5 P. at 121 (noting that rules of evidence applicable to criminal prosecutions are replaced by civil standards in punitive damages context).

161. *See, e.g.*, Hanna v. Sweeney, 62 A. 785, 785 (Conn. 1906) (asserting that amount of punitive damages awarded is left almost entirely to discretion of jury, as courts generally refuse to grant new trial for excessive damages of this kind).

162. *See* Fay v. Parker, 53 N.H. 342, 384-97 (1872) (detailing constitutional violations caused by lack of safeguards in procedures for awarding punitive damages).

163. *See, e.g.*, Braunberger v. Cleis, 4 AM. L. REG. 587, 594 (Pa. 1865). In *Braunberger*, the court denied punitive damages in a wrongful death action against a surgeon for medical malpractice. *Id.* The court observed that the case did not involve malice: "If he caused the death of the deceased, it was not intentional, but the result of ignorance and unskillfulness, and therefore the jury should be merciful while they do justice." *Id.* Similarly, in *Hyatt v. Adams*, punitive damages were unavailable in a medical malpractice case where the plaintiffs' decedent died at the hand of an incompetent surgeon. Hyatt v. Adams, 16 Mich. 180, 198-200 (1867) (superseded by statute). The court reasoned that because the physician had no evil

emplary damages were generally assessed in tort cases based on fraudulent sales.[164] During the initial decades of the twentieth century, punitive damages gained an expanded role in consumer protection. Courts assessed punitive damages against defendants in commercial transactions where there existed ingredients of malice, fraud, insult, or wanton and reckless disregard of the rights of the plaintiff.[165] For example, plaintiffs sought punitive damages against merchants for fraud in connection with sales of goods,[166] bank/customer relationships,[167] commercial paper transactions,[168] and security interests in personal property.[169] Increasingly, courts

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motive in performing the operation, punitive damages could not lie. *Id.* In *Van Meter v. Crews*, the court found no evidence warranting punitive damages in a case involving the performance of unskillful surgery. Van Meter v. Crews, 148 S.W. 40, 42 (Ky. 1912). In *Cochran v. Miller*, however, the Iowa Supreme Court allowed vindictive damages in a case of gross negligence and malpractice. Cochran v. Miller, 13 Iowa 128, 131 (1862). In *Brooke v. Clark*, a physician, through gross negligence, caused serious injury to a child during delivery. Brooke v. Clark, 57 Tex. 105, 113-14 (1880). The Texas Supreme Court permitted the jury to assess exemplary damages. *Id.* at 114. By the mid-1920s, punitive damages awards were commonly allowed in cases of gross negligence in medical malpractice. *See, e.g.*, Pratt v. Davis, 79 N.E. 562, 565 (Ill. 1906) (involving award of punitive damages for removal of vital organs without patient's consent); Rennewanz v. Dean, 229 P. 372, 375 (Or. 1924) (allowing award of punitive damages in suit over death of patient caused by grossly negligent treatment of hemorrhoidal tumors); Morrell v. Lalonde, 120 A. 435, 437 (R.I. 1923) (assessing punitive damages against physicians and surgeons found guilty of malpractice).

164. *See* K.A. Drechsler, Annotation, *Punitive or Exemplary Damages in Action in Tort Based on Fraudulent Sale*, 165 A.L.R. 614, 614 (1946) (noting that it was generally accepted by all courts in nineteenth century that punitive damages were recoverable in all tort actions involving fraud).

165. *See* Donaldson v. Temple, 80 S.E. 437, 438 (S.C. 1913) (finding punitive damages for breach of contract not recoverable unless breach was accompanied by fraudulent act, as distinguished from fraudulent intent); *see also* Oklahoma Fire Ins. Co. v. Ross, 170 S.W. 1062, 1064 (Tex. Civ. App. 1914) (allowing recovery of punitive damages where defendant committed tortious conduct by breach of contract, but not for tortious conduct committed after breach). Courts' traditional doctrinal objection to the awarding of punitive damages in contract cases was avoided by constructively establishing a case in tort. *See* Drechsler, *supra* note 164, at 614 (noting that presence of contract dispute did not preclude plaintiff from stating action in tort and thus receiving punitive damages). The requirement of pleading a tort violation independently of a breach of contract claim, in order to seek punitive damages, is reminiscent of the former writ system. *See* Samuel Maxwell, *Damages for Injuries to Property, Fraud, Etc.*, 7 SOUTHERN L. REV. 879, 879-80 (1881) (noting requirement of pleading independent tort and conflict over proper measure of damages for fraud in connection with sale of real or personal property).

166. *Compare* Huffman v. Moore, 115 S.E. 634, 635 (S.C. 1923) (allowing recovery of punitive damages in action for fraud in sale of secondhand car) *with* Littlefield v. Clayton Bros., 194 S.W. 194, 199 (Tex. Civ. App. 1917) (holding that punitive damages are not recoverable for fraud in breach of sales contract where fraudulent conduct inflicted no additional injury), *rev'd on other grounds*, 244 S.W. 509 (Tex. 1922).

167. *See, e.g.*, Westesen v. Olathe State Bank, 225 P. 837, 838 (Colo. 1924) (refusing to award punitive damages for breach of bank's agreement to credit plaintiff's checking account with $5000 against which he could draw at his convenience while on vacation).

168. *See, e.g.*, State Mut. Life & Annuity Ass'n v. Baldwin, 43 S.E. 262, 264 (Ga. 1903) (finding that where promissory note was satisfied in full and payee negligently submitted it to bank for collection, maker was entitled to recover actual but not punitive damages).

169. *See, e.g.*, Hays v. Anderson, 57 Ala. 374, 376 (1876) (providing for recovery of exemplary damages where remedy of garnishment was vexatiously used against plaintiff's property).

employed punitive damages as a consumer protection device against the employment of sharp practices by businesses.[170] Courts assessed punitive damages against defendants who violated community norms by selling, for example, worthless oil properties,[171] defective buildings,[172] ersatz corporate stock,[173] or reconditioned watches as new ones,[174] misrepresented the quality of automobiles,[175] or deliberately sold hogs infected with cholera.[176] The emblem of nineteenth-century punitive damages was "spite or ill-will."[177]

II. THE CONTEMPORARY FUNCTIONS OF PUNITIVE DAMAGES

A. The Empirical Picture

In *TXO Production Corp. v. Alliance Resources Corp.*, Justice Richard Neely[178] stated:

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170. Research in *The American Digest (1658-1896)* revealed two contractually based punitive damages actions. The first case involved a garnishment claim where punitive damages were recoverable. *Hays*, 57 Ala. at 376. The second case involved a contractual breach where the court did not permit punitive damages. *See* Goins v. Western R.R., 68 Ga. 190, 192 (1881) (refusing to award punitive damages in case where conductor refused to allow plaintiff to ride with valid ticket).

Research in *The First Decennial Digest (1897-1906)* revealed four contractually based punitive damages actions. *See* Ford v. Fargason, 48 S.E. 180, 180 (Ga. 1904) (refusing to allow punitive damages claim in suit for breach of contract); *State Mut. Life*, 43 S.E. at 264 (holding punitive damages unavailable when promissory note was satisfied and payee negligently sent it to bank for collection); Welborn v. Dixon, 49 S.E. 232, 234-35 (S.C. 1904) (allowing punitive damages in case where land was conveyed to secure debt with agreement for reconveyance, but on payment grantee fraudulently refused to reconvey); Gatzow v. Buening, 81 N.W. 1003, 1008-09 (Wis. 1900) (assessing punitive damages against liverymen's association for illegally blocking rental of hearse and carriage for child's funeral).

171. *See* Greene v. Keithley, 86 F.2d 238, 242 (8th Cir. 1936) (granting exemplary damages where defendants conspired to sell plaintiff valueless oil properties).

172. *See* Luikart v. Miller, 48 S.W.2d 867, 871 (Mo. 1932) (permitting award of punitive damages against real-estate agent who sold defective building through misrepresentations to buyer).

173. *See, e.g.*, Southern Bldg. & Loan Ass'n v. Dinsmore, 144 So. 21, 23 (Ala. 1932) (allowing punitive damages for sale of faulty stock in building and loan association); Long v. McAllister, 118 A. 506, 508 (Pa. 1922) (allowing assessment of punitive damages in action for deceit based on fraudulent sale of corporate stock involving extreme aggravation); Mossop v. Zapp, 189 S.W. 979, 981 (Tex. Civ. App. 1916) (finding exemplary damages appropriate when defendant fraudulently induced plaintiff to sell bonds).

174. *See* Saberton v. Greenwald, 66 N.E.2d 224, 229 (Ohio 1946) (holding punitive damages appropriate in fraudulent representation of used watch as new).

175. *See, e.g.*, Lufty v. R.D. Roper & Sons Motor Co., 115 P.2d 161, 165 (Ariz. 1941) (holding seller liable for punitive damages for falsely representing that 1936 model automobile was 1937 model); Jones v. West Side Buick Co., 93 S.W.2d 1083, 1088 (Mo. Ct. App. 1936) (assessing punitive damages against seller for fraudulently turning back odometer on used automobile); Hunt Battery Mfg. Co. v. Stovall, 80 P.2d 623, 624 (Okla. 1938) (awarding punitive damages against defendant who fraudulently sold automobile).

176. *See* Hobbs v. Smith, 115 P. 347, 349 (Okla. 1911) (assessing punitive damages for knowing sales of infected livestock).

177. HOROWITZ, *supra* note 142, at 113.

178. 419 S.E.2d 870, 887 (W. Va.), *cert. granted*, 113 S. Ct. 594 (1992).

> Originally, punitive damages were awarded only to deter malicious and mean-spirited conduct. However, the punitive damages definition of malice has grown to include not only mean-spirited conduct, but also extremely negligent conduct that is likely to cause serious harm. Generally, then, we can distinguish between the "really mean" punitive damages defendant, and the "really stupid" punitive damages defendant. We want to discourage both forms of unpleasant conduct . . . .[179]

In making these observations, Justice Neely identified the core of former Vice President Quayle's critique of punitive damages. Quayle supported the use of punitive damages for mean-spirited or malicious actions, characteristic of nineteenth-century awards. Quayle stated:

> In the past, punitive damages were assessed only in cases where the defendant was proved to have had a quasicriminal intent to harm the plaintiff. Today, however, plaintiffs in civil lawsuits routinely ask juries to award not only compensatory damages for their economic or out-of-pocket losses, but also punitive damages. . . . In personal injury cases, the rise has been even more dramatic.[180]

Quayle mischaracterizes the modern usage of the remedy in arguing that these awards are given routinely,[181] although he is correct

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179. TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870, 887 (W. Va.), *cert. granted*, 113 S. Ct. 594 (1992).

180. Quayle, *supra* note 55, at 564.

181. *See* Quayle, *supra* note 55, at 564 (basing his call for punitive damages reform on kind of anecdotal evidence labeled by Professor Saks as "factoids and factlets"); *see also* Michael Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1160-62 (1992) (explaining that "factoids" are statements that sound like facts but actually convey false or meaningless information and that "factlets" are pieces of information that by themselves reveal little). Hypothetical dangers and hyperbole are often presented by proponents of punitive damages reform, in lieu of solid historical and empirical studies. One commentator writes:

> If one believes newspaper headlines, punitive damage awards are skyrocketing. In the past decade, punitive damages in the millions of dollars have been awarded and are no longer automatically rejected by courts as excessive. Though calmer voices have maintained that there is no crisis in the punitive damages arena, it is understandable that multi-million dollar punitive damage awards garner a great deal of media attention.

Toy, *supra* note 67, at 303 (footnotes omitted). For example, instead of demonstrating the existence of runaway juries, former Vice President Quayle quotes Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit as complaining: " 'I suppose next we will be seeing lawsuits seeking punitive damages for maliciously refusing to return phone calls or adopting a condescending tone in interoffice memos.' " Quayle, *supra* note 55, at 564 (quoting Oki America v. International, Inc., 872 F.2d 312, 315 (9th Cir. 1989) (Kozinski, J., concurring). Quayle also quotes a leader of the tort reform movement, Theodore B. Olson, who maintains that punitive damages " 'have made civil litigation sort of like the lotteries you have in so many states.' " *Id.* (quoting Ruth Marcus, *Are Punitive Damages Fair to Firms? Supreme Court Finally Agrees To Referee High-Stakes Dispute*, WASH. POST, Sept. 23, 1990, at H1 (quoting Theodore B. Olson, Esquire)). Such complaints have emotional appeal, but they fail to address the actual application of punitive damages in punishing extreme carelessness. It is quite

in detecting a transformation from malicious acts to highly negli-

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possible that Vice President Quayle's anecdotes will be believed by many to be factually based. Indeed, Jan Brunvand has collected a large number of misconceptions that have become accepted as truths by our culture. *See* JAN H. BRUNVAND, THE VANISHING HITCHHIKER 2-4 (1981) (arguing that outlandish urban myths survive and continue to be passed on from generation to generation).

Vice President Quayle believes that there has been an unjustifiable increase in the number and size of punitive damages awards, particularly in product liability cases. *See* AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 53, at 8 (asserting that lack of unified structure in punitive damages assessment procedures has resulted in disproportionately high awards being made capriciously, leading to excessively high product liability insurance costs). While the expansion of punitive awards is principally in the areas of intentional torts and business/contract actions, the target of Vice President Quayle's reform efforts is principally product liability. *See* MARK A. PETERSON ET AL., THE INST. FOR CIVIL JUSTICE (RAND), PUNITIVE DAMAGES: EMPIRICAL FINDINGS 8-9 (1987) (studying patterns of punitive damages awards in business/contract cases, involving claims for money damages for fraud, business torts, and unfair business practices; intentional torts, including claims for defamation, discrimination, violations of civil liberties, and assaults; and personal injury cases involving negligence and strict liability, including product liability; and concluding that largest increases in punitive damages awards occurred in business/contract and intentional tort cases). In fact, state tort reform measures have sometimes focused on curbing punitive damages in product liability actions and medical malpractice. *See, e.g.*, KAN. STAT. ANN. § 60-3402(e) (1991) (requiring that punitive damages awards in medical malpractice cases be divided evenly between plaintiff and state treasury and be credited to health care stabilization fund); N.J. REV. STAT. § 2A:58C-5 (1992) (limiting punitive damages in product liability actions to only those cases where plaintiff receives compensatory damages and proves by preponderance of evidence that defendant caused harm with actual malice or willful disregard); N.Y. CIV. PRAC. L. & R. 3017:11 (McKinney 1991) (precluding *ad damnum* clauses, which specify amount of money damages claimed by plaintiff, from medical malpractice actions)..

Former Vice President Quayle supported Senate bill 640, which its drafters designed specifically to reform punitive damages in product liability actions. *Cf. Product Liability Fairness Act, 1991: Hearings on S. 640 Before the Subcomm. on the Consumer of the Senate Comm. on Commerce, Science, and Transportation*, 102d Cong., 1st Sess. 15 (1991) [hereinafter *Hearings on S. 640*] (prepared statement of Robert A. Mosbacher, Secretary, Dept. of Commerce) (noting Bush administration approval of S. 640). In 1991, the Senate considered the bill, entitled the Product Liability Fairness Act, which would have (1) required claimants seeking punitive damages to prove by clear and convincing evidence that the defendant's conduct manifested a "conscious, flagrant indifference" to public safety; (2) provided drug manufacturers with immunity if they complied with Food and Drug Administration regulations and did not commit fraud; and (3) provided aircraft manufacturers with a safe harbor from punitive damages so long as they complied with applicable Federal Aviation Administration standards. S. 640, 102d Cong., 1st Sess. § 303(a), (c)(1)-(2) (1991); *see Hearings on S. 640*, *supra*, at 67-102 (providing expert testimony on likely effects of bill). Both former President Bush and Vice President Quayle also backed the 1990 Product Liability Reform Act contained in S. 1400, 101st Cong., 2d Sess. (1990). *See Hearings on S. 1400*, *supra* note 69, at 25 (creating uniform standards for awards of punitive damages similar to those later incorporated in S. 640). President Bush specifically referred to the need to reform product liability jurisprudence in his January 31, 1990 State of the Union Address. President's State of the Union Address, PUB. PAPERS 129, 132 (Jan. 31, 1990). Vice President Quayle endorsed the product liability reform bill, declaring tort reform to be a top legislative priority. *See* Dan Quayle, *Now Is the Time for Product Liability Reform*, 18 Prod. Safety & Liab. Rep. (BNA) 306, 306 (Mar. 23, 1990) (asserting that reform of product liability system is vital to promotion of U.S. competitiveness).

The RAND study quoted by Vice President Quayle actually found very few punitive damages awards in the substantive areas that receive the most media attention. *See* AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 53, at 5-6 (referring to RAND study results). The RAND study located a total of only six product liability punitive verdicts over a 25-year period in Cook County, Illinois and San Francisco, California. PETERSON ET AL., *supra*, at 12. Less than 4% of all punitive awards surveyed by RAND's Institute for Civil Justice between 1980 and 1984 were in the field of strict liability, including product liability. *Id.* at 46 tbl. 4.2. Many other empirical studies also fail to find large numbers of punitive damages awards in product

gent ones with respect to the circumstances under which punitive damages are awarded. Contrary to the former Vice President's assertions, judges and juries award punitive damages with striking rarity to individuals in suits against manufacturers. Table One summarizes all available research on the incidence of punitive damages in product liability litigation. Every empirical study included in the table reveals that punitive damages are neither routine nor staggering. For example, the Daniels and Martin study yielded thirty-four punitive damages awards out of 967 product liability trials.[182] Professor Landes and Judge Posner examined all federal product liability trials decided from 1982 through November 1984 and found only ten punitive damages awards out of 172 product liability cases.[183] The authors' intensive study of product liability cases nationwide from 1965-1990 yielded 355 punitive damages verdicts.[184] Table One describes the years studied and the number of punitive damages awards discovered, and provides brief descriptions of the samples used in these studies.

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liability cases. *See* STEPHEN DANIELS & JOANNE MARTIN, EMPIRICAL PATTERNS IN PUNITIVE DAMAGE CASES: A DESCRIPTION OF INCIDENCE RATES AND AWARDS 8 (American Bar Foundation Working Paper No. 8705, 1987) [hereinafter DANIELS & MARTIN, EMPIRICAL PATTERNS] (finding that punitive damages are not routinely awarded, and that when they are awarded, amounts are not astronomical); U.S. GEN. ACCOUNTING OFFICE, PRODUCT LIABILITY: VERDICTS AND CASE RESOLUTION IN FIVE STATES 31 (1989) [hereinafter GAO REPORT] (finding that although amounts awarded varied, punitive assessments in five states did not appear erratic or out of control); Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 29-38 (1990) [hereinafter Daniels & Martin, *Myth and Reality*] (noting that regardless of raw numbers, percentage of verdicts that include punitive damages award is generally modest); William M. Landes & Richard A. Posner, *New Light on Punitive Damages*, REG., Sept.-Oct. 1986, at 33, 36 (concluding that courts rarely award punitive damages in product liability actions). The authors' empirical study of a quarter century of punitive damages in product liability is consistent with all of these prior empirical studies. *See* Rustad, *supra* note 67 (noting that once anomalies were controlled for, number of punitive damages awards decreased from 1986-1990).

Citing the RAND study, Vice President Quayle maintained that "the average punitive damage award increased, in inflation-adjusted dollars from $43,000 in 1965-69 to $729,000 in 1980-84—a jump of 1500%." AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 53, at 6. This statistic is misleading in that it reports the mean versus the median. When dealing with averages or mean numbers, a small number of very large awards can dramatically skew the distribution. *See* Saks, *supra*, at 1256 (concluding that RAND study's finding of increased size of punitive awards simply "reflects the impact of very few cases with exceptionally large awards").

182. Daniels & Martin, *Myth and Reality*, *supra* note 181, at 38 tbl. 5.

183. Landes & Posner, *supra* note 181, at 35.

184. Rustad, *supra* note 67; *see also Hearings on S. 640*, *supra* note 181, at 146-47 (testimony of Michael Rustad, Professor of Law, Suffolk University, and of Thomas Koenig, Associate Professor of Sociology, Northeastern University) (discussing empirical findings contained in study).

TABLE ONE
EMPIRICAL STUDIES OF PUNITIVE VERDICTS
IN PRODUCT LIABILITY

STUDY	YEARS	# OF AWARDS	LOCATION
1. RAND ICJ[185]	1960-1984	6	Cook County, Ill., San Francisco, Ca. (state and federal).
2. ABF[186]	1981-1985	34	47 sites in Ariz., Cal., Ga., Ill., Kan., Mo., N.Y., Ore., Tex. & Wash.
3. GAO[187]	1983-1985	23	Ariz., Mass., Mo., N.D. & S.C. (state and federal).
4. L & P[188]	1982-1984	10	Published federal & state cases reported in federal and regional reporters.

185. PETERSON ET AL., *supra* note 181. In the past quarter century, RAND researchers found only one punitive damages award in product liability from 1960-1979 in San Francisco County and one such award during the 1980-1984 period in Cook County. *Id.* at 13. In San Francisco, the researchers uncovered three product liability cases where punitive damages were awarded from 1980-1984. *Id.* In Cook County, one punitive damages award in a product liability case was handed down in 1980-1984. *See id.* (providing breakdown of punitive damages awards in product liability cases according to date and location). The RAND Study concluded that punitive damages are extremely rare in personal injury cases. *See id.* at 12 (noting that few punitive damages awards were granted in personal injury cases over 25-year period). For all types of cases, courts rarely assessed punitive damages; such damages were found in only 2.5% of the Cook County trials conducted between 1980-1984 and in only 8.3% of the verdicts handed down in San Francisco County during the same period. *Id.* at 9 tbl. 2.1. The median punitive damages award was $43,000 in Cook County and $63,000 in San Francisco County. *Id.* at 15. The researchers stated that "[p]roduct liability cases have been of special concern to many critics, but our analyses indicate that punitive damages were awarded in only four product liability cases in San Francisco and two in Cook County from 1960 to 1984." *Id.* at v.

186. *See* Daniels & Martin, *Myth and Reality*, *supra* note 181, at 38 (listing results regarding rates of punitive damages awards in medical malpractice and product liability cases). The Daniels and Martin study surveyed 47 counties in 11 different states: Arizona, California, Colorado, Georgia, Illinois, Kansas, Missouri, New York, Oregon, Texas, and Washington. *Id.* at 3.

187. GAO REPORT, *supra* note 181, at 29-30. The GAO collected data on the frequency and size of punitive damages awards in product liability cases in five states between 1983 and 1985 by reviewing court records for all product liability cases resolved through trial (305) in five states—Arizona, Massachusetts, Missouri, North Dakota, and South Carolina. *Id.* at 20-21. The study supplemented official court records with post-trial interviews with attorneys. *Id.* at 21. The GAO concluded that punitive damages awards in product liability cases were neither routine nor excessive. *Id.* at 31. Post-trial adjustments often reduced the size of the punitive awards. *Id.* at 47.

188. Landes & Posner, *supra* note 181, at 33-36. Professor William Landes and Judge Richard Posner examined all product liability cases reported in 10 volumes of each West Publishing Company federal and regional reporters and all product liability cases in the federal courts of appeals from January 1982 through November 1984. *Id.* at 35. California

5. R & K[189]	1965-1990	355	Published and unpublished federal & state cases nationwide.

B. The Contemporary Functions

The consistent historic function of punitive damages has been to control the abuses of the powerful. Today, the pragmatic rationale for punitive damages has been extended to punish and deter extremely careless actions by corporate managers. This extension is justified because the radius of the risk to the public is very great in many of these cases.

The assessment of punitive damages against corporations was not necessary in the early days of the United States because only small businesses existed. As Justice Neely argued:

> In a world with only smaller, closely held businesses, we would not need punitive damages for this type of case. Once Joe, the owner of Joe's Automobile Company, realizes that there is a foul up in his business that is causing problems for his customers, he has plenty of incentive to correct it. However, compensatory damages do not always provide sufficient incentive for the middle managers who makes these types of decisions for a major automobile company with hundreds of thousands of employees and agents.[190]

To understand the function of punitive damages as a "sword" wielded by relatively powerless individuals and entities against giant firms, one needs to examine the contemporary uses of the remedy. The punitive damages objected to by the former Vice President are not based on malicious intent.[191] Excessive profit-seeking or ex-

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and New York cases were excluded from the analysis. *Id.* at 34. They found that punitive damages were awarded by trial courts in only 10 of 172 product liability cases.

189. Rustad, *supra* note 67.

190. TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870, 888 (W. Va.), *cert. granted*, 113 S. Ct. 594 (1992).

191. *See* Quayle, *supra* note 55, at 60-61 (focusing punitive damages attack on product liability doctrine, which operates irrespective of intent). Professor David Owen conceptualized the recurrent types of corporate misconduct resulting in punitive damages in product liability actions as: "(1) fraudulent-type misconduct; (2) knowing violation of safety standards; (3) inadequate testing and manufacturing procedures; (4) failures to warn of known dangers before marketing; and (5) post-marketing failures to remedy known dangers." Owen, *supra* note 66, at 1329. Tom Riley explained Owen's typology in the following way:

> (1) Fraudulent Conduct—This type of cases [sic] involves overt efforts at deception, either of the public or of agencies of government. It includes such things as falsifying test data required by state or federal governments or knowingly misrepresenting to customers the nature of the product.
>
> (2) Violations of Safety Standards—Where the defendant violates safety standards and a plaintiff is injured thereby, the plaintiff will be entitled to compensatory damages. If the defendant knowingly violated the standards, punitive damages may

treme carelessness with respect to public safety motivate the awarding of punitive damages in many product liability cases.[192] The punishment/deterrence function of punitive damages in such cases is to protect the consuming public from egregious corporate conduct that perhaps does not rise to the level of malicious intent.[193]

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be awarded by the jury since the defendant acted in flagrant disregard of the safety of the public.

(3) Inadequate Testing or Quality Control—If the manufacturer's testing or quality control procedures are so inadequate as to expose consumers to unreasonable risks of harm, this manifests a flagrant indifference or disregard of the public's safety for which punitive damages will lie.

(4) Failure to Warn of Known Dangers—If a manufacturer knows of a danger prior to the sale, he [or she] must give adequate warning or be exposed to a claim for punitive damages. By the same token, if he [or she] learns of the danger after the sale, he [or she] must convey this information effectively to the consumer. The failure to do so is evidence of a flagrant indifference to public safety for which punitive damages will lie.

(5) Post-Marketing Failures to Remedy Known Dangers—If the manufacturer learns of defects in a product that has been sold and fails to correct the defects in similar products not yet marketed, punitive damages will be allowed.

TOM RILEY, PROVING PUNITIVE DAMAGES: THE COMPLETE HANDBOOK 24 (1981). The vast majority of punitive damages verdicts in product liability have been handed down in the last quarter century. *Id.* at 223. In that time, punitive damages jurisprudence in the area of product liability has been transformed from a newly developed doctrine into a major social institution. *Id.* Judges often phrase the test for punitive liability as "conscious or reckless disregard" of the public safety. *See id.* at 223-38 (analyzing importance of, and various methods for, assessing punitive damages in product liability cases).

192. *See, e.g.*, Martin A. Kotler, *Motivation and Tort Law: Acting for Economic Gain as a Suspect Motive*, 41 VAND. L. REV. 63, 88-89 (1988) (describing recent use of punitive damages to curb violations motivated by economic considerations).

193. This modern usage of punitive damages as a shield to protect the public in product liability cases was quite rare, but not unknown, before the late 1960s. A LEXIS search using the search terms "punitive damages and products liability" failed to uncover any such federal or state cases prior to 1965. The earliest reported case involving a consumer product in which a court awarded punitive damages was Fleet & Semple v. Hollenkemp, 52 Ky. 175 (1852). In *Fleet*, the court assessed damages against a pharmacist who breached his duty to exercise the highest degree of care by mistakenly mixing poison into a prescription. *Id.* at 175. The customer became violently ill after ingesting the tainted medicine. *Id.* at 175-76. The jury awarded $1141.75 to the plaintiff, an amount far greater than the plaintiff's actual damages. *Id.* at 176. The court upheld the award, stating, "The damages given may be more or less exemplary, or otherwise, as the circumstances of aggravation or extenuation characterizing each particular case may reasonably require." *Id.* at 180.

Even before the passage of pure food and drug statutes, punitive damages signaled pharmacists that the public expected them to be extremely careful in fulfilling their duties. In 1947, an Arizona court allowed a punitive damages claim against the Coca-Cola Corporation when the company bottled a soft drink containing "decomposed flesh," which caused the plaintiff to become ill after ingesting it. Southwestern Coca Cola Bottling Co. v. Northern, 177 P.2d 219, 221 (Ariz. 1947) (holding there was sufficient evidence of negligence to support jury's award of punitive damages). In a similar case in 1949, a Missouri appeals court overturned a $5000 punitive damages award granted to a plaintiff who had ingested a decomposed mouse in his soft drink. Crews v. Sikeston Coca-Cola Bottling Co., 225 S.W.2d 812, 815 (Mo. Ct. App. 1949) (finding that punitive damages are not matter of right). The court found insufficient grounds for punitive damages and observed:

> [A] mouse probably got into one of [the company's] bottles and was sold to plaintiff's son in that condition and caused plaintiff's illness later. But there is nothing in the record in this case to show that defendant permitted the bottle of coca-cola to go out from its plant in Sikeston, in wanton disregard of the rights of plaintiff, or of any one else and it was not liable for punitive damages.

1. The Haslip *factors*

In *Haslip*, the Court determined which factors should be used "for determining whether a punitive award is reasonably related to the goals of deterrence and retribution."[194] These factors include:

> (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.[195]

Punitive damages in product liability cases are generally awarded for a company's extreme carelessness in marketing or failure to recall dangerously defective products. Few manufacturers are likely to kill or injure consumers or workers maliciously or intentionally. Their failure, however, to take precautionary or corrective action to protect the consuming public has dire consequences.

a. Actual or potential harm

Two hundred thousand persons will die from asbestos-related diseases by the end of the twentieth century.[196] Many of these deaths have resulted from asbestos manufacturers' active concealment of the dangers of unprotected exposure.[197] In our study of

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Id.

Although occasional mismanufacturing cases still result in punitive damages, the bulk of the modern cases are based on systematic error, which is present in failure to warn and design defect cases. For example, fraud and deceit in the marketing of motor oil that damaged engines led to the awarding of punitive damages in Standard Oil Co. v. Gunn, 176 So. 332, 334 (Ala. 1937). In a 1951 case, a California court assessed punitive damages against the manufacturer of sulfuric acid because the manufacturer did not adequately warn users of the danger of leaving barrels of the acid in the hot sun. Gall v. Union Ice Co., 239 P.2d 48, 60 (Cal. App. 1951).

194. Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1045 (1991).

195. *Id.*

196. *See* Stephen Labotan, *Judges' Panel, Seeing Court Crisis, Combines 26,000 Asbestos Cases*, N.Y. TIMES, July 30, 1991, § A, at 1 (noting that experts predict that 200,000 Americans will die from asbestos-related diseases by year 2000, with number rising to 265,000 by year 2015).

197. The asbestos industry knew of the hazards as early as the late 1930s and made considerable efforts to conceal those hazards from the public and from their own workers. Hardy v. Johns-Manville Corp., 509 F. Supp. 1353, 1355 (E.D. Tex. 1981); *see also* Gideon Mark,

punitive damages awarded from 1965-1990 in product liability cases, slightly more than one quarter of the victims lost their lives. The majority of plaintiffs in these cases were permanently or partially disabled as a result of the corporation not having taken prompt remedial measures. Because these products represent a widespread threat the awards were also appropriately made on behalf of those who were endangered but not actually harmed. Toyota was assessed $25 million in punitive damages stemming from the death of a plaintiff's husband and two daughters in a fire that ensued after their station wagon was rear-ended and the gas tank punctured.[198] That punitive award could have been based on the loss of life of three people as well as the danger presented to the general public.[199] In the Dalkon Shield litigation, punitive damages awards were predicated on serious injuries to women's reproductive systems, deaths, and the continuing danger posed to hundreds of thousands of users stemming from A.H. Robin's failure to recall these birth control devices.[200]

b. Reprehensibility, duration, and concealment

Manufacturer, distributors, and retailers have in effect a monopoly of knowledge as to developing or known profiles of danger in consumer products. Firms that design, test, market, distribute, and monitor their products are in the best position to apprehend and correct profiles of developing dangers. Corporate abdication of the responsibility to protect and inform consumers is the basis for civil punishment.

The recurrent types of reprehensible conduct that resulted in punitive damages awards were: (1) fraudulent-type misconduct; (2) knowing violations of safety standards; (3) inadequate testing and manufacturing procedures; (4) failures to warn of known dangers before marketing; and (5) post-marketing failures to remedy known dangers.[201]

Comment, *Issues in Asbestos Litigation*, 34 HASTINGS L.J. 871, 889 (1983) (discussing letters between former president and general counsel of two asbestos manufacturers, dating from 1930s, which indicate industry's knowledge of asbestos dangers).

198. *See Punitive Damages*, NAT'L L.J., Jan. 29, 1990, at S11 (discussing Adegbite v. Toyota, Inc., No. 84-44359 (Harris Cty. Tex. Dec. 13, 1989)).

199. *See id.* (noting that Toyota did not take corrective measures after its own crash test indicated fuel integrity problems).

200. *See* Palmer v. A.H. Robins Co., 684 P.2d 187, 220-21 (Colo. 1984) (asserting that penalty should be commensurate with seriousness of misconduct).

201. Rustad, *supra* note 67.

c. The profitability of the defendant

The quintessential feature of conduct leading to the award of punitive damages is the decision of the corporate hierarchy to trade safety for profits. In recent years, manufacturers have been assessed punitive damages for various reasons: (1) racing to market a drug without adequate research and testing;[202] (2) the concealment of known product defects that caused loss of life;[203] (3) failing to take corrective action even after receiving numerous complaints from consumers of significant safety hazards in order to protect profits;[204] and (4) advertising a product as safe when it posed hidden dangers.[205]

d. Financial position of the defendant

In *Haslip*, the Supreme Court also viewed wealth of the defendant as a key factor in determining the reasonableness of a punitive award.[206] Most defendant manufacturers that were assessed punitive damages measured their wealth in hundreds of millions of dollars. Many firms, like the Ford Motor Company, were listed in the Fortune 500. In *Grimshaw v. Ford Motor Co.*,[207] a multibillion-dollar car manufacturer was assessed $125 million dollars in punitive damages for an impermissible cost-benefit equation.[208] Even after it had conducted several crash test that demonstrated the Pinto's susceptibility to fire in rear-end collisions, Ford failed to correct the design problem.[209] The company balanced the cost of installing $11 rubber bladders in 11 million cars and 1.5 million light trucks against paying for the actual damages attributable to 180 burn deaths, 180 serious burn injuries, and 2100 burned vehicles.[210]

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202. *See* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 843 (2d Cir. 1967) (noting that manufacturer would be liable for punitive damages if it placed drug on market without any test program, but reversing lower court where manufacturer's conduct only rose to level of recklessness).

203. *See* Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 361-63 (1981) (discussing case where driver suffered fatal injuries from fire caused by defective fuel tank, and noting that manufacturer was aware of defect).

204. *See* Ford Motor Co. v. Stubblefield, 319 S.E.2d 470, 481 (Ga. Ct. App. 1984) (maintaining that Ford made "conscious decisions to defer implementation of safety devices in order to protect its profits"); Ford Motor Co. v. Nowak, 638 S.W.2d 582, 593 (Tex. Ct. App. 1982) (noting evidence that Ford received numerous complaints of problems in upholding punitive damages award).

205. *See* Leichtamer v. American Motors Corp., 424 N.E.2d 568, 578 (Ohio 1981) (allowing punitive damages in case where manufacturer knew of defect and continued to advertise product as safe).

206. Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1045 (1991).

207. 174 Cal. Rptr. 348 (1981).

208. Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 380-89 (1981).

209. *Id.* at 385.

210. *See* David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defec-*

Post-verdict adjustments resulted in a reduction of the punitive damages award from $125 million to $3.5 million.[211] The net worth of the Ford Motor Company was $7.7 billion.[212] The company earned more than two times the unadjusted punitive award during the last quarter of the year of appeal.[213] The wealth of the defendant manufacturer and consideration of the expected gain from knowingly marketing defective products must be considered in light of deterrence. Accordingly, the Seventh Circuit has stated that a "typical ratio for a punitive damages award to a defendant's net worth may be around one percent."[214]

e. Other Haslip *factors*

The other *Haslip* factors used to determine the reasonableness of high ratio punitive damages awards are the cost of litigation, the imposition of criminal sanctions on the defendant for its conduct, and the existence of other civil awards against the defendant for the same conduct.[215] The cost of prosecuting punitive damages in product liability cases is considerable. The median cost of plaintiff's legal fees in product liability cases with punitive damages at issue was $40,000.[216] No defendant in the past quarter century of punitive awards has also received a criminal sanction.[217] With the sole exception of the asbestos cases, financial overkill due to multiple punitive awards is also rare.[218]

There are numerous recent examples of cases that meet many of the *Haslip* factors, and a brief review of several of these cases is illustrative:

- A manufacturer continued to sell surgical bandages to hospitals, knowing that some of them were subject to infection with a poten-

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tive Products, 49 U. CHI. L. REV. 1, 56 n.264 (1982) (reproducing Grush-Saunby Report that detailed mathematical costs and benefits to Ford of correcting or not correcting Pinto's fuel tank defect). The Grush-Saunby Report was excluded from the trial in *Grimshaw*. *Grimshaw*, 174 Cal. Rptr. at 376.

211. *Id.* at 358.

212. *Id.* at 388-90.

213. *Id.* at 390.

214. Cash v. Beltman North Am. Co., 900 F.2d 109, 111 n.3 (7th Cir. 1990).

215. Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1045 (1991).

216. Computer Run from Author's Database (on file with authors) [hereinafter Computer Run].

217. The sole exception was the MER/29 litigation where several Richardson-Merrell officials pleaded *nolo contendere* for fraudulent FDA reporting in connection with the marketing of its anti-cholesterol drug. Computer Run, *supra* note 216.

218. Asbestos cases accounted for slightly greater than a quarter of the punitive awards in our empirical study. Computer Run, *supra* note 216. Dalkon Shield litigation yielded only 11 punitive awards. *Id.*

tially harmful rhizopus bacteria.[219] In one case, a plaintiff's skin was stripped nearly to the bone to eliminate the bacteria introduced by tainted bandages.[220] The manufacturer of the bandages had prior knowledge of other incidents of contamination and had been warned by the Food and Drug Administration to take preventive measures.[221]

- A manufacturer removed salt, a necessary nutrient, from baby food to save $14,000 a year.[222] The manufacturer of the formula never employed a nutritionist or other scientist to assess whether this absence of salt would impede the babies' development.[223] Thousands of infants suffered brain damage resulting from the "don't care" mentality of the firm.[224] Concerns about this blatant case of corporate irresponsibility led to enactment of the Infant Formula Act of 1980.[225] The Illinois jury assessed punitive damages against the firm in the amount of 2.75 times the actual damages.[226] This high ratio award was on behalf of the plaintiffs, but also on behalf of the thousands of infants who suffered brain damage from the extreme carelessness of the firm.[227]
- A manufacturer destroyed Consumer Product Safety Commission notices of defective gas fittings rather than forward them to customers a second time, after the company agreed to participate in the recall.[228] Plaintiffs proved that the company received multiple notices in the form of registered mail about the recall.[229] The court assessed punitive damages against the company in the wake of a gas stove explosion caused by the one of the defective fittings.[230]
- A manufacturer marketed a modular phone unit fully aware that the hand-held phone posed a danger of "earblasting" and "earblowouts."[231] The jury levied an award that was five times the ac-

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219. Bhagvandoss v. Beirsdorf, Inc., 723 S.W.2d 392, 392-93 (Mo. 1987) (reversing punitive damages award because manufacturer did not have "strict knowledge" of defect).

220. *Id.* at 393.

221. *Id.* at 394-95.

222. Duddleston v. Syntex Lab., Inc., No. 80-L-57726 (Ill. Cir. Ct. Feb. 28, 1985); *see* David Ranii, *$27M Awarded in Baby Formula Use; 2d Neo-Mull-Soy Award*, NAT'L L.J., Mar. 18, 1985 (discussing case).

223. Duddleston v. Syntex Lab., Inc., No. 80-L-57726 (Ill. Cir. Ct. Feb. 28, 1985).

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. Blossman Gas Co. v. Williams, 375 S.E.2d 117, 120 (Ga. Ct. App. 1988) (noting that reasonably prudent gas dealer would have foreseen that users of defective product, if not notified of defect, would be injured).

229. *Id.*

230. *Id.* (holding that while company was not initially required to recall defective gas fittings, once it voluntarily accepted such obligation, it was bound to follow through).

231. *See* Gearhart v. Uniden Corp. of Am., 781 F.2d 147, 149 (8th Cir. 1986) (noting that

tual damages when a physician experienced permanent hearing loss from such a blowout.[232] The "smoking gun" in the case was the company's file of "ear blasting and blowout cases" that proved the company's knowledge of the problem and implied that it considered the problem as a mere cost of doing business rather than as a dangerous condition to be remedied quickly.[233]

- A manufacturer failed to recall television sets known to be a fire hazard.[234] Punitive damages were assessed in an Ohio case in which one such television set caused a fire that destroyed the plaintiff's house. The owner of the set was severely burned and required permanent nursing home care.[235]
- A manufacturer marketed a replica of a Wild West gun without a safety in order to preserve the gun's authenticity.[236] When the gun discharged into the plaintiffs bladder, rendering him permanently impotent, a Kansas jury awarded punitive damages to punish and deter the irresponsible firm.[237]
- A manufacturer marketed a lathe in the United States without a safety guard, when comparable machines in Europe were equipped with guards.[238] Punitive damages were assessed against the German firm whose lathe scalped a young assembly worker.[239]

In each of these cases, the lack of malice on the defendant's part would likely prevent the awarding of punitive damages under Vice

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defendant had placed warning sticker on portable telephone in response to complaints of injuries).

232. *See id.* at 148 (discussing appeal from jury verdict of $25,000 in compensatory damages and $125,000 in punitive damages awarded to plaintiff).

233. *Id.* at 152-53.

234. Gillham v. Admiral Corp., 523 F.2d 102, 106 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976). Admiral Corporation received numerous consumer complaints about television set fires and failed to remedy the problem. *Id.* The highest officials of the company were aware of the fire hazard and its precise cause. *Id.* Yet, the company failed to warn its customers knowing that the television sets posed a significant fire hazard. *Id.* at 106-07.

235. *Id.* at 104.

236. Johnson v. Colt Indus. Operating Corp., 797 F.2d 1530, 1532 (10th Cir. 1986) (asserting that gun design gained notoriety from association with "Old West").

237. *Id.* at 1530. The .22 caliber Colt single-action revolver was a replica of an Old West six-shooter and had an exposed hammer that caused the gun to discharge when dropped, a risk known as "drop-fire." *Id.* at 1532. The only safety precaution the company took to prevent drop-fire was the inclusion of a warning in the instructions that stated "the safest way to carry your [gun] is with five cartridges in the chamber and the hammer on the sixth chamber." *Id.* at 1533. The appeals court in *Johnson* found ample evidence for an award of punitive damages, due to the company's failure to include an effective safety device on the gun after previous accidents. *See id.* at 1536 (noting that under Kansas law plaintiff is entitled to have jury consider punitive damages if any reasonable view of evidence would support their award). Colt had been aware of the risk of drop-fire in exposed hammer revolvers for many years. *Id.* at 1536. Moreover, Colt had a patent application dating back to 1850 that would have prevented drop-fire. *Id.*

238. Borowski v. Hermann Troub Machinen-Fabrik, No. 80-C-171 (E.D. Wis. Jan. 28, 1982).

239. *Id.*

President Quayle's proposed punitive damages reforms. The malice standard requires that a plaintiff prove that the defendant committed mean-spirited and intentional acts.[240] Even if malice could be proven, the former Vice President's proposed punitive damages ceiling would reduce the awards.[241] Because defendants could predict with certainty their total punitive damages exposure, much of the deterrence value of this penalty would be eviscerated.

Today, punitive damages provide a powerful check against corporate abuses of power over consumers.[242] In the past quarter century, punitive damages awards have arisen in the field of product liability to punish and deter "objectionable corporate policies" in instances where government safety standards and the civil law have failed to protect the public.[243] Beside the most frequently recognized functions of preventing and deterring further misconduct, the awarding of punitive damages serves other less recognized social functions.

Punitive damages awards frighten even the most powerful firms because judges often allow juries to calibrate awards in proportion to the wealth of the defendant, the severity of the injury, and the enormity of the wrong.[244] The rationale for considering the wealth of the defendant is that a "penalty which would be sufficient to reform a poor [person] is likely to make little impression on a rich one; and therefore the richer the defendant, the larger the punitive

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240. *See* RICHARD L. BLATT ET AL., PUNITIVE DAMAGES: A STATE BY STATE GUIDE TO LAW AND PRACTICE 57 (1991) (noting that malice is generally proven by showing that "the alleged wrongdoer intended to harm the injured party"). States vary widely in the verbalism used to describe the requisite state of mind requirement for punitive damages. The American Bar Association Section on Litigation categorized punitive damages verbalisms into four clusters: (1) the intent or scienter nucleus: intentional, willful, deliberate, knowing, conscious design, plan, or purpose or consequences; (2) the bad motive or state of mind nucleus: malice (real), hatred, ill will, spite, anger, revenge, evil intent, moral turpitude, fraud, oppression, vexatious annoyance, and insulting behavior; (3) a test based on conduct seen objectively as warranting punitive damages: outrageous misconduct or conduct beyond the bounds of decency, flagrant misconduct; and (4) the nucleus of more than negligence but less than intent: wanton or reckless indifference to consequences, implied malice, gross negligence, heedless conduct, and actions involving an entire want of care. *Punitive Damages: A Constructive Examination*, 1986 A.B.A. SPECIAL COMM. ON PUNITIVE DAMAGES 34-35. On the borderline between the "intent" nucleus and the "more than negligence but less than intent" nucleus are the following verbal tests: conscious disregard or indifference, where injury would probably result; ought to have known consequences; and other elements of aggravation. *Id.*

241. *See* Quayle, *supra* note 55, at 565 (asserting that benefits of punitive damages can be maintained while limiting amount of punitive damages awards to full amount of compensatory damages).

242. *See, e.g.*, Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 382-83 (1981) (noting new protective role for punitive damages).

243. *See, e.g.*, Bell & Pearce, *supra* note 66, at 3 (describing various functions of punitive damages); Owen, *supra* note 66, at 1283-87 (noting deterrence power of punitive damages, particularly with regard to corporate defendants).

244. *See* RILEY, *supra* note 191, at 225 (noting importance of defendant's wealth in jury calculation of punitive damages, particularly with respect to corporate defendants).

damage award should be."[245] There are a variety of important reasons for retaining the essential structure of the remedy of punitive damages in product liability.[246] It is a "sword" to be used with the "shield" of compensation provided by strict liability.[247]

2. *Punishment and deterrence*

The punishment and deterrence functions are the most frequently cited rationales for the remedy of punitive damages.[248] Courts and legal academicians often write of punishment and deterrence[249] as the dual social functions of punitive damages.[250] Courts, however, may theoretically "impose punitive damages in four general situations: punishment necessary but deterrence unnecessary, punish-

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245. Morris, *supra* note 104, at 1206.

246. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 9 (5th ed. 1984) (discussing relationship between torts, crimes, and punitive damages); Owen, *supra* note 66, at 1278 (observing that in addition to punishment and deterrence, two less prominent functions served by punitive damages awards include: (1) inducement of private persons to enforce rules of law, i.e., to serve as private attorneys general, by rewarding them for bringing lawbreakers to justice; and (2) fully compensating victims whose recovery may have been substantially reduced by cost of attorney's fees).

247. *See* Thiry v. Armstrong World Indus., 661 P.2d 515, 517 (Okla. 1983) (describing balancing roles of strict liability and punitive damages).

248. *See* 1 GHIARDI & KIRCHER, *supra* note 65, §§ 2.02, 2.06, at 4-5, 13-14 (reviewing various rationales for awarding punitive damages).

249. Punishment is mentioned in the common law decisions and statutes of 36 of the 46 states that permit punitive damages. *See* 1 GHIARDI & KIRCHER, *supra* note 65, at 59-64, tbl. 4-1 (Supp. 1992) (setting forth chart summarizing states' positions on punitive damages). A second frequently expressed function of punitive damages is to deter the defendant from repeating the wrongful conduct in the future, i.e., specific deterrence. Thirty-one states impose punitive or exemplary damages to deter the specific defendant. *Id.* Professor Dobbs argued that the doctrine of punitive damages "operate[s] to punish and to set an example that will deter similar conduct in the future." DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION 205 (1973). Similarly, Professor Morris suggested that "the punitive damage doctrine is useful in cases in which 'compensatory' damages are too lenient for admonitory purposes." Morris, *supra* note 104, at 1184. Ghiardi and Kircher's survey of states' positions on punitive damages found that 37 of the 46 states permitting punitive damages explicitly awarded punitive damages to deter others, i.e., general deterrence. 1 GHIARDI & KIRCHER, *supra* note 65, at 59-64, tbl. 4-1 (Supp. 1992); *see also* Morris, *supra* note 104, at 1174 & n.1 (maintaining that it is difficult to rationalize "taking money" from defendant where such measure is unlikely to discourage similar acts in future).

250. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (defining punitive damages as "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence"); Tetuan v. A.H. Robins Co., 738 P.2d 1210, 1239 (Kan. 1987) (finding that punishment and deterrence are social functions performed by remedy of punitive damages); Fibreboard Corp. v. Pool, 813 S.W.2d 658, 690 (Tex. Ct. App. 1991) (stating that courts assess exemplary damages to "punish the mental attitude of the defendant, as opposed to [the defendant's] conduct"); Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1, 38-39 (1985-1986) (criticizing courts for impermissibly expanding remedy of punitive damages and arguing for their reform); Owen, *supra* note 66, at 1277 (noting criticism of punitive damages as intruding into domain more properly served by criminal law, which shares purposes of punishment and deterrence); Leslie E. John, Comment, *Formulating Standards for Awards of Punitive Damages in the Borderland of Contract and Tort*, 74 CAL. L. REV. 2033, 2052-53 (1986) (citing punishment, deterrence, and compensation as rationales supporting punitive awards).

ment unnecessary but deterrence necessary, both necessary but greater punishment desired, and both necessary but greater deterrence desired."[251] Punitive damages punish firms for endangering the public and deter them from repeating such conduct in the future. Specific deterrence focuses on preventing a defendant from repeating an act, whereas general deterrence focuses on sending a message to the world that specific misconduct will not be tolerated.[252]

The jurisprudence of punitive damages in product liability litigation centers on punishing and deterring companies that trade profits for safety.[253] Punitive damages are particularly appropriate when there is a corporate strategy of earning profits by jeopardizing the public safety.[254] The threat of multiple punitive damages "forces a prudent manufacturer intent on maximizing profits to hesitate before marketing a known defective . . . or an untested product."[255] Capping punitive damages is likely to limit severely the efficiency of this remedy in deterring corporate misconduct.[256]

Because of the indeterminate nature of punitive damages, a company is unlikely to conclude that it is more profitable to pay damages

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251. Note, *An Economic Analysis of the Plaintiff's Windfall from Punitive Damage Litigation*, 105 HARV. L. REV. 1900, 1904 (1992).

252. *See* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 149 (5th ed. 1989) (explaining that deterrence theories provide widely accepted rationale for imposition of punishment in criminal law).

253. *See, e.g.*, Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 383 (Ct. App. 1981) (approving application of California's punitive damages statute, CAL. CIV. CODE § 3294 (West 1981), to strict product liability cases involving design of 1972 Ford Pintos); Wangen v. Ford Motor Co., 294 N.W.2d 437, 451 (Wis. 1980) (finding that punitive damages were recoverable against Ford in product liability litigation concerning 1967 Mustangs). California has long recognized the retributive and deterrent functions of punitive damages. *See Grimshaw*, 174 Cal. Rptr. at 380-81 (explaining that California common law recognized punitive damages long before punitive damages statute was adopted in 1872). In recent years, California has also allowed punitive damages for compensatory purposes. *See* CAL. CIV. CODE § 3294(d) (West Supp. 1993) (expanding ability of survivors of homicide victims to recover punitive damages if defendant is convicted of felony).

254. Wangen v. Ford Motor Co., 294 N.W.2d 437, 451 (Wis. 1980) (noting that if it were not for punitive damages "[s]ome may think it cheaper to pay damages or a forfeiture than to change a business practice"). The court elaborated:

> The possibility of the manufacturer paying out more than compensatory damages might very well deter those who would consciously engage in wrongful practices and who would set aside a certain amount of money to compensate the injured consumer. Punishment of manufacturers guilty of intentional or reckless breaches of their obligation by imposing punitive damages might diminish the profitability of misconduct and any unfair competitive advantages such manufacturers might otherwise have.

Id.

255. Campus Sweater & Sportswear Co. v. M.B. Kahn Constr. Co., 515 F. Supp. 64, 107 (D.S.C. 1979), *aff'd*, 644 F.2d 877 (4th Cir. 1981).

256. *See* Johnston, *supra* note 68, at 1406 (finding that while arbitrary nature of punitive damages may raise fairness issue, unlimited punitive damages awards yield optimal deterrence effect).

than to eliminate the hazard.[257] This fact led the California Court of Appeals to conclude that the remedy of punitive damages fulfills a key role in consumer protection.[258] Punitive damages perform the salutary function of safeguarding "the vital state interest of protecting persons against personal injury."[259]

3. Retribution

The retributive function of punitive damages is closely related to the punishment/deterrence model.[260] The Supreme Court in *Pacific Mutual Life Insurance Co. v. Haslip*[261] observed that the remedy serves the purposes of retribution and deterrence.[262] Retribution justifies punishment on the ground that every wrong deserves punishment.[263] In lay terms, the notion of retribution stems from the idea of "paying" for misconduct.[264] The predicate for retribution is the principle that the "payback" should be proportional to the wrong committed.[265] The continuing vitality of retributive philosophies in punitive damages jurisprudence parallels the shift from rehabilitative to retributive philosophies in the criminal law.[266] In the prod-

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257. *See* Owen, *supra* note 66, at 1285-86 (explaining that unpredictability of punitive damages penalties should discourage well-advised manufacturers from knowingly marketing defective products).

258. Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 383 (1981) (noting that punitive damages awards remain "as the most effective remedy for consumer protection against defectively designed mass produced articles").

259. Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727, 737 (Minn.), *cert. denied*, 449 U.S. 921 (1980).

260. *See* Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 648 (1980) (explaining that retribution function cannot be separated from deterrent function because imposition of punishment for past acts also tends to control future behavior); *see also* Melvin M. Belli, Sr., *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 49 UMKC L. REV. 1, 6 (1980) (noting that most frequently articulated reason for awarding punitive damages "is to punish the wrongdoer in order to deter him [or her]"). Professor Richard Epstein argues that "[i]n the end the strongest, indeed the only justification for punitive damages is [retribution]." RICHARD A. EPSTEIN, MODERN PRODUCTS LIABILITY LAW 180 (1980).

261. 111 S. Ct. 1032 (1991).

262. Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1044 (1991).

263. *See* Johnston, *supra* note 68, at 1430-31 (suggesting that punitive liability may both punish and induce optimal safety); *see also* Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment?*, 87 COLUM. L. REV. 509, 516-17 (1987) (explaining that Kant, who is "regarded as a paradigm retributivist," viewed punishment as "an evil inflicted on an individual because that individual has committed a crime").

264. *See* Note, *Punitive Damages and Libel Law*, 98 HARV. L. REV. 847, 849 n.13 (1985) (defining retribution as "society's moral concern with giving wrongdoers their just deserts").

265. *See id.* at 851 (explaining that "fairness . . . demands that the punishment be proportionate to the severity of the act"). Punitive damages are typically not predicated on the concept of rehabilitation. *See* Jonathan Kagan, Comment, *Toward a Uniform Application of Punishment: Using the Federal Sentencing Guidelines as a Model for Punitive Damage Reform*, 40 UCLA L. REV. 753, 759 n.27 (1993) (noting that rehabilitation is not goal of punitive damages system).

266. *Cf. generally* FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL

uct liability context, retribution requires that courts punish firms that subordinate safety to the pursuit of profits in order to "vent[] the indignation of the victimized."[267]

4. Augmented compensation

A minority of jurisdictions view punitive or exemplary damages as serving, at least in part, a compensatory function.[268] Connecticut and Michigan forbid the use of punitive damages to punish and deter and instead employ the remedy as a form of extra compensation.[269] Augmented compensation is frequently justified on the ground that the contingency fee system ensures that plaintiffs will be systematically undercompensated because they must pay substantial legal fees.[270] For example, some commentators view com-

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POLICY AND SOCIAL PURPOSE 10 (1981) (examining reasons for retreat from rehabilitation to retribution in criminal law context).

267. Note, *supra* note 264, at 851.

268. *See* KEETON ET AL., *supra* note 246, § 2, at 9 & n.20 (noting that some states view punitive damages as reimbursing plaintiff for elements of damage not legally compensable). Idaho permits courts to assess punitive damages for attorney's fees, but does not preclude an award of punitive damages to punish and deter. *See, e.g.*, Erhardt v. Leonard, 657 P.2d 494, 499 (Idaho Ct. App. 1983) (upholding award of punitive damages calculated to reimburse plaintiff for reasonable attorney's fee in wrongful conversion suit). West Virginia and Virginia permit juries to award punitive damages in order to compensate plaintiffs for egregious misconduct, but also allow the remedy to be used for punishment and deterrence. *See, e.g.*, Sperry Rand v. A-T-O, Inc., 459 F.2d 19, 21 (4th Cir. 1972) (finding that Virginia law allows punitive damages, at least in part, to compensate person for pecuniary loss); Perry v. Melton, 299 S.E.2d 8, 13 (W. Va. 1982) (explaining that in West Virginia, punitive damages serve not only to punish and deter but also to compensate plaintiff for defendant's reckless misconduct).

269. Connecticut limits awards of punitive damages to full compensation for litigation expenses less taxable costs. *See, e.g.*, Gagne v. Enfield, 734 F.2d 902, 904 (2d Cir. 1984) (explaining Connecticut law on punitive damages); Bates v. McKeon, 650 F. Supp. 476, 481 (D. Conn. 1986) (permitting police officer to collect punitive damages to compensate for litigation expenses in aggravated assault action); Vandersluis v. Weil, 407 A.2d 982, 986 (Conn. 1978) (explaining that punitive damages recovery is limited to litigation costs of action being tried and does not include expenses of former trial); Collens v. New Canaan Water Co., 234 A.2d 825, 831-32 (Conn. 1967) (maintaining that punitive damages award is purely compensatory). Punitive damages in Michigan fulfill a broader compensatory function. *See, e.g.*, Peisner v. Detroit Free Press, Inc., 364 N.W.2d 600, 606 (Mich. 1984) (discussing availability of punitive damages in Michigan in context of defamation suit); Jackovich v. General Adjustment Bureau, Inc., 326 N.W.2d 458, 461 (Mich. Ct. App. 1982) (holding that punitive damages are to compensate plaintiff for humiliation and indignity suffered resulting from defendant's tort).

In the nineteenth century, Harvard Law School Professor Simon Greenleaf assiduously argued that punitive damages were not doctrinally based and were really no more than full compensation. 2 GREENLEAF, *supra* note 137, § 253, at 240 n.2; *see supra* notes 146-47 and accompanying text (discussing Greenleaf's view that punitive damages should have no place in American law). In fact, one state that viewed punitive damages as extracompensatory cited Greenleaf's treatise on evidence as authority. *See* Fay v. Parker, 53 N.H. 342, 356-57 (1873) (citing 2 GREENLEAF, *supra* note 137, §§ 253-254, 266-267, 272, at 240, 250, 264-66, 270-71).

270. *But see* Note, *supra* note 251, at 1907 (arguing that where punitive damages exceed litigation costs, plaintiff receives "windfall"). Counsel received between 25% and 50% of the total recovery in the punitive awards examined in one study. Rustad, *supra* note 67. "Just over three-fourths of the attorneys charged one-third of whatever amount the plaintiff collected. . . . [Only o]ne attorney stated that he . . . receive[d] 50 percent of the punitive

pensation as a residual function of punitive damages.[271] Additionally, states that do not allow punitive damages sometimes assess damages in excess of actual damages to compensate for an act's maliciousness.[272]

5. Encouraging private attorneys general

Punitive awards are a common law remedy in which citizens serve as prosecutors, bringing wrongdoers to justice.[273] The possibility of being awarded punitive damages encourages plaintiffs to act as "private attorneys general"[274] and provides incentive for plaintiffs to sue in instances where conduct has caused widespread harm.[275] Pu-

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damages and one-third of the actual damages." *Id.* Plaintiffs' attorneys spent more than $100,000 in legal costs in a number of cases and the median cost of trying a product liability action was $30,000. *Id.*

271. *See, e.g.*, Owen, *supra* note 66, at 1295-96 (finding that punitive damages serve valuable, although not primary, compensatory function in product liability cases); Note, *supra* note 251, at 1902 & n.22 (describing compensation as "secondary goal" of punitive damages).

272. Massachusetts, for example, does not recognize punitive damages, absent statutory authorization, but permits the increasing of compensatory damages to punish the defendant. In *Smith v. Holcomb*, the plaintiff produced evidence that the defendant struck him. Smith v. Holcomb, 99 Mass. 552, 553 (1868). The trial judge instructed the jury that the plaintiff could recover for all the direct injurious results of the assault and also for insult and indignity. *Id.* The Supreme Judicial Court affirmed, stating:

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

Id. at 554-55.

New Hampshire, which forbids awards of punitive damages, created an exception to its ban for malicious acts. In *Panas v. Harakis*, the New Hampshire Supreme Court explained that "when the actor involved is wanton, malicious, or oppressive, the compensatory damages awarded may reflect the aggravating circumstances." Panas v. Harakis, 529 A.2d 976, 987 (N.H. 1987). Similarly, in Louisiana a plaintiff may not recover punitive damages unless such damages are expressly provided for in the state's civil code. Young v. Ford Motor Co., 595 So. 2d 1123, 1131 n.13 (La. 1992). The Louisiana civil code allows for punitive damages recovery by plaintiffs injured by intoxicated drivers, LA. CIV. CODE ANN. art. 2315.4 (West Supp. 1992), and by plaintiffs injured by defendants' reckless disregard for public safety in the handling of hazardous or toxic substances. *Id.* art. 2315.3.

273. *See* Owen, *supra* note 66, at 1287-88 (explaining that "punitive damage[s] recoveries induce injured plaintiffs to act as private attorneys general, thereby helping to increase the number of wrongdoers who are properly 'brought to justice' ").

274. *See* Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 403 (5th Cir. 1986) ("[P]unitive damages reward individuals who serve as 'private attorneys general' in bringing wrongdoers to account."). The private attorney general function of punitive damages was recognized by pre-Civil War legal commentators. *The American Law Journal* reflected on the valuable function vindictive damages played in bringing wrongdoers to justice:

> The principal argument adduced in favor of vindictive damages bases itself on the necessity that every community is under of affixing some punishment to violations of the law, which, though partaking more or less of the character of crimes, are yet not of importance enough to demand, or too subtle in their nature to admit of criminal prosecution.

Vindictive Damages, *supra* note 84, at 73.

275. *See, e.g.*, DOBBS, *supra* note 249, at 205 (noting that private attorney general function

nitive damages permit the litigation of claims that might otherwise be too expensive for an individual plaintiff to prosecute,[276] and they serve as "bounty" for the plaintiff.[277] Without exemplary damages,

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serves public interest by encouraging suits against reckless defendants whose misconduct might otherwise go unchallenged); Pamela B. Fort et al., *Florida's Tort Reform: Response to a Persistent Problem*, 14 FLA. ST. U. L. REV. 505, 519 (1986) (explaining that while punitive damages may unjustly enrich plaintiffs, they also encourage public to pursue meritorious claims); John, *supra* note 250, at 2051 (explaining that rationale behind concept of private attorney general is that public interest demands that defendant be punished for his or her actions and punitive remedy provides plaintiffs incentive to sue where they might not otherwise do so, or where defendant is unlikely to be prosecuted criminally); *cf.* Susan Abramson, Note, *Crawling out from Under* Boulder, 34 CASE W. RES. L. REV. 303, 338 (1984) (noting that private damage remedy in Clayton Act § 4 fulfills private attorney general function).

ERISA and fair housing legislation also employ the concept of a private attorney general. *See* 29 U.S.C. § 1132(a) (1988) (providing that any employee benefit plan participant or beneficiary may bring civil action under ERISA); 42 U.S.C. § 3613(a) (1988) (providing that any aggrieved person under Fair Housing Act of 1968 may institute civil action in state or federal court); Carole V. Harker, Comment, *The Fair Housing Act: Standing for the Private Attorney General*, 12 SANTA CLARA LAW. 562, 575-76 (1972) (arguing for expansion of right of private citizens to bring suit under Fair Housing Act of 1968). *But see* Mark H. Berlind, Note, *Attorney's Fees Under ERISA: When Is an Award Appropriate?*, 71 CORNELL L. REV. 1037, 1037 (1986) (arguing that ERISA plaintiffs do not serve as private attorneys general and should not be awarded attorney's fees).

The concept of a private attorney general can also justify attorney fee shifting. *See* Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 653 ("[T]he 'private attorney general' theory justifies a fee award on the basis of the public usefulness of advancing a particular type of claim."). A number of states have enacted punitive damages reforms that require a portion of the awards to be remitted to the public. Legislatures justify these reforms on the theory that plaintiffs' attorneys are acting as private attorneys general for the public, and therefore the public should share in the reward. *See, e.g.*, FLA. STAT. ANN. ch. 768.73(2)(b) (Harrison Supp. 1991) (requiring 60% of punitive awards to be paid to Public Medical Assistance Trust Fund in personal injury and wrongful death cases); ILL. ANN. STAT. ch. 10, para. 2-1207 (Smith-Hurd Supp. 1992) (providing that trial judge has discretion to apportion punitive damages among plaintiff, plaintiff's attorney, and Illinois Department of Rehabilitation Services); IOWA CODE ANN. § 668A.1(2)(b) (West 1977) (providing that tort claimant may receive amount not exceeding 25% of net punitive damages awarded, with remainder of award being paid into civil reparations trust fund set up for support of indigent civil litigation programs or insurance assistance programs); MO. ANN. STAT. § 537.675 (Vernon 1988) (providing that 50% of net punitive damages go to Missouri Tort Victim's Compensation Fund); N.Y. CIV. PRAC. L. & R. 8701 (McKinney Supp. 1993) (providing that 20% of punitive damages awarded in civil actions must be surrendered to state); OR. REV. STAT. § 18.540(1) (1991) (providing for allocation of punitive damages awards as follows: (1) attorney for prevailing party receives amount agreed upon between attorney and party; (2) 50% of remainder is allocated to prevailing party; and (3) remainder is paid to Oregon's Criminal Injuries Compensation Account); UTAH CODE ANN. § 78-18-1(3) (1992) (providing that 50% of punitive damages awards in excess of $20,000 must be paid into state treasury's General Fund).

A Colorado court declared Colorado's statute, COLO. REV. STAT. § 13-21-102(4) (1987), which remitted one-third of a punitive damages award to the State, unconstitutional as a forced taking of the judgment creditor's property interest. Kirk v. Denver Publishing Co., 818 P.2d 262, 264 (Colo. 1991). Similarly, a Georgia court declared Georgia's statute, GA. CODE ANN. § 51-12-5.1(c) (Michie Supp. 1992), which provided that 75% of a punitive damages award be remitted to the state, unconstitutional. McBride v. General Motors Corp., 737 F. Supp. 1563, 1578 (M.D. Ga. 1990).

276. *See* Ausness, *supra* note 250, at 69 ("Without the opportunity to recover punitive damages it would be economically impossible for a victim to bring a lawsuit in those cases in which actual damages would be minimal.").

277. In *Grimshaw v. Ford Motor Co.*, the California Court of Appeals noted that incentives for the private pursuit of corporate misconduct are built into the punitive damages remedy:

a corporation would run little risk if it harmed a large number of people, each in a relatively minor way.[278] Punitive damages are particularly necessary where there are "gaps" in the criminal law.[279] Private attorneys general provide a "backup" remedy in situations where government enforcement agencies fail to adequately protect the public.[280] Government regulatory agencies play little or no role in uncovering the smoking guns utilized to obtain punitive damages verdicts in product liability cases.[281] Moreover, courts and government agencies assess civil penalties against defendants in less than two percent of the product liability cases that result in the awarding of punitive damages.[282]

> In the traditional noncommercial intentional tort, compensatory damages alone may serve as an effective deterrent against future wrongful conduct but in commerce related torts, the manufacturer may find it more profitable to treat compensatory damages as a part of the cost of doing business rather than to remedy the defect. . . . Governmental safety standards and the criminal law have failed to provide adequate consumer protection against the manufacture and distribution of defective products. . . . [Punitive damages] provide a motive for private individuals to enforce [the] rules of law and enable them to recoup the expenses of doing so which can be considerable and [are] not otherwise recoverable.

Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 382-83 (Ct. App. 1981).

278. *See* Wangen v. Ford Motor Co., 294 N.W.2d 437, 452 (Wis. 1980) (noting that punitive damages are particularly useful in situations where large numbers of individuals have been slightly or moderately injured by defective product).

279. John, *supra* note 250, at 2051.

280. The government relies on private attorneys general to enforce certain environmental statutes. *See, e.g.*, Robert F. Blomquist, *Rethinking the Citizen as Prosecutor Model of Environmental Enforcement Under the Clean Water Act: Some Overlooked Problems of Outcome-Independent Values*, 22 GA. L. REV. 337, 367 (1988) (noting that Congress enlisted citizenry as watchdogs of Environmental Protection Agency (EPA) due to EPA's lack of aggressiveness in implementing Clean Water Act of 1970, but criticizing this device and explaining that it undermines important values of American legal system). The antitrust laws explicitly recognize the private attorney role where a private party is permitted a treble damage remedy. Clayton Act, 15 U.S.C. § 15 (1988). Moreover, the Federal Government lacks the resources to prosecute all cognizable claims. *See The Supreme Court, 1988 Term-Leading Cases*, 103 HARV. L. REV. 137, 203 (1989) (noting societal and governmental benefits of private citizens serving prosecutorial roles); *see also* Owen, *supra* note 66, at 1288-89 (discussing multiple social benefits derived from law enforcement function of punitive damages).

281. *See* Owen, *supra* note 66, at 1288 (observing that "many serious misdeeds deserving of punishment are beyond the reach of criminal law and the public prosecutor"); *cf.* Kink v. Combs, 135 N.W.2d 789, 798 (Wis. 1965) (upholding award of compensatory and punitive damages in assault and battery case and noting that such cases are seldom prosecuted by district attorney); Adam Bryant, *G.M. Set To Fight on Pickups*, N.Y. TIMES, Feb. 8, 1993, at D1 (reporting that General Motors insists that design of its pickup trucks met all federal standards despite jury verdict awarding $101 million in punitive damages in product liability trial involving GM truck).

282. Section 15(b) of the Consumer Product Safety Act requires that businesses report to the U.S. Consumer Product Safety Commission (CPSC) all instances in which the businesses obtain information that "reasonably supports the conclusion" that their products fail to comply with safety rules, contain defects that may "create a substantial product hazard," or create "an unreasonable risk of serious injury or death." Consumer Product Safety Act § 15(b), 15 U.S.C. § 2064(b) (Supp. II 1990). Section 37 of the Consumer Product Safety Improvements Act of 1990 requires businesses to report to the CPSC if a "particular model of a consumer product is the subject of at least 3 civil actions . . . for death or grievous bodily injury" within a 24-month period. Consumer Product Safety Improvements Act of 1990 § 37, 15 U.S.C.

The countries lacking private attorneys general tend to compensate for the attorneys' absence by instituting a functional equivalent: a huge government bureaucracy charged with evaluating products.[283] Government agencies have been slow to adopt safety standard to protect the public.[284] The Republican administrations'

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§ 2084 (Supp. II 1990); *see also* Robert S. Adler, *The CPSC at 20 Is Still Immature*, TRIAL, Nov. 1992, at 30 (discussing CPSC reporting requirements in light of recent tort reform proposals).

Firms are rarely sanctioned for their failure to meet reporting requirements. In fiscal year 1990, the CPSC collected only $782,000 in civil penalties from eight firms for allegedly failing to report hazardous products to the Commission. *See* Michael R. Lemov & Malcolm D. Woolf, *Underreporting Defects Is Risky*, NAT'L L.J., Dec. 14, 1992, at S6 (explaining that failure to comply with CPSC reporting requirements may subject businesses to civil and criminal liability). The sum total of all CPSC penalties assessed in 1990 approximates the median punitive award obtained by plaintiffs in one study of product liability cases. *See Hearings on S. 640*, *supra* note 181, at 148 (statement of Michael Rustad, Professor of Law, Suffolk University Law School, and Thomas Koenig, Associate Professor of Sociology, Northeastern University) (testifying that median punitive damages award for all product liability cases was $625,000); *see also* Rustad, *supra* note 67 (finding that median punitive damages award was $688,500 after control for inflation was incorporated into analysis). The civil penalties collected by government agencies pale in comparison to the punitive damages awarded in product liability suits. For example, the punitive damages award assessed in Coyne v. Celotex Corp., Nos. 85-11034, 86-181052 (Md. Cir. Ct., Mar. 1, 1989) totaled $150 million, 30 times greater than all CPSC penalties assessed in its first two decades. *See Verdicts*, NAT'L L.J., Jan. 29, 1990, at S3, S12 (reporting that punitive damages in *Coyne* were awarded to two plaintiffs who suffered from asbestosis).

In the period between 1980-1991, the CPSC issued a mere $5.09 million in fines to approximately 50 companies that failed to comply with the reporting rule. Michael Rustad, *Ten Commandments for Avoiding Civil Punishment: Prompt CPSC Reporting and Corrective Action Is Good for Business*, *in* CONSUMER SAFETY AND INDUSTRY COMPLIANCE WITH THE NEW REPORTING REQUIREMENTS OF THE CONSUMER PRODUCT SAFETY COMMISSION: A BLUEPRINT FOR COOPERATION IN THE '90s 1, 12-13 (1992); *see* Tom Riley, *Md. Toolmaker Among 4 Firms Fined Twice for Late Reporting*, WASH. TIMES, May 31, 1992, at A15 (citing $5.09 million figure). The total of all CPSC fines in its history is the functional equivalent of a parking ticket for a Fortune 500 firm. Statutory penalties are too insignificant to be noticed. In Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (Cal. App. 1981), the firm might have been fined a whopping $50 for selling a defective car or $100 if it could be proved that Ford Motor Company was a repeat offender. In contrast, punitive awards are a far greater deterrent in presenting the risk of multiple awards for the same conduct of an unknown magnitude. The mean punitive damages award in nonasbestos products cases for 1965-1990 was $4,470,000, which approximates the total of all CPSC fines to date. The mean is much greater than the median value because it is affected by extremely high (and low) awards. The mean value is so high because of the 4 in 10 punitive awards that exceed one million dollars in product liability cases. The punitive damages awarded in the famous Pinto case were $125 million, more than 25 times the total of CPSC fines. *See id.* at 390-91 (affirming remittal of award to $3.5 million). The amended Consumer Product Safety Act permits firms to be fined up to $1.25 million, 1/100th of the punitive damages award in the Pinto case. *See* 15 U.S.C. § 2069(a) (Supp. II 1990) (limiting civil penalties to $5000 per violation and $1.25 million per serious violation).

283. *Cf.* HARRY D. TEBBENS, INTERNATIONAL PRODUCT LIABILITY: A STUDY OF COMPARATIVE AND INTERNATIONAL LEGAL ASPECTS OF PRODUCT LIABILITY §§ 2.1.5, 2.1.6 (1979) (surveying substantive product liability law of France and Netherlands); Ferdinando Albanese & Louis F. Del Luca, *Developments in European Product Liability*, 5 DICK. J. INT'L L. 193, 198-200 (1987) (reviewing product liability law of several European countries); Stephen C. Yeazell, Comment, *The Salience of Salience: A Comment on Professor Hazard's Authority in the Dock*, 69 B.U. L. REV. 481, 485 (1989) (explaining that widespread and comprehensive European insurance programs serve similar functions as U.S. product liability suits).

284. *See* Robert S. Adler, *From "Model Agency" to Basket Case—Can the Consumer Product Safety*

hostility to federal health and safety agencies helps explain the snail's pace with which agencies adopted and enforced safety standards.[285] Punitive awards appear to be equally efficient in protecting the public and may well be less costly to American competitiveness.

6. To bridge the gap between criminal and tort law

Grant Gilmore proposed that the first-year law school curriculum merge the courses in contracts and torts into a course he dubbed "contorts."[286] "Contorts" combines acts that lie on the borderline between contract law and tort law.[287] For example, one traditional black-letter rule teaches that punitive damages are unavailable in breach of contract actions absent an accompanying tort.[288] Plaintiffs can collect punitive damages in such actions, however, by employing the legal fiction of an independent tort, which arises when the conduct constituting the contract breach is also a tort.[289]

Commission be Redeemed?, 41 ADMIN. L. REV. 61, 70 (1989) (discussing failure of CPSC to adopt safety standards in rapid fashion).

285. *See id.* at 74-76 (noting Reagan administration's cuts in CPSC budget and staff); Robert S. Adler, *Manufacturers Blind CPSC to Product Hazards*, TRIAL, Oct. 1990, at 20, 20 (stating that all federal health and safety agencies suffered losses in funding, staff, and morale during Republican administrations).

286. GRANT GILMORE, THE DEATH OF CONTRACT 90 (1974).

287. *See id.* at 88-90 (discussing gradual convergence of contract and tort in 20th-century American law).

288. *See* RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981) (explaining that purpose of awarding contract damages is to compensate injured party, not to punish breaching party); RESTATEMENT (FIRST) OF CONTRACTS § 342 (1932) (noting that contract damages are awarded in spite of uncertainty as to actual extent of harm and that such damage awards are not considered punitive in nature); John, *supra* note 250, at 2040-41 (noting that one possible historical explanation for rule precluding recovery of punitive damages in breach of contract actions is that contractual damages, unlike tort damages, are subject to precise measurement). The prohibition against awards of punitive damages in contract actions is longstanding. *See, e.g.*, Hood v. Moffett, 69 So. 664, 666 (Miss. 1915) (explaining that punitive damages are not recoverable in breach of contract unless act or omission constituting breach of contract amounts also to commission of tort); Welch v. Missouri State Life Ins. Co., 180 S.E. 447, 450 (S.C. 1935) (ruling that plaintiff cannot recover punitive damages in breach of contract action without showing of fraudulent intent and act); Williams v. Metropolitan Life Ins. Co., 176 S.E. 340, 345 (S.C. 1934) (holding that breach of contract will not support award of punitive damages absent fraudulent intent and act); Hall v. General Exch. Ins. Corp., 169 S.E. 78, 79 (S.C. 1933) (finding that punitive damages are recoverable in breach of contract if breach is accompanied by fraudulent act); Donaldson v. Temple, 80 S.E. 437, 438 (S.C. 1913) (holding that punitive damages are not recoverable for breach of contract in absence of fraud); Givens v. North Augusta Elec. & Improvement Co., 74 S.E. 1067, 1070 (S.C. 1912) (holding that punitive damages are not recoverable for breach of contract where breach is not accompanied by intent to defraud).

289. RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981). Lon Fuller noted the proliferation of legal fictions in judicial decisionmaking. *See* Lon L. Fuller, *Legal Fictions*, 25 U. ILL. L. REV. 877, 877 (1931) (observing that "[i]f judges and legal writers have used the fiction in the past, and are using it now, they will probably continue to use it in the future"). Judges employ legal fictions when they require a plaintiff to pretend that the breach of contract is tortious. This is a form of "as if" reasoning, where metaphor is used in an utilitarian way. *See generally*

Gilmore's legal fiction of the contort is a useful invention, and a need exists for a similar doctrine to describe conduct lying on the boundary between crime and tort. The "crimtort" would describe conduct that is tortious and at the same time inimical to the public safety.[290] Nineteenth-century classical theorists split legal doctrine into rigid public and private domains, leaving gaps in the borderline.[291] Many threats to modern society meld private and public aspects and therefore are hidden from public law enforcers.[292] Punitive damages help to bridge this gap and, in part, represent a form of recognition of the blurred distinction between the public and private spheres.

Punitive damages have a unique ability to patrol the borderline between crime and tort by offering a bounty to plaintiffs.[293] Moreover, an injured plaintiff is less likely to be "paralyzed by the power of the offender"[294] than the prosecutor confronted with patrolling crime in the streets. Few district attorneys have the specialized knowledge or resources to successfully prosecute cases of corporate criminal liability for defective products.[295] Even when prosecuting

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LON L. FULLER, LEGAL FICTIONS 9, 29 (1967) (observing that legal fictions litter every segment of modern jurisprudence).

290. *Cf.* Morris, *supra* note 104, at 1195-96 (discussing overlap of crime and tort and recognizing that "allowance of punitive damages for torts which are also crimes may remedy some maladjustment not adequately treated by the criminal law").

291. *See supra* notes 141-42 and accompanying text (discussing historical separation of public and private legal realms).

292. *See* EDWARD A. ROSS, SOCIAL CONTROL AND THE FOUNDATIONS OF SOCIOLOGY: PIONEER CONTRIBUTIONS OF EDWARD ALSWORTH ROSS TO THE STUDY OF SOCIETY 58 (Edgar F. Borgatta & Henry J. Meyer eds., 1959) (noting that criminal law sanctions fail to "control the hidden portions of life. Despite the sleuths of the law and the ferrets of the press, there are still opportunities for secret wrongdoing.").

293. *See supra* note 277 and accompanying text (discussing "bounty" function of punitive damages). The criminal element of corporate conduct stems from the fact that manufacturers may directly affect the public interest by providing a particular product or service to the community. Matthew D. Tobriner & Joseph R. Grodin, *The Individual and the Public Service Enterprise in the New Industrial State*, 55 S. CAL. L. REV. 1247, 1249-50 (1967). Companies have a duty to reduce excessive preventable danger to the lowest feasible level to fulfill their public interest role. Punitive damages awards serve a public law function in controlling companies that "hold themselves out" to the general public. *See* John, *supra* note 250, at 2044 (explaining that at common law, enterprises that held themselves out to public had special relationship with and duty to customers).

294. ROSS, *supra* note 292, at 58.

295. *See generally* Michael B. Metzger, *Corporate Criminal Liability for Defective Products: Policies, Problems, and Prospects*, 73 GEO. L.J. 1, 87 (1984) (examining whether application of criminal sanctions to manufacturers of defective products is socially desirable). There are insurmountable problems for public law prosecutors to enforce the criminal law against corporate risk creators. For example, in most toxic torts cases prosecutors would need to learn the fundamentals of physiology, pharmacology, genetics, chemistry, biology, and genetic toxicology to successfully prosecute an action. *See* G.Z. NOTHSTEIN, TOXIC TORTS: LITIGATION OF HAZARDOUS SUBSTANCE CASES 371 (1984) (explaining that plaintiffs in toxic tort litigation must rely on physicians' testimony and on often-complex biomedical, epidemiological, and toxicological evidence). In a prosecution of a company that deliberately exposed fertile workers to toxins, prosecutors would need to have some understanding of chemical mutagenesis in

attorneys use the criminal law against corporate malfeasance, they are rarely victorious.[296] Prosecutors, therefore, rarely subject corporate officials to any criminal penalty for externalizing excessive preventable risk onto the public.[297]

CONCLUSION

Former Vice President Quayle is correct in characterizing product liability awards as different from the punitive damages judgments of an earlier age.[298] The rise of punitive damages to punish and deter

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order to make an informed decision to bring an action against the company for the resultant fetal deaths. The field is so young and so rapidly changing that it would take specialized knowledge even to hire experts. *See generally* DAVID BRUSICK, PRINCIPLES OF GENETIC TOXICOLOGY 9 (1980) (explaining that genetic toxicology studies human health effects of exposure to naturally occurring and manmade mutagens). Judge David Bazelon has noted that many prominent product liability and toxic tort cases involve scientific and technological uncertainty, making a legal assessment of the reasonableness of risk-taking a complex assessment. *See* David L. Bazelon, *Science and Uncertainty: A Jurist's View*, 5 HARV. ENVT'L L. REV. 209, 210 (1981) (observing that pace of scientific and technological advances has outstripped common law). Some scholars perceive insurmountable problems in proving tortious injury, let alone criminal liability, in such cases. *See, e.g.*, David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, 855 (1984) (arguing that tort system is incapable of effectively handling mass exposure cases because of burden of proving causation). Peter Huber explains that modern threats to human health and safety are "centrally or mass-produced, broadly distributed, and largely outside the individual risk bearer's direct understanding and control." Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277, 277 (1985).

296. *See* Metzger, *supra* note 295, at 3 (discussing use of criminal law to control corporate conduct); *see also* Paul A. Lebel, *Intent and Recklessness as Bases of Product Liability: One Step Back, Two Steps Forward*, 32 ALA. L. REV. 31, 33 (1980) (predicting more criminal prosecutions of product manufacturers in future). The first American prosecution of a manufacturer for manslaughter arose from three deaths caused by the dangerously defective Ford Pinto. *See* Joseph R. Tybor, *How Ford Won Pinto Trial*, NAT'L L.J., Mar. 24, 1980, at 1 (reporting acquittal of Ford Motor Company in State v. Ford Motor Co., No. 5234 (Ind. Super. Ct. Mar. 13, 1980)). The prosecutor based the case on the company's failure to recall a potentially deadly vehicle when the company had knowledge of a defect in the vehicle. *See id.* (reporting that prosecutor charged Ford with recklessly concealing defects in Pinto gas tanks). The first murder indictment of corporate officials arose out of the death of a factory worker exposed to cyanide gas by a firm that knew of the unsafe conditions in the plant. *See* David Ranii, *Verdict May Spur Industrial Probes*, NAT'L L.J., July 1, 1985, at 3 (reporting that legal experts did not predict wave of indictments against corporate officials in light of convictions of corporate officers in People v. O'Neill, No. 83C-11091 (Ill. Cir. Ct. June 15, 1985)). Although the firm and several high-level employees were convicted, their convictions were reversed. *See Job-Related Murder Convictions of 3 Executives Are Overturned*, N.Y. TIMES, Jan. 20, 1990, at A10 (reporting that convictions were reversed because differing mental states would have been required to commit all offenses defendants were convicted of at trial).

297. *See, e.g.*, Barbara H. Doerr, Comment, *Prosecuting Corporate Polluters: The Sparing Use of Criminal Sanctions*, 62 U. DET. L. REV. 659, 661 (1985) (noting that "few corporations or corporate employees have been prosecuted under existing environmental laws"); Steven L. Humphreys, Comment, *An Enemy of the People: Prosecuting the Corporate Polluter as a Common Law Criminal*, 39 AM. U. L. REV. 311, 331 (1990) (explaining that only recently have traditional criminal theories been used against modern industrial polluters); Michele Koruc, Comment, *Putting Polluters in Jail: The Imposition of Criminal Sanctions on Corporate Defendants Under Environmental Statutes*, 20 LAND & WATER L. REV. 93, 95 (1985) (discussing judiciary's reluctance to impose criminal sanctions on corporate officers and corporations).

298. *See* Quayle, *supra* note 55, at 564 (explaining that in earlier era, plaintiff had to prove that defendant acted with quasi-criminal intent before punitive damages could be awarded).

grossly negligent corporate conduct is a new application for the remedy. Just as punitive damages protected less powerful individuals against the King's agents or brutal employees of the railroads, however, the remedy continues to protect those unable to protect themselves.[299] There is a logical continuity from the early cases

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299. Both criminal and civil law often inadequately protect the public. For example, although A.H. Robins purposely concealed test results that revealed that thousands of potential consumers would be injured by its Dalkon Shield, the company was not prosecuted. *See* Tetuan v. A.H. Robins Co., 738 P.2d 1210, 1240 (Kan. 1987) (finding substantial evidence to conclude that A.H. Robins fully comprehended and deliberately and intentionally concealed dangers posed by Dalkon Shield). When A.H. Robins marketed the Dalkon Shield, an intrauterine device, as a "modern superior and safe" method of birth control, the company advertised that the device had a pregnancy rate of 1.1%, was "safe," and "would prevent pregnancy without producing any general effects on the body." Palmer v. A.H. Robins Co., 684 P.2d 187, 207 (Colo. 1984). The company, however, had full knowledge that the pregnancy rate exceeded 5% and that the Shield caused numerous deadly side effects. *Id.* at 195, 200.

Not only did A.H. Robins have tests in its possession that demonstrated the device's harmful side effects, but the company marketed the device without adequately testing it. SHELDON ENGELMAYER & ROBERT WAGMAN, LORD'S JUSTICE 33, 43 (1985). Plaintiffs' attorneys uncovered an internal document acknowledging that the "device ha[d] not been subjected to any formal stability testing." *Tetuan*, 738 P.2d at 1217. The company also concealed the radius of the known risk. The court in *Tetuan* observed:

> There was substantial evidence to conclude that Robins fully comprehended, by 1974 at the latest, the enormity of the dangers it had created, but that it deliberately and intentionally concealed those dangers; that it put money into "favorable" studies; that it tried to neutralize any critics of the Dalkon Shield; . . . that it consistently denied the dangers of the Dalkon Shield for nearly fifteen years after its original marketing; . . . that it commissioned studies on the Dalkon Shield which it dropped or concealed when the results were unfavorable; [and] it consigned hundreds of documents to the furnace.

Id. at 1240. Unfortunately, before these facts became known, doctors had implanted the Dalkon Shield in some 2.2 million American women. MARSHALL B. CLINARD, CORPORATE CORRUPTION: THE ABUSE OF POWER 103 (1990).

Asbestos litigation provides a second example of the criminal law failing to protect the public adequately. None of the asbestos firms involved in the litigation, or their officers, were prosecuted criminally for the cold-blooded business decision to conceal the dangers of unprotected asbestos exposure from workers and consumers. *See, e.g.*, Lipke v. Celotex Corp., 505 N.E.2d 1213, 1218 (Ill. App. Ct. 1987) (affirming trial court finding that defendant asbestos manufacturer knew of dangers of asbestos yet failed to take timely protective measures); Millison v. E.I. Du Pont de Nemours & Co., 558 A.2d 461, 462 (N.J. 1989) (affirming appellate court's conclusion that sufficient evidence supported finding that defendants asbestos manufacturers engaged in deliberate strategy to conceal employees' asbestos-related diseases); *cf.* King v. Armstrong World Indus., 906 F.2d 1022, 1027 (5th Cir. 1990) (approving award of punitive damages against asbestos manufacturer despite serious misgivings over repeated recovery of punitive damages against this one manufacturer), *cert. denied*, 111 S. Ct. 2236 (1991). The court in *In re School Asbestos Litigation* wrote that asbestos litigation presents an "unparalleled situation in American tort law." *In re* School Asbestos Litigation, 789 F.2d 996, 1000 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986). By 1986, an estimated 30,000 personal injury suits had been filed against asbestos manufacturers and producers. *Id.* By 1990, 30,401 asbestos cases were pending in federal courts alone. *See Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation*, Asbestos Litig. Rep. (Andrews Pub.) 22,699, 22,702 (Mar. 14, 1991) (proposing that Judicial Conference recommend that Congress consider legislative dispute resolution system to resolve asbestos litigation).

Similarly, a company that flagrantly disregarded the public safety by permitting several pounds of plutonium to be removed from a nuclear processing plant was not prosecuted criminally. *See* Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 243 n.5 (1984) (noting that 4.4 kilograms of plutonium were unaccounted for over four-year period). The Supreme Court

against these powerful interests to the modern product liability cases against powerful corporate interests.

Punitive damages have consistently provided important protection for average citizens against entities too powerful to be constrained by lesser remedies. This function should not be surrendered unless punitive damages can be clearly shown to produce so many harms that the remedy requires extensive reform. The former Vice President is clearly targeting the wrong group when he attacks the propriety of punitive damages assessments against product manufacturers, because the largest and most numerous punitive damages awards in the 1980s and early 1990s are found in business/contract lawsuits, not in product liability cases.[300]

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reversed and remanded the Tenth Circuit's reversal of a punitive damages award in favor of the estate of a deceased plutonium plant worker. *Id.* at 258. The $10 million punitive damages award was based on the plant's lax safety standards, although the firm had substantially complied with all federal safety standards. *Id.* at 245. The Court held that the award of punitive damages did not conflict with the Atomic Energy Act of 1954, the Price-Anderson Act, or the federal remedial scheme under which Congress authorized the Nuclear Regulatory Commission to impose civil penalties. *Id.* at 251, 256, 257.

The Tenth Circuit reversed and remanded the case in the summer of 1985. Silkwood v. Kerr-McGee, 769 F.2d 1451, 1462 (10th Cir. 1985), *cert. denied*, 476 U.S. 1104 (1986). The appeals court again reversed the trial court's award of $10 million punitive damages and remanded the case. *Id.* It held that although evidence of the defendant employer's lackadaisical attitude toward the handling of plutonium and the health and safety of its employees was sufficient to present the issue of punitive damages to the jury, and that the employer's substantial compliance with the Nuclear Regulatory Commission's regulations on nuclear plants did not preclude an award of punitive damages, the trial court had erred in its jury instructions regarding the punitive award. *Id.* at 1461. The court ruled that the personal injury claim could not be the basis of a punitive damages award because it was covered by the exclusivity bar of Oklahoma's Workers' Compensation Act. *Id.* at 1458. Professor Rustad was clerk to the late Honorable William E. Doyle, author of the dissenting opinion in that case. The case settled for $1.33 million shortly before retrial in 1986. *See* Alberta I. Cook, *Estate Settles Silkwood Suit*, NAT'L L.J., Sept. 15, 1986, at 11 (reporting that Karen Silkwood's estate settled 10-year suit because relitigating it would have taken several years). By the time Karen Silkwood's children received any compensation from the lawsuit, they were in their late teens. *Id.*

300. *See* PETERSON ET AL., *supra* note 181, at 10, 13 (finding that punitive damages were awarded in approximately one-third of business/contract cases during 1980s where defendants were found liable). RAND's study of punitive damages awards in San Francisco County, California, and Cook County, Illinois uncovered 19 times as many punitive awards in the business/contracts area (114) as in the product liability field (6). *Id.* The rise of punitive damages in commercial product liability litigation has occurred largely over the past decade. *See, e.g.*, Trimed, Inc. v. Sherwood Medical Co., 977 F.2d 885, 888 (4th Cir. 1992) (affirming $3 million punitive damages award for tortious interference with contract and unfair competition causing customers to breach contracts); Royal Business Machines v. Lorraine Corp., 633 F.2d 34, 49 (7th Cir. 1980) (allowing punitive damages to go forward on breach of warranty and fraud action). The dramatic increase in punitive damages awards is occurring in disputes between large corporations. For example, the largest jury award of 1989 arose out of a business dispute over the planned construction of a coal slurry pipeline from Wyoming to Texas. In ETSI Pipeline Project v. Burlington N., Inc., No. B-84-979-A (E.D. Tex. 1989), the federal antitrust laws allowed the $345 million award to be tripled to $1.035 billion. *See Verdicts*, NAT'L L.J., Jan. 29, 1990, at S3 (reviewing largest and most significant jury awards in civil actions in 1989). The aggravating misconduct was evidence that several railroad companies

Even in the business/contract area, punitive damages were not routinely awarded.

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conspired to block the pipeline by filing hundreds of lawsuits in towns along the projected path of the pipeline. *Id.*

A recent study that was prepared in part by Texaco concluded that punitive damages awards against businesses have increased dramatically over the past two decades. *See* STEPHEN M. TURNER ET AL., PUNITIVE DAMAGES EXPLOSION: FACT OR FICTION? 1, 4 (Washington Legal Foundation Working Paper No. 50 1992) (finding that amount of punitive damages awarded increased 89 times in business-related cases between 1971 and 1989). Business-related cases included product liability, wrongful termination, defamation, and other business tort disputes. *Id.* In recent years, the media has reported the existence of a large number of punitive damages awards that can best be characterized as arising from business disputes between two Goliaths. In Pennzoil Co. v. Texaco Inc., No. 84-05905 (Tex. Dist. Ct. 1985), for example, a $3 billion punitive damages award was granted to Pennzoil for Texaco's interference with Pennzoil's contract to purchase Getty Oil. *Id.* This award dwarfs the amount collected in other product liability actions. *See* John Riley, *Civil Justice*, NAT'L L.J., Dec. 30, 1985, at S2 (discussing Texaco's possible responses to award). The total award, $10.53 billion, was the largest verdict ever reported. *See Litigation Monitor*, LEGAL TIMES, Dec. 9, 1985, at 11 (reporting details of case). The parties settled the case after they had argued the appeal but before the appellate court made a decision. *Id.* One commentator referred to business versus business litigation as "corporate ambulance chasing." *See* Ross E. Cheit, *Corporate Ambulance Chasers: The Charmed Life of Business Litigation*, 11 STUD. IN L., POL. & SOC. 119, 120 (1991) (arguing that "business litigation involves its own form of legal abuse," such as business plaintiffs pursuing "deep pockets" strategies to recover financial losses).

Multimillion-dollar punitive damages awards in the past year include the following cases:

Year & State	Punitive Damages	Type of Case
1992 CA	$14,000,000	Breach of duty to defend commercial insurance policy. Chemstar Inc. v. Liberty Mut. Ins. Co., 797 F. Supp. 1541 (N.D. Ca. 1992).
1992 TX	$134,000,000	Fraud, participation in illegal pre-arranged trades and racketeering. ContiCommodity Servs. Inc. v. Prescott, Ball & Turben, *reported in Newsline: $137 Million Fraud Verdict*, NAT'L L.J., Apr. 20, 1992, at 19 (reporting that federal jury awarded $3 million in compensatory damages and $134 million in punitive damages to former commodities brokerage firm for fraud and racketeering committed by ex-employee).
1991 AL	$9,100,000	Fraud and breach of contract. Braswell v. ConAgra, Inc., 936 F.2d 1169, 1172 (11th Cir. 1991) (approving punitive damages award against defendant ConAgra for purposefully misweighing broiler chickens and thus breaching contract and committing fraud against chicken farmers).
1991 AR	$8,000,000	Fraud and intentional interference with business relationship. Robertson Oil Co. v. Phillips Petroleum Co., 930 F.2d 1342, 1343 (8th Cir. 1991) (remanding to trial court for reconsideration of propriety of punitive damages award in suit by oil distributor company alleging intentional interference with business relationship by Phillips Petroleum).
1991 AR	$4,500,000	Fraud and breach of fiduciary duty. Union Nat'l Bank v. Mosbacher, 933 F.2d 1440, 1443 (8th Cir. 1991) (finding substantial evidence supported award of punitive damages to church furniture manufacturer in suit for fraud and breach of fiduciary duty against bank, but remanding to trial court to determine if award violated bank's due process rights) *cert. denied*, 112 S. Ct. 870 (1992).

The rise of punitive damages as a remedy for business/contract disputes is the most recent extension of the doctrine.[301] The use of punitive damages by powerful corporations against their rivals is inconsistent with the traditional functions of the remedy and deserves further empirical study. Just as commercial law provides consumers with special protections that are not available to commercial concerns, it might be appropriate to limit punitive damages availability to relatively powerless individuals and entities.[302] It would be con-

1991 CA	$10,000,000	Fraud, breach of contract. Las Palmas Assocs. v. Las Palmas Ctr. Assocs., 1 Cal. Rptr. 2d 301, 304 (Ct. App. 1992) (reducing punitive damages from $10 million to $2 million).
1991 IL	$1,000,000	Trademark infringement and unfair competition. Zazu Designs v. L'Oreal, S.A., No. 86-C-7536, 1991 U.S. Dist. LEXIS 9433, at *5-6 (N.D. Ill. July 9, 1991) (imposing punitive damages against defendant corporation for knowingly infringing on plaintiff's trademark for hair conditioning products).
1991 MD	$12,500,000	Tortious interference with contracts between insurance companies. Alexander & Alexander Inc. v. B. Dixon Evander & Assocs., Inc., 596 A.2d 687, 689 (Md. Ct. Spec. App. 1991) (vacating punitive damages award on due process grounds and remanding for retrial on punitive damages issue only in suit by insurance broker against insured, insurer, and rival broker for conspiracy to deprive plaintiff of commission).
1991 MN	$1,500,000	Defamation, breach of contract, and deceptive trade practices. GN Danavox, Inc. v. Starkey Lab., Inc., 476 N.W.2d 172, 175 (Minn. Ct. App. 1991) (affirming punitive damages award on defamation claim in suit brought by hearing aid manufacturer against competitor), *cert. denied*, 112 S. Ct. 2940 (1992).
1991 SC	$13,875,000	Common law fraud, civil conspiracy, and Racketeer Influenced and Corrupt Organizations Act violation. Ross v. Jackie Fine Arts, Inc., C/A No. 2:85-2425-1, 1991 U.S. Dist. LEXIS 13535, at *29 (D.S.C. Sept. 4, 1991) (imposing punitive damages against defendant for selling master kits in massive tax fraud scheme).
1991 TX	$1,200,000	Fraud, tortious interference with contract, breach of contract, breach of duty of good faith and fair dealing, and unfair competition. Bard v. Charles R. Myers Ins. Agency, 811 S.W.2d 251, 255 (Tex. Ct. App. 1991) (approving punitive damages against insurance company in action instituted by insurance agency).

301. *See supra* note 300 and accompanying text (discussing prevalence of punitive damages awards in business/contract litigation).

302. *Cf.* Magnuson-Moss Warranty-Federal Trade Commission Improvements Act, 15 U.S.C. § 2308(a) (1988) (imposing federal limitations on disclaimers made to consumers, but not to commercial buyers). Furthermore, in 1975, the FTC made it an unfair or deceptive practice under the Federal Trade Commission Act § 5, 15 U.S.C. § 45 (1988), for a seller to take a note from a consumer unless the note contained the statement "subject to all claims and defenses" of the consumer. *See* 16 C.F.R. § 433.2 (1992) (requiring that all promissory notes and contracts taken in consumer sales or purchase money loans bear legend that effectively destroys instrument's negotiability); *see also* Jim L. Banks, Comment, *FTC Holder in Due Course Rule: A Rule Without a Private Remedy*, 44 MONT. L. REV. 113, 120 (1983) (noting that FTC rule is designed to protect consumers). This protection does not extend to nonconsumer parties because the FTC presumes that such parties are knowledgeable enough to pro-

sistent with historical and modern usage to restrict the use of punitive damages to transactions that are predominately for "personal, family or household purposes"[303] or that involve other types of asymmetrical power relations. Such a reform would eliminate the use of the remedy by large corporations and restrict it to its historically established functions. Before so restricting this remedy, however, the functions it plays in filling the gap between public and private law in the business/contract context should be examined further.

The thrust of former Vice President Quayle's punitive damages reforms and the issue currently before the U.S. Supreme Court is whether to impose some arbitrary ratio between compensatory and punitive damages. Historically, juries have protected the public interest by the flexible remedy of indeterminate punitive damages. As Justice Neely concludes, large awards may be needed "to attract the defendant's attention,"[304] especially where their acts endanger the public safety.

Even as early as the beginning of this century, corporations had grown powerful enough that their careless acts could cause widespread danger to the public. Sociologist Edward Ross wrote in *Sin and Society: An Analysis of Latter-Day Iniquity* that public safety rested in the hands of a few individuals who controlled the railways, utilities, and other corporations.[305] Professor Ross noted that an individual in industrial society is absolutely dependent on the conscientiousness of corporations and manufacturers.[306] Today, the collective security is even more dependent on the conscientiousness of the managers of large privately owned bureaucracies. As long as this asymmetrical power relationship continues, extraordinary sanctions such as punitive damages are necessary to ensure corporate responsibility.

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tect themselves. *See* Preservation of Consumer's Claims and Defenses, 40 Fed. Reg. 53,506, 53,509 (1975) (finding that innocent consumer is easy victim for merchant that engages in unethical sales practices). The consumer protection statutes and regulations also attempt to remedy the unequal bargaining power that exists between a consumer and a seller in the consumer goods context where the seller takes back a note in lieu of full payment. *See id.* (explaining that 16 C.F.R. § 433 (1975) places risk of seller misconduct on party best able to bear burden, which is lender).

303. U.C.C. § 9-109(1) (1992) (defining "consumer good").

304. TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870, 889 (W. Va.), *cert. granted*, 113 S. Ct. 594 (1992).

305. EDWARD A. ROSS, SIN AND SOCIETY: AN ANALYSIS OF LATTER-DAY INIQUITY 3 (1907).

306. *Id.*