

POETIC JUSTICE: PUNITIVE DAMAGES AND LEGAL PLURALISM

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INTRODUCTION

We typically distinguish two sets of responses to harmful behavior: civil law provides victims with compensation, while criminal law inflicts punishment on wrongdoers. Civil law forms a part of private law, the law governing relations between private parties, while criminal law forms part of public law, the law governing relations between private parties and the state. Thus a civil wrong is an injury to a private party or to the state in the role of a private party, while a crime is, in theory at any rate, an injury to the state or community that is inflicted on a private party. Civil wrongs, private injuries, compensation, and private law are concepts that belong together, as do crimes, public injuries, punishment, and public law. Viewed against the background of this conventional taxonomy, punitive damages, or punishments inflicted through the civil law, appear to be an anomaly, a hybrid in search of a rationale. As such, punitive damages have come increasingly under attack¹ for reasons that we shall discuss presently.

The aim of this Article is threefold. First, we wish to show that punitive damages are no anomaly; indeed, we argue that they are but one of a number of forms of legally recognized noncriminal or "civil style" punishments that are as basic to social and legal life as criminal punishment. If this is correct, the standard legal taxonomy stands in need of drastic revision. We suggest that theoretical neglect of civil punishment is symptomatic of the more basic fallacy of "legal centralism," the normative or descriptive view that the state exercises a monopoly on legal power and authority.²

1. See, e.g., Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559, 564-65 (1992) (criticizing increased punitive damages awards as product of unfettered jury discretion and proposing restrictions to limit punitive awards); Victor E. Schwartz & Mark A. Behrens, *Punitive Damages Reform—State Legislatures Can and Should Meet the Challenge Issued by the Supreme Court of the United States in Haslip*, 42 AM. U. L. REV. 1365, 1369 (1993) (asserting that "scope of punitive damages law has broadened considerably" and that its "purposes have become cloudy").

2. See *infra* note 24 and accompanying text (setting forth definitions of "legal centralism"). One of us has criticized legal centralism previously. See Marc Galanter, *Justice in Many Rooms*, in ACCESS TO JUSTICE AND THE WELFARE STATE 147, 162 (Mauro Cappelletti ed., 1981) [hereinafter Galanter, *Justice in Many Rooms*] (criticizing legal centralism for its failure to credit

Our principal focus, however, is on punitive damages in particular, not civil punishment in general. Thus our second aim is to dispel some persistent myths about the extent and character of punitive damages and their connection with the "tort explosion," an explosion that in our view is greatly exaggerated.

Third and finally, we wish to sketch an elementary jurisprudence for punitive damages, which for expository purposes we develop out of an issue litigated before the U.S. Supreme Court in *Browning-Ferris Industries v. Kelco Disposal, Inc.*³ and again, though under a different constitutional theory, in *Pacific Mutual Life Insurance Co. v. Haslip*⁴ and the currently pending *TXO Production Corp. v. Alliance Resources Corp.*⁵ This issue is whether punitive damages are excessive whenever they are grossly disproportionate to compensatory damages. Advocates of tort reform have frequently criticized large punitive awards and recommended caps on punitive damages, sometimes to absolute dollar amounts, but often to amounts determined by some fixed multiple of compensatory damages,⁶ and ten states have enacted such caps.⁷ Such proposals explicitly raise the problem of

the role of "indigenous law" in social life); see also John Griffiths, *What Is Legal Pluralism?*, 24 J. LEGAL PLURALISM 1, 1 (1986) (describing legal pluralism, or idea that more than one legal order can exist in society). For another recent discussion of legal centralism, see Robert W. Gordon, *Without the Law II*, 24 OSGOODE HALL L.J. 421, 423 (1986) (reviewing H.W. ARTHURS, *WITHOUT THE LAW: ADMINISTRATIVE JUSTICE AND LEGAL PLURALISM IN NINETEENTH CENTURY ENGLAND* (1985) and criticizing legal centralism as flawed and problematic normative ideal).

3. 492 U.S. 257 (1989).

4. 111 S. Ct. 1032 (1991).

5. 419 S.E.2d 870 (W. Va.), cert. granted, 113 S. Ct. 594 (1992). As we write, *TXO Production* has been argued and awaits decision.

6. See, e.g., AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT ON PUNITIVE DAMAGES OF THE COMMITTEE ON SPECIAL PROBLEMS IN THE ADMINISTRATION OF JUSTICE 15 (1989) [hereinafter ACTL REPORT] (proposing to limit punitive damages to twice amount of compensatory damages or \$250,000, whichever is greater); II AMERICAN LAW INST., ENTERPRISE RESPONSIBILITY FOR RESPONSIBILITY FOR PERSONAL INJURY: REPORTERS' STUDY 258-59 (1991) (proposing that punitive damages be limited to some ratio to compensatory damages with alternative cap of "perhaps \$25,000").

7. See ALA. CODE § 6-11-21 (Supp. 1992) (imposing \$250,000 cap on punitive damages except in cases of wrongful death); COLO. REV. STAT. § 13-21-102(1)(a), (3)(a)-(b) (1987) (providing that amount of punitive damages awarded by jury "shall not exceed an amount which is equal to the amount of the actual damages awarded to the injured party"; trial court may increase punitive damages "to a sum not to exceed three times the amount of actual damages" if it is shown that defendant "has continued the behavior or repeated the action which is the subject of the claim . . . in a willful and wanton manner, either against the plaintiff or another person or persons, during the pendency of the case" or that defendant "has acted in a willful and wanton manner during the pendency of the action in a manner which has further aggravated the damages of the plaintiff"); CONN. GEN. STAT. ANN. § 52-240b (West 1991) (stating that in product liability actions, "[i]f the trier of fact determines that punitive damages should be awarded, the court shall determine the amount of such damages not to exceed an amount equal to twice the damages awarded to the plaintiff"); FLA. STAT. ANN. ch. 768.73(1)(b) (Harrison Supp. 1992) (providing that punitive damages must be capped at three times compensatory damages unless "the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive in light of the facts and circumstances" of case); GA. CODE ANN. § 51-12-5.1(g) (Michie Supp. 1992) (capping allowable pu-

how punishments should be scaled to wrongdoings, and this "scaling problem," as we shall call it, in turn requires us to examine the justification for punishment in general and for punitive damages in particular. Thus, the *Browning-Ferris*, *Haslip*, and *TXO Production* cases offer a useful jumping-off point for a broader argument.

The broader argument proceeds in four steps. First, we develop a retributivist account of the appropriate scaling of punitive damages, based loosely on Jean Hampton's recent essay *The Retributivist Idea*.⁸ Second, we argue that while our approach to the scaling problem implies that punitive damages must not be arbitrarily large, their limits have nothing to do with the level of compensatory damages. Third, we argue that punitive damages serve important purposes that could not be accomplished through criminal sanctions. Punitive damages, we suggest, constitute the best available means for social control and moral sanction of economically formidable wrongdoers. Moreover, we suggest that if punitive damages are pared back too drastically, civil law may be underenforced. Finally, we show that punitive awards do not illegitimately evade the safeguards of criminal procedure.

I. PUNISHMENT CIVIL STYLE

Discussions of punishment and its role in modern societies often proceed as if punishment is coextensive with the criminal justice system. To take a recent example from a distinguished legal philosopher, Joel Feinberg begins his four-volume treatise on the criminal law with the question, "What sorts of conduct may the state rightly make criminal?"⁹ He later redescribes his project as an effort "to

nitive damages awards in tort actions at \$250,000); KAN. STAT. ANN. § 60-3701(e)-(f) (Supp. 1991) (limiting punitive damages to lesser of defendant's highest gross income for 5-year period preceding wrongful conduct or \$5 million, unless court finds that it is still profitable for defendant to engage in wrongful conduct, in which case damages cannot exceed 1.5 times profitability); NEV. REV. STAT. § 42.005(1)(a)-(b) (1991) (capping allowable punitive damages awards at three times compensatory damages if amount of compensatory damages is \$100,000 or more, or \$300,000 if amount of compensatory damages is less than \$100,000); OKLA. STAT. ANN. tit. 23, § 9 (West 1987) (providing that jury may award punitive damages "in an amount not exceeding the amount of actual damages awarded" unless trial court makes finding outside of jury's presence that there is clear and convincing evidence that defendant is guilty of oppression, fraud, or malice); TEX. CIV. PRAC. & REM. CODE ANN. §§ 41.007-.008 (West Supp. 1993) (noting that "exemplary damages awarded against a defendant may not exceed four times the amount of actual damages or \$200,000, whichever is greater," but excepting from limit punitive damages awarded on grounds of malice or intentional tort); VA. CODE ANN. § 8.01-38.1 (Michie 1992) (placing \$350,000 cap on punitive damages).

8. Jean Hampton, *The Retributive Idea*, in JEAN HAMPTON & JEFFRIE G. MURPHY, *FORGIVENESS AND MERCY* 111 (1988) [hereinafter Hampton, *The Retributive Idea*]. Hampton elaborates her theory in *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659 (1992). In a bit of intellectual symbiosis, Hampton, who read our Article in manuscript, adopts its analysis of punitive damages in her elaboration. *Id.* at 1687-89.

9. 1 JOEL FEINBERG, *HARM TO OTHERS* 3 (1984).

trace the contours of the zone in which the citizen has a moral claim to be . . . free of legal coercion."¹⁰ Clearly, Feinberg has tacitly identified the criminal law with legal coercion.

Instead, we want to begin with the observation that a large part of punishment as a social institution lies outside of the criminal law. Indeed much of it lies outside of the legal system. To understand the working of punishment in our society and what the law can do with it and about it requires that we examine the entire span of punishment, not just the part that epitomizes it in legal theory.

What is punishment? We hesitate to enter into a definitional struggle on what must be well-worn turf. It seems to us that we can identify a core idea of "bad for bad," i.e., the deliberate imposition of a harm, injury, deprivation, or other bad thing on someone on the ground of the commission of some offense. The infliction of harm on the offender may be viewed as a goal of justice, or as proximate to a goal of justice, or it may be viewed instrumentally as a means to social betterment through rehabilitation, incapacitation, deterrence, reassurance, and so forth. Thus, the harm may be thought to redound to the ultimate benefit of the society or even to the benefit of the offender.

Punishment takes many forms and has many locations. We propose to review briefly some of the less prominent locations of punishment as a social institution, particularly those located in and around civil law. Our examples are taken from the contemporary United States. We suspect that they are not entirely dissimilar to things that might be found in other industrial societies. To the extent that American patterns seem to be distinctive, we shall offer some speculations on the way that punishment is related to other aspects of American law and society.

A. Informal Punishment Outside of the Official Law

Among the most common types of punishment are the various kinds of harm that are sometimes visited by victims, kin, friends, allies, and onlookers on those who engage in offending behavior. These include violence to the person, destruction or seizure of property, harassment, boycotts, and assaults on reputation.¹¹ We tend to perceive this activity under such rubrics as retaliation, self-

10. *Id.* at 6.

11. See Stewart Macaulay, *Private Government*, in *LAW AND THE SOCIAL SCIENCES* 445, 447 (Leon Lipson & Stanton Wheeler eds., 1986) (observing that "private governments" impose sanctions that can range from ridicule to threatening offenders with physical violence); see also *infra* notes 15-16 and accompanying text (describing practice of self-help justice in many neighborhoods as response to offensive conduct committed against family and friends).

help, avoidance, and gossip. We recognize these as major means of control in simpler societies, but tend to ignore them in our own society. But the social life of the contemporary United States is pervaded by such controls and punishments. A few examples will have to suffice. Thus among Maine lobstermen, a violation of customary harvesting territories is punished as follows:

Ordinarily, repeated violation of territorial boundaries will lead to destruction of the offender's gear. It is usual for one man operating completely on his own to first warn an interloper. In some places this is done by tying two half hitches around the spindle of the offending buoys; in other places by damaging the traps slightly. At this point, most intruders will move their traps. If they are not moved, they will be "cut off." This means cutting off the buoy and warp line from the trap, which then sinks to the bottom where the owner has no chance of finding it.

....

A man who violates a boundary is ordinarily never verbally confronted with the fact of his intrusion, and the man who destroys his gear will traditionally never admit to it.¹²

Lest this example be thought to represent a traditional rural enclave, consider the following accounts taken from two recent studies of disputing in American urban neighborhoods:

[1] One winter we did have that problem with father's parking space being taken, because we live in a large apartment building up there and all the young people who live there, of course, most of them don't own shovels but they all own cars so, of course, if you've . . . shoveled your spot as soon as you've left they were in it. But you know it was nothing for someone to just get behind them and give them a shove up into the snowbank. . . . People wouldn't think anything about giving them a little nudge.¹³

[2] A teenage white boy who lived in the [housing] project began to date a teenage Chinese girl, also a project resident. The boy tried to persuade this girl to work for him as a prostitute and introduced her to drugs such as Valium. The Chinese girl did spend at least one night out with a customer. . . . Late that night when she did not return home, her brothers came to look for her boyfriend, angry that he had turned their sister to drugs and prostitution. The boy was nowhere to be found. The next day the brothers did find him and beat him up. The white boy and the

12. James M. Acheson, *Territories of the Lobstermen*, NAT. HIST. MAG., Apr. 1972, at 60, 65.

13. Leonard G. Buckle & Suzann R. Thomas-Buckle, *Doing unto Others: Disputes and Dispute Processing in an Urban American Neighborhood*, in NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA 78, 84 (Roman Tomasic & Malcolm M. Feeley eds., 1982).

Chinese girl were not seen together again.¹⁴

The amount of this kind of activity in contemporary society has not been measured, but both scholarly observation and everyday experience suggest that it is very common. What Leonard Buckle and Susan Thomas-Buckle call a system of "self-help justice" appears to be a major component of resolving disputes in American neighborhoods.¹⁵ Indeed, Donald Black argues that a large portion of what we perceive as crime is actually self-help punishment for perceived breaches of social norms.¹⁶

B. *Formal Punishment Outside of the Law*

Most extralegal punishment is relatively unorganized; there are no formal charges or determinations of guilt, no explicit *corpus juris*, and no specialized institutions of enforcement. In many settings, however, such as workplaces, sports leagues, churches, and schools, punishment is part of more formalized proceedings. Understandings about offending behavior and appropriate penalties are crystallized in codes and administered by designated parties or special tribunals that operate with varying degrees of formality. A proceeding to withdraw hospital privileges from a physician who is "tried" before the hospital's board of directors may proceed with exquisite formality, elaborate investigation, intensive lawyering, court reporters, and so forth.¹⁷ The proceedings of the National Collegiate Athletic Association (NCAA) imposing fines and suspensions on universities that violate its written rules about athlete recruitment resemble the proceedings of governmental courts more closely than they do the lobstermen or disgruntled parkers.¹⁸ A similar elaboration of procedure and severity of sanction is evident in the church

14. Sally E. Merry, *Going to Court: Strategies of Dispute Management in an American Urban Neighborhood*, 13 LAW & SOC'Y REV. 891, 912 (1979).

15. See Buckle & Thomas-Buckle, *supra* note 13, at 86 (noting that many neighborhood residents prefer direct confrontation with each other to official intervention by authorities); see also Donald Black & M.P. Baumgartner, *On Self-Help in Modern Society*, in THE MANNERS AND CUSTOMS OF THE POLICE 193, 193 n.3 (Donald Black ed., 1980) (defining "self-help" as any response to offensive behavior in which offended party takes action on his or her own); Merry, *supra* note 14, at 900-01 (noting many forms of dispute management strategies employed by neighborhood residents, including gossip, threatened violence, or contacting police).

16. See Donald Black, *Crime as Social Control*, 48 AM. SOC. REV. 34, 35-38 (1983) (noting large number of self-help crimes committed in United States and adding that people often openly admit to committing these crimes because they are proud of what they have done).

17. See Mark G. Field, *Stability and Change in the Medical Systems: Medicine in the Industrial Society*, in STABILITY AND SOCIAL CHANGE 30, 32 (Bernard Barber & Alex Inkeles eds., 1971) (describing parallels between social system and medical system, including formalized procedure to control deviant behavior of those in medical profession).

18. For example, the proceeding that led to the suspension of University of Nevada at Las Vegas (UNLV) basketball coach Jerry Tarkanian involved charges of violation of NCAA bylaws, numerous exhibits and sworn affidavits, "factual determinations concerning alleged

courts that defrocked television evangelist Jimmy Swaggart.¹⁹ Somewhere in between informal and formal extra-governmental sanctions are punishments by employers who address suspected theft, embezzlement, and other workplace offenses by dismissal, demotion, transfer, forced restitution, and so forth.²⁰ Much of the punishment in society is administered by these "private governments," which apply their own systems of criminal law by creating offenses, imposing punishments, and radiating threats of punishment unknown to the official public criminal law.²¹

C. *Legal Pluralism and the Location of Punishment*

A vast portion of the formal punishment in society is not located in legal institutions, but in indigenous social institutions that the law regulates.²² We refer to these various indigenous forums as "outside" the official law, but many can themselves be regarded as legal forums in the strict sense. They administer complex bodies of written rules and procedures that bear all the earmarks of law, including the "secondary" rules of recognition, change, and adjudication that H.L.A. Hart proposed as the characteristics of a full-fledged legal system.²³ Thus, it is proper to speak not only of indigenous forums but also of indigenous law, and one might call punish-

rule violations," and the imposition of "appropriate penalties" by the Committee on Infractions. *NCAA v. Tarkanian*, 488 U.S. 179, 183 (1988).

The committee in *Tarkanian* requested that UNLV show cause why the NCAA should not impose additional penalties on UNLV if it failed to discipline Tarkanian by removing him completely during the probation period from the university's athletic program. *Id.* at 186. UNLV appealed the committee's findings and sought sanction before the NCAA Council. *Id.* After attorneys representing UNLV and Tarkanian presented arguments, the Council approved the committee's investigation and hearing process and adopted all of its recommendations. *Id.*

19. After the Louisiana District Presbytery of the Assemblies of God recommended that Swaggart be suspended from its pulpit for three months, the Executive Presbytery of the church's General Council ordered him to stop preaching for a year, leading to his departure from the church. *Final Decision Due in Swaggart Case*, N.Y. TIMES, Mar. 4, 1988, at A12; see also *Church Defrocks Swaggart for Rejecting Its Punishment*, N.Y. TIMES, Apr. 9, 1988, § 1, at 1 (reporting that Swaggart announced his resignation from Assemblies of God after rejecting church's punishment). Swaggart's defrocking is a recent instance in a long and complex tradition of church courts. For some earlier American examples, see AMERICA'S RELIGIOUS HERETICS 9-12 (George H. Shriver ed., 1966) (analyzing several heresy trials conducted in Protestant church courts).

20. See George Cole, *The Second Criminal Justice System*, 43 SOC'Y FOR ADVANCEMENT OF MGMT. J. 17, 17-18 (1978) (arguing that failure of criminal justice system to prosecute crimes against business has led to "second criminal justice system").

21. See Macaulay, *supra* note 11, at 446-49 (providing examples of "private governments" such as Jewish Community Tenant Association and American Institute of Architects, which impose their own standards and regulations of behavior on their members).

22. Indigenous systems of regulation and punishment exist within legal institutions as they do in other social institutions. E.g. PETER M. BLAU, *THE DYNAMICS OF BUREAUCRACY* 223-26 (1963) (describing indigenous regulation in government enforcement agency).

23. H.L.A. HART, *THE CONCEPT OF LAW* 91-96 (1961).

ments such as the formal defrocking of Jimmy Swaggart "quasi-legal" rather than "extralegal."

Indigenous law and quasi-legal punishment have to a large extent been ignored by legal theorists and omitted from conventional legal taxonomies. This, we suspect, results from a theoretical bias toward legal centralism, the view that state-made law is the sole normative skeleton on which the flesh of society hangs.²⁴ Legal centralism simply fails to regard punishment emanating from sources other than the state as a phenomenon of the same sort as criminal punishment. We believe that phenomena such as indigenous law and civil punishment call legal centralism into question as a descriptive theory, and we doubt centralism's identification of law with state-made law. In a modern, complex, and highly differentiated society such as ours, government is, after all, only one major system among others: the economy, the mass media, the educational system, the family, science, religion, the medical system, and so forth.²⁵ Government is not an overarching whole of which these are parts, as in the ancient polis; nor is it the pinnacle of a social hierarchy, as in feudal kingdoms; nor the center of society, as in the court of the Sun King. Rather, as Niklas Luhmann writes, ours is a society "without summit and without center."²⁶ It should come as no surprise that a high school, a hospital, a law firm, a university, and a church will all promulgate norms and that many of these norms will become formalized. Legal pluralism offers a better description of contemporary society than does legal centralism.

Saying that indigenous norms lie outside of the official law should not mislead us into regarding them as unaffected by the official law,

24. One of us has defined legal centralism as "a picture in which state agencies (and their learning) occupy the center of legal life and stand in a relation of 'hierarchical control' to other, lesser normative orderings such as the family, the corporation, the business network." Galanter, *Justice in Many Rooms*, *supra* note 2, at 161. Robert Gordon defines legal centralism as "the dogma that there exists . . . a dominant normative order, defined by a general set of rules and principles (the law), emanating from the state, governing all members of society equally and impersonally, and enforced and applied through the ordinary courts." Gordon, *supra* note 2, at 421.

25. This point has been stressed by Niklas Luhmann in numerous publications. See, e.g., NIKLAS LUHMANN, *THE DIFFERENTIATION OF SOCIETY* (Stephen Holmes & Charles Larmore trans. 1982); NIKLAS LUHMANN, *POLITISCHE THEORIE IM WOHLFAHRTSSTAAT* (1981); NIKLAS LUHMANN, *AUSDIFFERENZIERUNG DES RECHTS: BEITRÄGE ZUR RECHTSSOZIOLOGIE UND RECHTSTHEORIE* (1981); see also Leon H. Mayhew, *Stability and Change in Legal Systems*, in *STABILITY AND SOCIAL CHANGE* 187, 188 (Bernard Barber & Alex Inkeles eds., 1971) (positing that successful exercise of legal control is made difficult because society is actually composed of many insulated subgroups). For a recent example of a sanction administered by the mass media, see Alex S. Jones, *Demonstration Renews Question of Conflict for Newspapers*, N.Y. TIMES, Apr. 16, 1989, § 1, at 28 (reporting that Supreme Court reporter for *New York Times* was censured by editor for violating newspaper's conflict of interest policy by participating in abortion rights march).

26. LUHMANN, *POLITISCHE THEORIE*, *supra* note 25, at 22.

however. These systems of indigenous ordering are connected to the official law in important ways.²⁷ The law provides influential models of process and discourse. Expressly, implicitly, or inadvertently, the law delegates the power to punish to various indigenous forums. Sometimes control by these forums is explicitly legitimated or even adopted as the policy of the state. For example, in *NCAA v. Tarkanian*,²⁸ the Supreme Court found that no constitutional violation arose when the NCAA ordered the University of Nevada at Las Vegas to terminate Coach Jerry Tarkanian's involvement with the school athletic program after an NCAA investigation found recruiting violations.²⁹ Despite Tarkanian's allegations of irregularities in the NCAA investigation,³⁰ the Court in effect permitted the NCAA to operate as a private government, conducting hearings under its own rules and inflicting punishments of its own device on conduct that violated no governmental standard.³¹

Eleven years before the *Tarkanian* decision, the Court had found no violation of due process when a school teacher inflicted corporal punishment on a student.³² Similarly, the Supreme Court held in a 1976 case that the Free Exercise Clause of the First Amendment prevents state courts from applying their own law in such a way as to overturn the decision of an ecclesiastical court dealing with an internal factional dispute over control of church assets.³³ Organized groups such as unions, trade associations, and condominiums are empowered to impose penalties such as fines and suspensions; banks may fine their customers for bouncing checks. Legally pro-

27. See Galanter, *Justice in Many Rooms*, *supra* note 2, at 163-64 (noting that some of these indigenous legal orders are relatively independent, but others rely on state law as models and to support their enforcement processes); Macaulay, *supra* note 11, at 449-54 (noting distinct nature of public government and private organizations and arguing that private organizations seek guidance from these official state entities).

28. 488 U.S. 179 (1988).

29. *NCAA v. Tarkanian*, 488 U.S. 179, 199 (1988).

30. See *id.* at 187-88 (noting Tarkanian's allegations against NCAA, which included deprivation of liberty and property without due process).

31. See *id.* at 183 (asserting that powers of NCAA include ability to conduct investigatory hearings and impose penalties). The Supreme Court's permissiveness is institutionalized in a recent Texas statute making it a civil offense to violate the rules of the NCAA. TEX. CIV. PRAC. & REM. CODE ANN. § 131.001-.008 (West Supp. 1993); see Peter H. Frank, *Texas Enacts Law To Curb Cheating*, N.Y. TIMES, June 22, 1987, at C5 (reporting that college boosters who violate NCAA rules prohibiting payment of athletes could be sued by "schools and athletic conferences . . . for damages in the amount of the revenue from ticket sales and television rights that was lost because of sanctions imposed by the N.C.A.A.").

32. See *Ingraham v. Wright*, 430 U.S. 651, 677-78 (1977) (noting that despite some cases of extreme physical abuse, corporal punishment in school system was justified and did not significantly threaten substantive rights of students).

33. See *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-25 (1976) (reversing Illinois Supreme Court decision that rejected right of religious organizations to establish their own rules and regulations).

tected rights of property, contract, association, and privacy can be deployed to establish what are in effect private systems of criminal justice. The relative autonomy of these systems is protected by the resource limitations, overcommitment, and reactivity of official legal institutions.³⁴ Legal remedies, where available, are expensive; group sanctions, entrenched by legal support or inertia, are often too formidable to challenge.

At the border between these indigenous controls and the legal system is the institution of arbitration. Indigenous forums may secure legal enforceability by using the forms of arbitration. The law enforces the undertakings of parties to submit their disputes to arbitrators, and it enforces the decisions of these arbitrators, permitting challenges only on limited grounds such as fraud or lack of authority.³⁵ Some courts do not permit arbitrators to make explicitly punitive awards,³⁶ but the trend is to allow such punitive awards.³⁷

All of these examples illustrate a familiar phenomenon: the formal legal system grants franchises to other authorities to issue regulations and enforce them punitively. These institutions may be

34. Cf. Macaulay, *supra* note 11, at 449-50 (noting that organizations often self-regulate to ward off public regulation and that in some cases, states encourage private regulation by statutorily providing that certain organizations may self-regulate).

35. See *Grissom v. Greener*, 676 S.W.2d 709, 711 (Tex. Ct. App. 1984) (recognizing that in arbitration agreements where both parties have waived their rights to appeal, judicial review will still be permissible in such areas as fraud, mistake, or misconduct).

36. See, e.g., *Barbier v. Shearson Lehman Hutton Inc.*, 948 F.2d 117, 122 (2d Cir. 1991) (reversing district court and holding that arbitrator could not award punitive damages as matter of law); *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793, 794 (N.Y. 1976) (prohibiting arbitrator from awarding punitive damages, even if agreed upon by parties); see also Donald L. Carper, *Punitive Damages in Commercial Arbitration*, 41 ARB. J. 27, 37 (1986) (discussing controversy in allowing punitive damages in arbitration cases and issues such as expertise of arbitrator to assess appropriate level of punitive damages); Thomas J. Stipanowich, *Punitive Damages in Arbitration: Garrity v. Lyle Stuart, Inc. Reconsidered*, 66 B.U. L. REV. 953, 959 (1986) (arguing that *Garrity* doctrine may frustrate goals of fairness in arbitration cases and underscoring role punitive damages may play in deterring wrongful conduct).

37. See, e.g., *Raytheon Co. v. Automated Business Sys.*, 882 F.2d 6, 9 (1st Cir. 1989) (holding that arbitration clause in contract gave arbitral panel power to award punitive damages); *Bonar v. Dean Witter Reynolds*, 835 F.2d 1378, 1387-89 (11th Cir. 1988) (affirming power of arbitrators to award punitive damages although court remanded case for new hearing on punitive damages issue). The court in *Raytheon* noted that the authority for granting punitive awards was found in contractual provisions providing that arbitration be conducted according to the rules of the American Arbitration Association (AAA), which provided that arbitrators may "grant any remedy or relief which is just and equitable and within the terms of the agreement of the parties." *Raytheon*, 882 F.2d at 9 (quoting AAA rule 42). Similarly, an arbitrator's award of treble damages in a RICO case has been upheld. See *Kerr-McGee Refining Corp. v. Triumph Tankers, Ltd.*, 924 F.2d 467, 470 (2d Cir. 1991) (noting that arbitrators may treble award if pattern of offensive behavior includes misconduct); *Baker v. Sadick*, 208 Cal. Rptr. 676, 682 (Ct. App. 1984) (concluding that where punitive damages may be sought in state court, they may also be sought under arbitration clause); *Rodgers Builders, Inc. v. McQueen*, 331 S.E.2d 726, 732 (N.C. Ct. App. 1985) (holding that language of arbitration clause is broad enough to include any claims related to breach, regardless of characterization of claim as tort or contract); *Grissom*, 676 S.W.2d at 711 (holding that arbitrator's award of punitive damages as penalty for tortious conduct did not violate public policy).

governmental, but, as we have seen, they are often private. The courts or other agencies issue "regulatory endowments": grants of authority to promulgate and punitively enforce their own rules.³⁸ Regulatory endowments are the formal legal system's charters of authority to private governments.

II. PUNISHMENT IN PRIVATE LAW

A. *Punitive Lawsuits*

Generally, American civil law views its remedial purposes as distinct from punishment. Damages generally are supposed to be proportional to harm or loss.³⁹ The law frowns on forfeitures because their effect may be to penalize.⁴⁰ Parties may stipulate to liquidated damages in cases of breach of contract, but such stipulation is invalid if it constitutes a penalty.⁴¹ In short, the law is hostile to carrying out the parties' contractual scheme to punish the breaching party.

The disassociation of damage awards from punishment is compromised by the association of liability with fault or wrongdoing on the defendant's part. Popular linguistic usage bears eloquent witness to the association of civil litigation with punishment. The word "guilty" is frequently used to describe a finding of liability;⁴² civil defendants are "accused" and those not liable are "innocent."⁴³ Even professionals occasionally slip into these usages.⁴⁴ Sophisticated business people react to being sued as accusation of a crime.⁴⁵

38. See Galanter, *Justice in Many Rooms*, *supra* note 2, at 155 (originating term).

39. CHARLES T. MCCORMICK, *ON THE LAW OF DAMAGES* § 20, at 85-87 (1935).

40. See RESTATEMENT (SECOND) OF CONTRACTS § 227 (1981) (noting courts' preference to interpret law so as to avoid forfeiture).

41. See U.C.C. § 2-718(1) (1987) (providing that fixing unreasonably large punitive damages as penalty is void); RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (1981) (stating that reasonable liquidated damages should be awarded in light of anticipated or actual loss caused by breach of contract). The test of reasonableness is approximation of actual (or anticipated) damages. See *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284, 1288 (7th Cir. 1985) (ruling that liquidated damages clause is void as penalty where clause would afford plaintiff several times profit it would have gained if there was no breach). The court in *Lake River* specifically noted the "deep . . . hostility to penalty clauses . . . in the common law." *Id.*

42. See Nick Ravo, *Who's Hustling Whom? A Paul Newman Court Drama*, N.Y. TIMES, June 16, 1988, at B1 (reporting on breach of contract suit against Paul Newman in dispute arising from his salad dressing business, and quoting Newman as complaining, "When you have to plead innocence and you're not guilty, that's degrading.").

43. Cf. RICHARD DANZIG, *THE CAPABILITY PROBLEM IN CONTRACT LAW* 22 (1978) (quoting juror in malpractice case who told interviewer, "I voted no negligence because there was no criminal act").

44. See Harry E. Figgie, Jr., *Football Faces a 100-Yard Loss*, N.Y. TIMES, Oct. 9, 1988, § 4, at 23 (stating that corporate CEO writing about product liability suit reported that "a not guilty verdict was rendered by the jury").

45. See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 61 (1963) (discussing hesitancy of businesspersons to use legal sanctions because of criminal stigma and need for "give-and-take" approach in business transactions). In

The more familiar "crime and punishment" is used as a metaphor to structure understanding of the less familiar civil process.⁴⁶ In formal professional understanding, civil law is guided by a notion of restitution, where wronged parties are given "what is theirs" or are "made whole"; they get "good for bad" and recompense in proportion to their unjust deprivations. But popular understanding has not learned to disregard the other side of civil justice that, like the criminal process, inflicts harm on the wrongdoing party, "bad for bad."⁴⁷

Punishment infiltrates the professional understanding, too, through the concept of deterrence. In tort and contract law, liability is determined and damages assessed with an eye toward affecting the behavior of the defendant and those similarly situated. Thus, even though damages are labeled as compensatory, the focus is not entirely on the victim's loss, but also on the conduct of potential wrongdoers. The "good for bad" compensation paradigm, where the victim receives recompense ("good") in proportion to the earlier injury ("bad"), is overlaid by a "bad for bad" paradigm. The assessment of damages ("bad") against the defendant is calibrated to prevent future wrongdoing ("bad"), or so it is often believed. Once the focus is on the offender, we are approaching the notion of punishment, at least in its weak, instrumental sense.

The punishment theme is allowed open expression in the award of punitive or "exemplary" damages. Punitive damages have close cousins in statutes that provide for the award of enhanced damages such as double or treble the actual damages suffered by the plaintiff. For example, the Clayton Antitrust Act provides treble damages to plaintiffs injured by antitrust violations.⁴⁸ The Racketeer Influenced and Corrupt Organizations Act also provides treble damages to plaintiffs injured by racketeering activity,⁴⁹ a term that includes some as yet undetermined sector of fraudulent and predatory business activities.⁵⁰ Cutting across all civil litigation is a new system of

an episode of *The Bob Newhart Show* (CBS television broadcast, Dec. 10, 1984), the hero, sued for plagiarism, is found "not guilty" after a proceeding replete with criminal imagery.

46. On the structuring roles of metaphors, see ROBERT FOGELIN, *FIGURATIVELY SPEAKING* 78-86 (1988); see also Stephen L. Winter, *Transcendental Nonsense, Metaphoric Reasoning and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1115 (1989) (asserting that human knowledge comes from real world experience but is expanded indirectly by metaphor and idealized cognitive models).

47. Unlike the criminal process, this harm to the wrongdoer is not in proportion to the badness of his or her act, but to the loss of the victim. Cf. DAN B. DOBBS, *ON THE LAW OF REMEDIES* § 3.9, at 208-10 (discussing relation of punitive damages to compensable loss or harm suffered by plaintiff).

48. 15 U.S.C. § 15(a) (1988).

49. 18 U.S.C. § 1964(c) (1988).

50. See 18 U.S.C. § 1961(1)(A) (1988) (defining racketeering activity as any act or threat

civil punishments for misconduct in that litigation itself, mandated by rule 11 of the Federal Rules of Civil Procedure.⁵¹

Before proceeding to discuss punitive damages, we want to emphasize that the legal line between punitive damages and compensatory damages does not accurately demarcate the presence of motives or perceptions of punishment. Ordinary compensatory damages may be pursued for purposes of vengeance, retribution, or vindication.⁵² This point underlies the usually facetious folk usage, "I'll sue him for everything he's got," as well as the witticism, "The best revenge is suing well." It is revealed in an array of real-life embodiments of these tropes, which shift the focus from appropriate compensation of the victim to appropriate injury to the wrongdoer.

- After one of his killers was convicted of murder, the mother of a young black man killed by members of the Ku Klux Klan filed a civil suit against the Klansmen.⁵³ She said the motive was neither money nor revenge but solely "to prove that 'Michael did no wrong.'"⁵⁴ For her lawyers, however, it was another step in their campaign to "finish . . . off the Klan through civil litigation."⁵⁵ She won a \$7 million verdict and judgment in a civil suit, leading to seizure of the Klan's headquarters building, garnishment of the wages of the individual defendants, and further criminal indictments.⁵⁶

- A Texas lawyer brought suit against the drunk driver who killed a friend's son and was awarded a default verdict of \$35 million, of which \$20 million was denominated punitive damages.⁵⁷ The lawyer commented, "I did this strictly for the purpose of punishing the guy. . . . I just didn't think two years in prison was enough. . . . I'm sick and tired of seeing the criminals serve their six

that may involve murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in drugs).

51. See FED. R. CIV. P. 11 (imposing sanctions on lawyers and/or clients for frivolous motions and filings). See generally THOMAS E. WILLGING, *THE RULE 11 SANCTIONING PROCESS* 169-77 (1988). Rule 11 is an instance of "indigenous" criminal law that resembles that in other workplace settings but is distinctive because it is administered by judges and is entwined with maneuvering about other civil punishments.

52. See, e.g., RANDALL P. BEZANSON ET AL., *LIBEL LAW AND THE PRESS: MYTH AND REALITY* 79 (1987) (citing survey of libel plaintiffs in which 29.4% gave punishment and vengeance as reasons for bringing suit).

53. Jesse Kornbluth, *The Woman Who Beat the Klan*, N.Y. TIMES MAG., Nov. 1, 1987, at 26, 27.

54. *Id.* at 27.

55. *Id.* at 34.

56. *Id.* at 26, 30.

57. Gary Taylor, *Does a \$35M Verdict Prove a Point?*, NAT'L L.J., Dec. 29, 1986-Jan. 5, 1987, at 3, 58.

months while the victim lives with it forever.”⁵⁸

- Residents of a small Illinois town pursued “economically irrational” contract claims not for gain but for vindication and punishment.⁵⁹

- A \$10.5 billion verdict won by Pennzoil against Texaco was compensatory, but clearly involved an element of punishing Texaco for unfair business practices.⁶⁰

Conversely, punitive damages may be regarded as compensating for lawyers’ fees or some otherwise uncompensated distress or, as we shall argue below, as providing adequate incentive for victims or their lawyers to pursue the matter.⁶¹ Even though punitive damages are an imperfect indicator of the presence of civil punishment, they are the most visible and clearly legitimated manifestation of that principle. Hence, the incidence of and discourse about punitive damages provides an opportunity to observe the punishment theme at work in the civil law.

B. Demythologizing Punitive Damages

In the United States, punitive damages are permitted in all but four states.⁶² Punitives can be awarded only when there is a showing of some element of aggravation beyond that ordinarily necessary for civil recovery, such as malice, gross negligence, or reckless disregard.⁶³ Although judges may award punitive damages,⁶⁴ punitive

58. *Id.*

59. See David M. Engel, *Legal Pluralism in an American Community: Perspectives on a Civil Trial Court*, 1980 AM. B. FOUND. RES. J. 425, 452 (reporting example of one man who had filed lawsuits claiming as little as five dollars because he felt it was important for other individuals not to breach their oral contracts).

60. See Debra Whitefield, *The Trial: Tactics Irk an ‘Ordinary’ Jury*, L.A. TIMES, Jan. 19, 1986, at 1 (reviewing 24,445 pages of trial transcript to determine how jury arrived at damages figure and concluding that \$7.53 billion represented actual damages, amount it would cost Pennzoil to replace one billion barrels of oil it lost in Getty transaction, and \$3 billion in punitive damages awarded to Pennzoil mainly due to Texaco’s “double-crossing”).

61. See *infra* note 260 and accompanying text.

62. See LA. CIV. CODE ANN. art. 3546 (West Supp. 1993) (prohibiting award of punitive damages); MICH. COMP. LAWS § 600.2911 (1991) (prohibiting recovery of punitive damages in action for slander and libel, unless defendant fails to publish retraction within reasonable time); N.H. REV. STAT. ANN. § 507:16 (Supp. 1991) (outlawing recovery of punitive damages in any action, unless otherwise provided by statute); *Abel v. Conover*, 104 N.W.2d 684, 689 (Neb. 1960) (interpreting state constitution, NEB. CONST. of 1875, art. vii, § 5, as preventing punitive damages awards).

63. See DOBBS, *supra* note 47, § 3.9, at 205 (noting that defendant’s mental state, rather than his or her outward conduct, often justifies award of punitive damages). The mental state required for an award of punitive damages has been described as malicious, evil, or displaying wanton misconduct. *Id.*

64. See Amy D. Marcus & Milo Geyelin, *Lawyers Told To Pay \$10 Million Damages*, WALL ST. J., Mar. 20, 1991, at B5 (reporting that California judge awarded \$10 million punitive damages and \$1.185 million compensatory damages against two plaintiffs’ lawyers for fraud in toxic waste litigation).

awards are closely associated with the institution of the jury trial.⁶⁵

Generally speaking, there is no fixed limit on the amount of punitive damages that can be awarded; the usual doctrinal requirements are that the amount should not be disproportionate to the compensatory damages⁶⁶ and should be commensurate with the defendant's acts⁶⁷ and wealth.⁶⁸ Obviously, these considerations give a great deal of discretion to the decisionmaker. One court that carefully examined a set of prior cases in hopes of extracting a formula frankly conceded that "[i]nstead of making a mathematical breakthrough we discovered what everyone probably already knows: the formula does not exist. And we have concluded, that is properly so."⁶⁹

Jury awards are reviewed by judges. Trial judges and appellate courts tend to reduce large punitive awards, so that the amounts actually collected are far less than those awarded by juries.⁷⁰ Perhaps the most famous example, and one to which we shall return, is the \$125 million punitive damages award in *Grimshaw v. Ford Motor*

65. See DOBBS, *supra* note 47, § 3.9, at 218-19 (noting that punitive damages are left entirely to discretion of jury with limited review of excessive awards by judge).

66. See, e.g., COLO. REV. STAT. § 13-21-102 (1987 & Supp. 1991) (limiting punitive damages to amount of compensatory damages but allowing court discretion to raise punitive damages up to three times amount of compensatory damages); CONN. GEN. STAT. ANN. § 52-240(b) (West 1991) (capping punitive damages at twice amount of actual damages); FLA. STAT. ANN. § 768.73(1) (West Supp. 1992) (prohibiting punitive damages over three times amount of compensatory damages unless plaintiff can produce clear and convincing evidence to award otherwise); OKLA. STAT. ANN. tit. 23, § 9 (West 1987) (requiring punitive damages to be no greater than actual damages unless court determines that conduct in question was done with "wanton" disregard for others); TEX. CIV. PRAC. & REM. CODE ANN. §§ 41.007-.008 (West Supp. 1993) (stating that punitive damages are limited to either four times amount of actual damages or \$200,000, unless conduct involved malice or intentional tort); see also DORSEY D. ELLIS, JR., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 58 (1982) (noting that some jurisdictions use "reasonable relationship" approach, which means that punitive awards should not greatly exceed compensatory awards). Ellis criticizes the reasonable relationship approach as a crude measurement of any egregious conduct on the part of the defendant. Ellis, *supra*, at 58. We also criticize this approach in part III, *infra*.

67. See, e.g., OKLA. STAT. ANN. tit. 23, § 9 (West 1987) (providing that statutory limitations on punitive damages do not apply where defendant acts with "wanton" disregard for others); TEX. CIV. PRAC. & REM. CODE ANN. §§ 41.007-.008 (West Supp. 1993) (providing that statutory limitations on punitive damages do not apply where defendant acts with malice or commits intentional tort).

68. See, e.g., KAN. STAT. ANN. § 60-3701(e)-(f) (Supp. 1991) (limiting punitive damages to lesser of defendant's highest gross income for five-year period preceding wrongful conduct or \$5 million unless court finds that it is still profitable for defendant to engage in wrongful conduct, in which case damages cannot exceed 1.5 times profitability); see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 15 & n.76 (5th ed. 1984) (confirming widely accepted practice of considering evidence of defendant's wealth when determining appropriate level of damages to adequately punish defendant for his or her conduct).

69. *Devlin v. Kearney Mesa AMC/Jeep/Renault*, 202 Cal. Rptr. 204, 209 (Ct. App. 1984).

70. See *infra* notes 75-79 and accompanying text (discussing incidence of remittitur).

*Co.*⁷¹ In *Grimshaw*, the jury held against the Ford Motor Company for fitting Pinto automobiles with poorly designed gas tanks and then failing to recall the cars for an \$11 modification after analysis showed that the costs of the recall outweighed the benefits by \$100 million.⁷² In addition to \$2.8 million in compensatory damages awarded to a 20-year-old burned over 80% of his body, the jury in *Grimshaw* assessed punitive damages amounting to the money Ford had saved by postponing gas tank modifications, plus interest.⁷³ The judge subsequently reduced the punitive award to \$3.5 million.⁷⁴

Because judges often overturn or reduce high punitive awards, parties who have won them often relinquish them in part to preserve a portion of their victory. A study of the post-award process in two counties reported that in the sixty-eight cases on which data could be generated, awards were reduced in thirty-two.⁷⁵ In twenty-one of these cases, there was a settlement between the parties; in eleven, there was a post-trial motion or appeal, and in one case there was a new trial.⁷⁶ The higher the award, the more likely that it would be reduced.⁷⁷ The defendants in the reduced-award cases ended up paying forty-five percent of the amount awarded by the juries.⁷⁸ Overall, defendants in all sixty-eight cases paid only fifty percent of the total amount awarded by the juries.⁷⁹

The frequency of remittitur is a noteworthy feature of the punitive damages landscape. Critics of punitive damages often point to what they regard as largely unfettered jury discretion in determining the size of awards.⁸⁰ This focus neglects the equally unfettered discretion of judges in decreasing the size of punitive awards. Judges may

71. 174 Cal. Rptr. 348 (Ct. App. 1981).

72. *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 390-91 (Ct. App. 1981).

73. *Id.* at 384-85; see also Connie Bruck, *How Ford Stalled the Pinto Litigation*, AM. LAW., June 1979, at 23, 26.

74. See *Grimshaw*, 174 Cal. Rptr. at 391 (holding that trial judge's decision to reduce punitive award was not abuse of discretion despite admission that different factfinder might have let larger award stand).

75. MARK PETERSON ET AL., THE INST. FOR CIVIL JUSTICE (RAND), PUNITIVE DAMAGES: EMPIRICAL FINDINGS 28 (1987) (reporting results from California punitive damages study); U.S. GEN. ACCOUNTING OFFICE, PRODUCT LIABILITY: VERDICTS AND CASE RESOLUTION IN FIVE STATES 46 & tbl. 3.7 (1989) [hereinafter GAO REPORT] (documenting that judges reduced punitive damages awards in 29% of studied product liability cases).

76. PETERSON ET AL., *supra* note 75, at 28.

77. PETERSON ET AL., *supra* note 75, at 28.

78. PETERSON ET AL., *supra* note 75, at 28.

79. PETERSON ET AL., *supra* note 75, at 28; see also MICHAEL RUSTAD, THE ROSCOE POUND FOUNDATION, DEMYSTIFYING PUNITIVE DAMAGES IN PRODUCTS LIABILITY CASES: A SURVEY OF A QUARTER CENTURY OF TRIAL VERDICTS, 27 (1991) [hereinafter RUSTAD, DEMYSTIFYING PUNITIVE DAMAGES] (noting that in 1970s and 1980s, appellate courts reversed or remitted punitive awards in over half of all product liability cases they reviewed).

80. See KENNETH R. REDDEN, PUNITIVE DAMAGES § 2.4, at 34 (1980) (noting criticism of

exercise the remittitur power responsibly; then again, in some cases they may be exhibiting a probusiness tilt that is just as powerful as, and no more rational than, the antibusiness tilt that critics often attribute to juries.⁸¹

Those who are affronted and alarmed by what they see as excessive litigiousness often target punitive damages as a major problem. For example, that stalwart enemy of litigation, the *Wall Street Journal*, expressing concern about the "abuses of Naderite tort lawyers," observed that "the zeal of some contingency-fee lawyers has transformed punitive damages into the major fuel of the litigation explosion."⁸² Current "tort reform" proposals include more stringent standards for awarding punitive damages, such as monetary limits and diversion of damages proceeds to the state.⁸³ Tort reformers have waged a media battle in forums ranging from the *National Enquirer*⁸⁴ to *Science*,⁸⁵ in addition to an ambitious litigation campaign that includes *Browning-Ferris*, *Haslip*, *TXO Production*, and other cases.⁸⁶ One corporate counsel predicted: "'We're going to keep throwing the challenges up there until one of them sticks.'" ⁸⁷

Contemporary tort reformers argue that "[w]hen coupled with

juries for using subjective criteria rather than objective calculation to arrive at punitive award figure).

81. Cf. *id.* § 2.4(B), at 35-36 (noting reluctance of some judges to award punitive damages against employer for actions of employee because judges feel deterrence factor is misdirected).

82. *Constitution vs. Tort Crisis*, WALL ST. J., Dec. 9, 1987, at 38; L. Gordon Crovitz, *Absurd Punitive Damages Also 'Mock' Due Process*, WALL ST. J., Mar. 14, 1990, at A19.

83. See *supra* note 6 (setting forth proposals to limit punitive damages awards); see also Comment, *An Economic Analysis of the Plaintiff's Windfall from Punitive Damage Litigation*, 105 HARV. L. REV. 1900, 1911 (1992) (proposing to reform punitive damages by requiring defendant to pay portion of punitive damages award into state fund); *infra* note 201 (citing state statutes adopting this proposal).

84. See Thomas P. Ramirez, *Outrageous Reasons People Sue*, NAT'L ENQUIRER, July 11, 1989, at 4 (noting that source of information for article "was provided by the American Tort Reform Association, Washington, D.C., an organization that's working to reform the legal system and cut down the number of unreasonable lawsuits being filed").

85. See Richard J. Mahoney & Stephen E. Littlejohn, *Innovation on Trial: Punitive Damages Versus New Products*, 246 SCIENCE 1395, 1395 (1989) (criticizing large punitive damages awards because they frighten big business into withdrawing products from market and restricting research and development). The authors are the CEO and public affairs director of Monsanto Company. Civil Justice Memorandum from the Manhattan Institute for Policy Research (Mar. 26, 1990) (on file with David Luban). Reprints of the article were circulated in a mass mailing by the Manhattan Institute for Policy Research, accompanied by a cover letter by Peter Huber, a major critic of current product liability law. *Id.*

86. See, e.g., *Eichenseer v. Reserve Life Ins. Co.*, 894 F.2d 1414, 1422 (5th Cir. 1990) (declaring punitive damages award unconstitutional because it violated prior notice requirement of due process); *George v. International Soc'y for Krishna Consciousness*, 262 Cal. Rptr. 217, 257 (Ct. App. 1989) (reducing punitive damages award to one-tenth amount awarded by jury).

87. Stephen Wermiel, *Supreme Court Shows Interest in Debate on Limiting Damage Awards in Civil Suits*, WALL ST. J., Jan. 5, 1988, § 2, at 27 (quoting George Frazza, general counsel of Johnson & Johnson).

strict liability, huge punitive damage awards are the greatest cause of legal uncertainty for innovators."⁸⁸ They paint a picture in which punitive awards are rising astronomically in number and amount in the areas of tort and product liability, particularly in strict liability matters. Plaintiffs' lawyers, in this picture, capitalize on the irrationality and pro-plaintiff attitudes of juries, which arise from the anti-corporate tilt of the less educated.

All these perceptions, however, are myths. Only a small proportion of punitive awards arise in strict liability cases,⁸⁹ and the rate of punitive awards in personal injury cases is minuscule.⁹⁰ The surge in punitive damages awards has been most marked in the business and contracts areas, reflecting in part a general increase in litigation by corporate and business plaintiffs.⁹¹ The propensity to award punitive damages appears to be independent of pro-plaintiff attitudes among jurors.⁹² Moreover, evidence suggests that the proportion of the general public favoring punitive damages is greater among the educated than among the less educated and greater still among corporate executives and risk managers.⁹³

1. *The incidence of punitive damages*

How often are punitive damages awarded? Stephen Daniels and Joanne Martin traced the incidence of jury awards of punitive damages in the state courts of forty-two counties in ten states in the early 1980s.⁹⁴ They found that overall, some 4.5% of the 23,129 reported verdicts in cases seeking money damages included a punitive award, and 8% of the verdicts in which plaintiffs were successful included a punitive award.⁹⁵ Almost half, or 49.4%, of these punitive damages awards were in intentional tort cases;⁹⁶ 31.7% were in

88. Mahoney & Littlejohn, *supra* note 85, at 1396.

89. PETERSON ET AL., *supra* note 75, at 11.

90. See, e.g., PETERSON ET AL., *supra* note 75, at 12 (noting that in California study, punitive damages were only awarded in one to two percent of personal injury trials during 1980s).

91. See *infra* notes 121-37 and accompanying text (discussing evidence of increased commercial litigation).

92. See *infra* notes 111-12 and accompanying text (discussing negative correlation between incidence of punitive damages and jury tendencies to find for plaintiff).

93. See *infra* notes 141-42 and accompanying text (discussing Gallup survey results).

94. STEPHEN DANIELS & JOANNE MARTIN, EMPIRICAL PATTERNS IN PUNITIVE DAMAGE CASES: A DESCRIPTION OF INCIDENCE RATES AND AWARDS 2 (American Bar Foundation Working Paper No. 8705, 1987) [hereinafter DANIELS & MARTIN, EMPIRICAL PATTERNS]; see also Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 28-33 (1990) [hereinafter Daniels & Martin, *Myth and Reality*] (analyzing expanded data base of 25,627 jury trials in 47 counties in 11 states for the years 1981-1985, and finding that 4.9% of money damages jury trials led to award of punitive damages, some 8.8% of all cases in which plaintiffs were successful).

95. DANIELS & MARTIN, EMPIRICAL PATTERNS, *supra* note 94, at 9.

96. DANIELS & MARTIN, EMPIRICAL PATTERNS, *supra* note 94, at 11.

business/contract cases,⁹⁷ and 18.9% were in personal injury cases.⁹⁸ Because there are a very large number of personal injury cases and a much smaller number of intentional tort cases, it is not surprising that the rate of punitive damages awards was lowest in personal injury cases, at only 1.5%,⁹⁹ and highest in intentional tort cases at 22.8%.¹⁰⁰ Business/contract cases fell between those figures, with punitive damages awarded in 9.2% of all reported verdicts.¹⁰¹

Daniels and Martin's study contains the most extensive data on the incidence of punitive damages, but it should be noted that a number of other sources confirm their picture of the low frequency of punitive awards in personal injury cases generally and in product liability cases particularly. An Institute of Civil Justice study of Cook County, Illinois, and a number of California counties from 1980-1984 found punitive awards in about 1% of all personal injury verdicts.¹⁰² A study of claims closed in Texas in the mid-1980s found punitive damages awarded in 0.6% of nonmedical claims and 0.2% of medical professional liability claims.¹⁰³ William Landes and Richard Posner found punitive damages awards in about 2% of 359 reported product liability cases from the first half of the 1980s.¹⁰⁴ A study of large product liability cases closed in 1985 found that punitive damages were paid in only four of 442 claims, amounting to 0.7% of the total payments made.¹⁰⁵ Finally, Michael Rustad and

97. DANIELS & MARTIN, *EMPIRICAL PATTERNS*, *supra* note 94, at 11. This category includes "contract cases, actions based on a violation of a presumed obligation to act in good faith (e.g., business interference, insurance bad faith, tortious interference with contract), and breach of duty or professional malpractice not involving personal injury (e.g., breach of fiduciary duty, legal malpractice, financial malpractice)". *Id.* at 24 n.5.

98. DANIELS & MARTIN, *EMPIRICAL PATTERNS*, *supra* note 94, at 11.

99. DANIELS & MARTIN, *EMPIRICAL PATTERNS*, *supra* note 94, at 13. Daniels and Martin report that there were punitive awards in 2.9% of medical malpractice cases and 8.9% of product liability cases. Daniels & Martin, *Myth and Reality*, *supra* note 94, at 37-38. These are relatively infrequent types of trials, however. Malpractice verdicts were 7.5% of the total number of trials and product liability only 3.8%. *Id.* at 37.

100. DANIELS & MARTIN, *EMPIRICAL PATTERNS*, *supra* note 94, at 13.

101. DANIELS & MARTIN, *EMPIRICAL PATTERNS*, *supra* note 94, at 13.

102. See PETERSON ET AL., *supra* note 75, at 35 (presenting statistics on incidence of punitive damages awards in business/contract, intentional tort, and personal injury cases).

103. TEXAS STATE BOARD OF INSURANCE, *TEXAS LIABILITY INSURANCE CLOSED CLAIM SURVEY* 32 (1987).

104. See William M. Landes & Richard A. Posner, *New Light on Punitive Damages*, REG., Sept.-Oct. 1986, at 33, 36 (presenting data and analysis on punitive damages awards in state and federal product liability cases from 1982-1985).

105. See LAWRENCE W. SOULAR, *A STUDY OF LARGE PRODUCT LIABILITY CLAIMS CLOSED IN 1985* 18-19 (1986) (reporting that punitive damages were sought in 81 (18%) of incidents and paid in only 4 (1%), but noting that threat of large punitive damages awards can result in higher settlement value of claim). But see GAO REPORT, *supra* note 75, at 24, 29 (reporting that of 305 product liability verdicts in five states in 1983-1985, punitive damages were awarded in 23 (7.5%) of total and 16.9% of 136 cases won by plaintiffs).

Thomas Koenig conducted an exhaustive search for punitive damages awards in product liability cases in both state and federal courts. They discovered that there were many fewer punitive awards in product cases than is often assumed.¹⁰⁶ From the early 1980s (1981-1985) to the late 1980s (1986-1990), the number of known punitive damages awards in asbestos cases increased by 265% (from 20 to 73), but known awards in nonasbestos cases decreased 34% (from 119 to 78) in those same years.¹⁰⁷

Daniels and Martin found that the incidence of punitive awards differed by locality.¹⁰⁸ For example, the percentage of successful verdicts with punitive awards was 2.2% in New York, 3.2% in Illinois, 13.1% in Georgia, and 22% in Missouri.¹⁰⁹ The frequency of punitive awards was not reflected in their size.¹¹⁰ The incidence of punitive damages seems to have little to do with the tendency to find for plaintiffs or to award generous compensatory damages.¹¹¹ For example, Bronx County, New York, with the second-highest plaintiff success rate and the highest median award, had no punitive dam-

106. RUSTAD, DEMYSTIFYING PUNITIVE DAMAGES, *supra* note 79, at 23-24 (1991) [hereinafter RUSTAD, DEMYSTIFYING PUNITIVE DAMAGES]. This research was also presented in Michael Rustad & Thomas Koenig, Setting the Record Straight About Skyrocketing Punitive Damages Awards in Products Liability: An Empirical Study of the Last Quarter Century of Verdicts (June 1991) (unpublished manuscript on file with authors); see *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. 46-47 (1991) (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); Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1 (1992) (setting forth findings and defending use of punitive damages in product liability cases).

The researchers compiled data on all punitive damages awards in product liability cases on the basis of a search of "all available computer-based statistical sources, regional verdict reporters, law reviews and other scholarly sources, state products liability practice guides, generalized case-reporting services, court records, asbestos reporters, and media reports . . . [and] surveyed all attorneys in reported cases, to locate further cases." RUSTAD, DEMYSTIFYING PUNITIVE DAMAGES, *supra*, note 79 at 42. They located a total of 355 punitive damages verdicts in state and federal courts. *Id.* at 23.

Despite the admirable thoroughness of these researchers, no doubt they missed some punitive damages awards. But because their method made it more likely that cases would be missing in the earlier period than in the later, the reliability of their trend data is strengthened rather than weakened by the missing data.

107. RUSTAD, DEMYSTIFYING PUNITIVE DAMAGES, *supra* note 79, at 25.

108. See DANIELS & MARTIN, EMPIRICAL PATTERNS, *supra* note 94, at 8-9 (describing wide variations among sites in terms of incidence of punitive damages, although rates for different counties within single state remain within well-defined range).

109. DANIELS & MARTIN, EMPIRICAL PATTERNS, *supra* note 94, at 9.

110. See DANIELS & MARTIN, EMPIRICAL PATTERNS, *supra* note 94, at 10-11 (reporting calculation of median punitive award in 17 sites where there were more than 10 punitive awards). Daniels and Martin found a range of medians from \$5570 in Johnson County, Kansas to \$108,000 in Sacramento County, California. *Id.* at 10. Six counties have medians over \$30,000; five have medians below \$20,000. *Id.* Daniels and Martin do not separate award levels by case types.

111. DANIELS & MARTIN, EMPIRICAL PATTERNS, *supra* note 94, at 8-9.

ages verdicts whatsoever.¹¹²

This is not to deny that punitive damages, particularly multiple punitive damages in mass tort cases, can have powerful effects. In considering the impact of punitive damages, we should recall that full-blown trials leading to verdicts occur in only a small minority of cases. Most cases settle.¹¹³ The threat of multiple punitive damages can be a major factor in settlement. Thus, in the litigation arising from the Buffalo Creek mine dam disaster, the possibility of punitive damages loomed large in the plaintiff's investigatory strategy and in the settlement negotiations.¹¹⁴ In air crash disasters, plaintiffs' agreements not to seek punitive damages are often the quid pro quo for defendants not to contest liability.¹¹⁵ The threat to defendants is aggravated by the fact that punitive damages are often not covered by insurance and may even jeopardize the coverage of the compensatory portion of the award.¹¹⁶

The potency of multiple punitive damages, awarded or threatened, as a scourge of corporate wrongdoing was dramatically demonstrated in the cases of the Manville Corporation, the leading American asbestos manufacturer, and A.H. Robins, a pharmaceutical company that manufactured the Dalkon Shield, an intrauterine device that caused an immense swath of injuries. In each case a major corporation went into bankruptcy in anticipation of a flood of product liability verdicts with an increasing punitive component.¹¹⁷

112. DANIELS & MARTIN, *EMPIRICAL PATTERNS*, *supra* note 94, at 8.

113. The oft-cited figures of 85, 90, or 95% settlements are misleading: they represent the portion of civil cases that do not go to trial, but a significantly larger number of cases may be disposed of by authoritative decisions in other ways than trial. See HERBERT KRITZER, *THE LAWYER AS NEGOTIATOR: WORKING IN THE SHADOWS* 12-13 (U. Wis. Disputes Processing Research Program Working Paper No. 4, 1986) (analyzing some 1649 cases in federal and state court in five localities and finding that although only 7% terminated through trial, another 24% terminated through some other form of adjudication (arbitration, dismissal on the merits) or ruling on significant motion that led to settlement).

114. GERALD M. STERN, *THE BUFFALO CREEK MINE DISASTER* 68, 87, *passim* (1976).

115. See Roy J. Harris, Jr., *Insurers Now Settle Faster, More Cheaply After Big Air Crashes*, WALL ST. J., July 11, 1980, at 1 (discussing defendant airlines' strategy of conceding liability if plaintiff agreed not to file for punitive damages in cases arising from crashes in Paris (1974), Canary Islands (1977), San Diego (1978), and Chicago (1979)); Andrew Wolfson, *Air Crash Lead Counsel Named*, NAT'L L.J., July 7, 1986, at 3, 30 (discussing Arrow Air's offer not to contest liability for compensatory damages in connection with Gander, Newfoundland disaster if plaintiff waives claim to punitive damages).

116. See Ellis, *supra* note 66, at 71 (discussing insurability of punitive damages and noting that courts are split over issue, with some holding that insurability defeats public policy purposes of retribution and deterrence, while others hold that those assessed punitive damages will be punished and deterred by higher insurance premiums).

117. See RONALD J. BACIGAL, *THE LIMITS OF LITIGATION* 37-39 (1990) (stating that at time of A.H. Robins' bankruptcy petition, 11 juries had awarded \$24.8 million in punitive damages and more than 5000 Dalkon Shield cases remained unresolved); John Riley, *The Manville Settlement: Pressure Percolating*, NAT'L L.J., Aug. 19, 1985, at 30, 32 (citing protection from punitive damages award as significant reason for Manville's bankruptcy petition).

Punitive damages were awarded with increasing frequency and in increasing amounts.¹¹⁸ In each instance, management lost control of the company: Manville emerged from bankruptcy in the control of a trust for the asbestos victims,¹¹⁹ and the Robins discharge involved acquisition of the company.¹²⁰ Unlike administrative regulation, civil lawsuits seem to have the capacity to deliver a kind of corporate "capital punishment."

2. *Business-driven punitive damages*

There appears to be a marked increase in the number and size of punitive damages awards in business cases.¹²¹ A study that traced jury awards in two large urban counties, Cook County, Illinois, and San Francisco County, California, in the period 1960-1984¹²² found that in Cook County, 5% of business/contract trials during the period 1960-1979 led to punitive damage awards; in the period 1980-1984, that figure rose to 7%.¹²³ In San Francisco, 11% of business/contract trials during the period 1960-1979 led to punitive awards; in the period 1980-1984, that figure rose to 20%.¹²⁴ Because defendants won in some cases, the portion of business/contract cases with compensatory awards in which there was a punitive award was higher: in the most recent period, 11% in Cook County and 32% in San Francisco County.¹²⁵ Not only were there numerically more punitive awards, but also there was a dramatic upward trend in the size of punitive awards in these business/contracts cases. In Cook County the average award in constant 1984 dollars rose from a me-

118. See Riley, *supra* note 117, at 32 (noting that early Manville cases did not have punitive damages awards but that gradually such awards began to appear); see also BACIGAL, *supra* note 117, at 39 (noting that, projected from initial awards, A.H. Robins would have been subject to billions of dollars of punitive damages liability).

119. See Riley, *supra* note 117, at 32 (discussing creation of Manville trust to administer future claims by asbestos victims, and noting impact of trust on management, operations, and financial obligations of company).

120. See BACIGAL, *supra* note 117, at 111-14 (discussing American Home Products Corporation's acquisition of A.H. Robins and its impact on settlement of Dalkon Shield claims).

121. A similar increase of punitive damages in commercial arbitration awards seems to be taking place. Telephone Interview with Robert Coulson, President, American Arbitration Association (May 6, 1991); see Richard B. Schmitt & Milo Geyelin, *Latham & Watkins To Settle Suit Against It*, WALL ST. J., May 9, 1991, at B6 (reporting that arbitration panel of Philadelphia Stock Exchange ordered Dean Witter to pay \$500,000 in punitive damages to client in "another case of increased use of punitive damages in securities cases"); see also *supra* note 37 (listing cases in which arbitrator's awards of punitive damages were upheld).

122. PETERSON ET AL., *supra* note 75, at 8-31.

123. PETERSON ET AL., *supra* note 75, at 11 tbl. 2.4.

124. See PETERSON ET AL., *supra* note 75, at 11 tbl. 2.4. The percentage of personal injury trials leading to a punitive damages award in 1980-1984 was 1% in Cook County and 2% in San Francisco. *Id.*

125. PETERSON ET AL., *supra* note 75, at 11 tbl. 2.4.

dian of \$9000 in 1960-1964 to \$149,000 in 1980-1984;¹²⁶ in San Francisco the median rose from \$13,000 in 1960-1964 to \$101,000 in 1980-1984.¹²⁷ Presumably there has been a corresponding increase in the role of prospective punitive damages as a bargaining chip in settlement negotiations.

This increase in punitive damages in business and contract cases corresponds to a more general surge of business-driven litigation in the federal courts.¹²⁸ Between 1960 and 1986, torts dropped from 38% of total federal court filings to 17%, while diversity contract matters increased from 8% to 13% of total filings.¹²⁹ Contract cases in the federal courts grew at a rate of 258% during this period, while torts grew at a rate of 113%.¹³⁰ In 1986, contracts accounted for 18.7% of all federal court civil filings, the single largest category.¹³¹

Within the tort area, it is product liability cases that have impressed many as the very heart of the "litigation explosion."¹³² If one sets aside asbestos cases, however, the federal product liability category is shrinking rather than expanding. From 1985 to 1991, filings of federal asbestos personal injury product liability cases rose by 69%, but the total of all other personal injury product liability cases declined so that the number filed in 1991 was 36% lower than in 1985.¹³³

126. PETERSON ET AL., *supra* note 75, at 23 tbl. 2.10.

127. PETERSON ET AL., *supra* note 75, at 23 tbl. 2.10.

128. See Marc Galanter, *The Life and Times of the Big Six; or, The Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921, 942-46 (discussing growth of commercial litigation in federal courts between 1960 and 1986).

129. *Id.* at 927.

130. *Id.* at 942.

131. *Id.* The phenomenon becomes even more striking when one examines the amount of judicial time occupied by the different categories of federal litigation. In 1985, contract cases (excluding overpayment recovery) consumed 11.37% of total judge time, whereas diversity product liability personal injury cases occupied only 6.24% of judge time (2.38% on asbestos cases). Steven Flanders, *What Do the Federal Courts Do? A Research Note*, 5 REV. OF LITIG. 199, 206 (1986).

132. See Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 3-5 (1986) [hereinafter Galanter, *The Day After the Litigation Explosion*] (presenting editorial and corporate comments regarding "litigation explosion" and "litigious America," one of which asserted that "[p]roduct liability suits have brought a blood bath for U.S. businesses and are distorting our traditional values"); see also Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 69-71 (1983) [hereinafter Galanter, *Reading the Landscape of Disputes*] (concluding that contemporary litigation is not "eruption of pathological contentiousness" but is, instead, in keeping with earlier patterns and is in response to changing conditions, including increased power and range of injury-producing machinery and substances, increase in society's knowledge about injury causation and prevention technologies, and actors' increasing interaction with remote organizations).

133. DIRECTOR OF THE ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE (1985-1991) tbl. C 2. This drop in nonasbestos product liability filings seems to reflect changing trends in the outcome of such cases. In a

In the state courts, where the majority of civil filings occur,¹³⁴ it is more difficult to obtain a sense of overall litigation trends.¹³⁵ Available figures compare filings in courts of general jurisdiction in thirteen states for the years 1984 to 1989.¹³⁶ During that period, tort filings increased by 26.7%, contract filings increased by 21.6%, and real property rights filings increased by 44.2%.¹³⁷

3. *Who favors punitive damages?*

It might be assumed that the punitive use of the civil law is a vestige, a lag of popular morality behind legal rationality. But, confounding this, there is suggestive evidence that approval of punitive damages is associated with the more educated and economically dominant sectors of the population. A 1982 survey asked the general public and business executives whether defendants whose conduct was "so improper as to warrant a penalty . . . intended to discourage such improper conduct in the future . . . should be required to pay a penalty for improper conduct, or should the award that already fully compensates the plaintiff for the damages be adequate?"¹³⁸ Even with this soporific formulation of the question,¹³⁹ some 30% of the general public favored the awarding of punitive

pioneering study, James Henderson and Theodore Eisenberg found that after the early 1980s, plaintiffs were less successful at trial and defendants won an increasing proportion of doctrinal victories. James A. Henderson & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479, 539-43 (1990).

134. COURT STATISTICS PROJECT, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1991 xi (1993) [hereinafter 1991 STATE COURT CASELOAD STATISTICS]; see Galanter, *The Day After the Litigation Explosion*, *supra* note 132, at 6 (citing 98% figure and noting that until early 1980s, comprehensive and reliable data had not been available).

135. This is being remedied by the Court Statistics Project, a joint undertaking of the Conference of State Court Administrators, the State Justice Institute, and the National Center for State Courts, which publishes an annual report of state court caseload statistics. See, e.g., 1991 STATE COURT CASELOAD STATISTICS, *supra* note 134; COURT STATISTICS PROJECT, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1989 (1991) [hereinafter 1989 STATE COURT CASELOAD STATISTICS].

136. See 1989 STATE COURT CASELOAD STATISTICS, *supra* note 135, at 39-49 (discussing trends in tort, contract, and real property rights filings). No such direct comparison is made in the 1991 report, but separate figures show an 18% increase in tort filings (courts in 23 states) from 1985 to 1991, an 8% increase in contract filings (18 states), and a 31% increase in real property filings (20 states). 1991 STATE COURT CASELOAD STATISTICS, *supra* note 134, at 21 chart I.14, 25 chart I.16, 27 chart I.17.

137. 1991 STATE COURT CASELOAD STATISTICS, *supra* note 134, at 45.

138. GALLUP ORG., ATTITUDES TOWARD THE LIABILITY AND LITIGATION SYSTEM: A SURVEY OF THE GENERAL PUBLIC AND BUSINESS EXECUTIVES 54 (1982) [hereinafter GALLUP SURVEY]. This study was commissioned by the Insurance Information Institute. *Id.* at 1.

139. This question contains a number of biases. First, its characterization of the offending conduct as "improper" is quite mild; it does not convey any sense that the conduct in question is intentional, reckless, or otherwise reprehensible. That is, the term lacks any emotive force comparable to an account of the conduct in question. Second, the question specifies the purpose as deterrence, excluding any retributive aspect. Third, it assumes that the plaintiff is already compensated so fully that there is no irreparable loss.

damages.¹⁴⁰ In contrast, 50% of business executives and 44% of risk managers favored such awards.¹⁴¹ Among the general public, the group most favorable to punitive damages, at 39%, was the college educated.¹⁴² It is not clear just how this pattern may be explained. Perhaps better-educated groups have a clearer grasp of the deterrence function of civil damages that is highlighted by the question. The punishment theme seems to be alive and well among sections of the population that are in the ascendant.

C. *Current Challenges to Punitive Damages: Browning-Ferris, Haslip, and TXO Production*

Current challenges to punitive damages focus on the enormous discretion juries have to impose punitive awards that greatly exceed the actual damages imposed by an injurer.¹⁴³ The principle of proportionality in criminal punishment insists that we "let the punishment fit the crime," and that requires some reasonable solution to the scaling problem. The worry in the case of punitive damages is twofold: first, that jury discretion simply sidesteps the scaling problem rather than solving it, and second, that juries' own solutions impose punishments that are too harsh to fit the wrongdoing. Tort reform proposals often feature caps on punitive damages; for example, a committee of the American College of Trial Lawyers, an organization of defense lawyers, proposed that punitive damages should not exceed twice the actual damages.¹⁴⁴

In 1989, the U.S. Supreme Court decided *Browning-Ferris Industries v. Kelco Disposal, Inc.*¹⁴⁵ Kelco was an independent garbage hauler in Burlington, Vermont that established itself in competition with the only other garbage hauler in town, a subsidiary of Browning-Ferris Industries (BFI), a large Houston-based corporation.¹⁴⁶ Kelco, owned by a man named Joseph Kelley, soon attracted more than

140. GALLUP SURVEY, *supra* note 138, at 54-55.

141. GALLUP SURVEY, *supra* note 138, at 54-55.

142. See GALLUP SURVEY, *supra* note 138, at 162-63 (correlating survey responses with respondent's level of education, region of country, identification with plaintiffs or defendants, and views of media).

143. See Quayle, *supra* note 1, at 564-65 (arguing that current approach to punitive damages assessment does not restrict juries, which "continue to generate disproportionately high awards in a random and capricious manner"); Schwartz & Behrens, *supra* note 1, at 1375 (arguing that legislators should curtail unlimited discretion of juries in awarding punitive damages).

144. See ACTL REPORT, *supra* note 6, at 15 (advocating limiting punitive damages to twice amount of compensatory damages or \$250,000, whichever is greater).

145. 492 U.S. 257 (1989). For a detailed description of the litigation, see Allison Frankel, *Score One for the Little Guy*, AM. LAW., Nov. 1989, at 54-59.

146. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 260 (1989).

half the market,¹⁴⁷ and BFI responded badly. A BFI executive ordered the local franchise to put Kelley out of business, imprudently but revealingly using the expression "squish him like a bug."¹⁴⁸ BFI slashed its prices and soon won back a sizable portion of the market.¹⁴⁹ Kelco sued for predatory pricing, and the jury awarded the company \$51,000 in compensatory damages.¹⁵⁰ Presumably impressed by BFI management's "squish him like a bug" command, the jury proceeded to impose \$6 million in punitive damages on BFI.¹⁵¹

BFI appealed, claiming that punitive damages so far in excess of the compensatory damages amounted to excessive fines in violation of the Eighth Amendment's prohibition.¹⁵² The Court ruled seven to two in favor of Kelco, resting the holding, however, on relatively narrow grounds. The Court held, based on a review of British and American constitutional history, that the Excessive Fines Clause of the Eighth Amendment "does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded."¹⁵³ Thus the Court did not address the substantive question of whether punitive damages that are grossly disproportionate to compensatory damages violate principles of proportionality in punishment.

The issue resurfaced, however, in another guise. BFI had asked the Court to review the magnitude of punitive damages under the Due Process Clause of the Fourteenth Amendment as well as under the Eighth Amendment.¹⁵⁴ The Court, acknowledging that "[t]here is some authority in our opinions for the view that the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme,"¹⁵⁵ nevertheless declined to address the issue because BFI's lawyers had not raised due process concerns before either the district court or the court of appeals.¹⁵⁶ The Court

147. *Id.*

148. *Id.*

149. *Id.* at 261.

150. *Id.* at 261-62.

151. *Id.* at 262.

152. *Id.*

153. *Id.* at 264.

154. *Id.* at 276-77.

155. *Id.* at 276.

156. *Id.* at 277. This was apparently a deliberate tactical choice. See Frankel, *supra* note 145, at 59 (noting that BFI elected not to pursue due process claim because procedural due process arguments, including jury instructions on burden of proof and bifurcation of liability and damages portions of trial, did not apply, and substantive due process challenge regarding lack of standards was addressed in terms of Eighth Amendment, not Fourteenth Amendment).

implied, and Justices Brennan and O'Connor stated explicitly in their separate opinions, that a proportionality review would be appropriate if in some future case a litigant challenged punitive damages on the ground of due process rather than the Eighth Amendment.¹⁵⁷ In a 1988 case, the Court had stated that it considered the issue an "important" one and hoped that a suitable case would arise for considering it.¹⁵⁸

In 1990, the Court granted certiorari in *Pacific Mutual Life Insurance Co. v. Haslip*¹⁵⁹ to address the due process issue. Unlike the situation in *Browning-Ferris*, the facts of *Haslip* were quite idiosyncratic. Municipal employees of Roosevelt City, Alabama purchased a group health insurance policy from a Pacific Mutual insurance agent who pocketed their premiums while falsely claiming to have placed the policy.¹⁶⁰ Haslip, one of the employees, discovered what had transpired when she was hospitalized and incurred \$3500 in hospital bills.¹⁶¹ She and other employees sued Pacific Mutual for its failure to monitor the agent who perpetrated the fraud.¹⁶² The jury awarded Haslip \$1.04 million and three other employees a total of \$40,000.¹⁶³ The company claimed to have had no knowledge of the fraud,¹⁶⁴ and this fact clearly made the case an unusual one for raising the due process issue.

In *Browning-Ferris* and *Bankers Life & Casualty Co. v. Crenshaw*,¹⁶⁵ five justices (Brennan, Marshall, O'Connor, Stevens, and Scalia) had joined in opinions explicitly inviting a due process challenge to high punitive awards.¹⁶⁶ Although Justice Brennan subsequently retired and Justice Souter took no part in the *Haslip* decision, the outcome was nevertheless surprising. By a vote of seven to one, with only Justice O'Connor dissenting, the Court rebuffed the challenge to

157. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 277 (1989); *id.* at 280-82 (Brennan, J., concurring); *id.* at 283 (O'Connor, J., concurring in part and dissenting in part).

158. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828-29 (1988); *see also Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 86-89 (1988) (O'Connor, J., concurring in part) (arguing that Court should have considered argument that Mississippi's delegation to jury of "standardless discretion" to determine amount of punitive damages violates Due Process Clause of Fourteenth Amendment).

159. 494 U.S. 1065 (1990).

160. *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1036-37 (1991).

161. *Id.*

162. *Id.* at 1037.

163. *Id.*

164. *Id.* at 1040-41.

165. 486 U.S. 71 (1988).

166. *See Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 280-301 (1989) (Brennan, J. and Marshall, J., concurring); *id.* at 283 (O'Connor, J. and Stevens, J., concurring in part and dissenting in part); *Bankers Life & Casualty Co. v. Crenshaw*, 482 U.S. 71, 86-89 (1988) (O'Connor, J. and Scalia, J., concurring).

punitive damages.¹⁶⁷

The magnitude of the rebuff lay not merely in the lopsided vote, but in the Court's opinion. To determine whether the process of determining the punitive award in *Haslip* placed sufficient constraints on the jury's discretion, the Court reviewed the trial judge's instructions to the jury and found them satisfactory.¹⁶⁸ Yet, as Justice O'Connor noted bitterly in her dissent, the instructions in fact amounted to little more than "think about how much you hate what the defendants did and teach them a lesson."¹⁶⁹ The actual instruction stated: "'Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and [the] necessity of preventing similar wrong.'"¹⁷⁰ The majority's comment that "the instructions thus enlightened the jury as to the punitive damages' nature and purpose"¹⁷¹ seems almost wry in its use of the verb "enlightened." The majority opinion seemed to be a calculated effort to warn tort reformers away from further procedural due process challenges. After all, if the Court found instructions as vague as this to be adequate fetters on jury discretion, it is hard to see what would constitute unfettered discretion.¹⁷²

167. *Haslip*, 111 S. Ct. at 1036. The sympathy of Justice O'Connor with the claim that large punitive awards unconstitutionally violate proportionality seems somewhat inconsistent with the fact that she, like other conservatives on the Court, has in the past been hospitable to extremely harsh, even savage, criminal punishments. For example, in a rather notorious 1980 case, Justice Rehnquist authored a 5-4 majority opinion upholding a life sentence for a man convicted of obtaining \$120 by false pretenses. *Rummel v. Estelle*, 445 U.S. 263, 265 (1980). The man had previous convictions for an \$80 credit card fraud and passing a \$28 forged check and was sentenced on Texas's repeat-offender statute. *Id.* at 266. Justice Rehnquist argued that a life sentence for \$228 worth of petty frauds was not constitutionally excessive because the defendant would be eligible for parole in 12 years. *Id.* at 268-80. The next year, based on this precedent, the Court sustained a 40-year sentence for possession of less than nine ounces of marijuana with intent to sell. *Hutto v. Davis*, 454 U.S. 370, 370-71, 375 (1981). Two terms later, the Court finally struck down a sentence as an Eighth Amendment violation. *Solem v. Helm*, 463 U.S. 277, 303 (1983). The sentence was life without parole for a repeat offender convicted of uttering a "no account" check for \$100. *Id.* at 281-82. Justices Burger, White, Rehnquist, and O'Connor, dissented, however. Writing for the dissent, Chief Justice Burger argued that the sentence should stand because the unavailability of parole was insufficient to distinguish this case from the previous two. *Id.* at 315-17 (Burger, C.J., dissenting). Subsequently, Justice O'Connor joined a plurality holding that a mandatory sentence of life without parole for a first-offense drug possession does not violate proportionality. *Harmelin v. Michigan*, 111 S. Ct. 2680, 2701, 2709 (1991). Justice O'Connor's views of proportionality in *Solem* and *Harmelin* seem jarringly out of sync with her solicitude for defendants in punitive damages cases.

168. See *Haslip*, 111 S. Ct. at 1044 (finding that trial court's jury instructions explained that imposition of punitive damages was not compulsory and sufficiently limited jury's discretion for imposing these damages to state-approved policies of retribution and deterrence).

169. *Id.* at 1059 (O'Connor, J., dissenting).

170. *Id.* (quoting jury instruction).

171. *Id.* at 1044.

172. We do not discuss Justice Scalia's extremely provocative (and provocatively extreme) concurring opinion, in which he upholds punitive damages by stating, "I affirm that no proce-

Haslip, however, does not reach the question whether punitive damages vastly disproportionate to compensatory damages violate substantive due process: a constitutional version of the scaling problem. As this Article prepares to go to press, the Supreme Court is deliberating over this issue in the latest due process challenge to punitive damages, *TXO Production Corp. v. Alliance Resources Corp.*¹⁷³ The case represents an appeal of a decision by the Supreme Court of Appeals of West Virginia upholding a \$10 million punitive award imposed by a jury for the unusual tort of slander of title.¹⁷⁴ TXO, a subsidiary of a large Texas corporation, leased land in West Virginia from Alliance Resources for purposes of gas and oil drilling.¹⁷⁵ Then, in an intricate scheme, TXO fabricated a fictitious defect in Alliance's title to the land, apparently in order to obtain the leverage necessary to renegotiate its deal with Alliance on more profitable terms.¹⁷⁶ Confronted with TXO's frivolous action to clear the nonexistent cloud on its title, Alliance counterclaimed for slander of title, an intentional tort that, notwithstanding its obscurity, has been recognized in the common law since the sixteenth century.¹⁷⁷ At trial, Alliance's attorneys introduced evidence that frivolous title challenges were one of a number of unscrupulous business practices in TXO's habitual repertoire.¹⁷⁸ Evidently persuaded of TXO's maleficence, the jury awarded Alliance \$19,000 in compensatory damages representing its attorneys' fees in the action, coupled with the \$10 million punitive award.¹⁷⁹

The case is enlivened by an incisive Supreme Court of Appeals opinion written by Justice Richard Neely in the smart-aleck style well known to readers of his books.¹⁸⁰ After holding that "because appellant and its agents and servants failed to conduct themselves as

sure firmly rooted in the practices of our people can be so 'fundamentally unfair' as to deny due process of law." *Id.* at 1053 (Scalia, J., concurring).

173. 419 S.E.2d 870 (W. Va.), *cert. granted*, 113 S. Ct. 594 (1992).

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

175. *Id.*

176. *Id.* at 875-77.

177. *Id.* at 877.

178. *Id.* at 881-83.

179. *Id.* at 877.

180. *E.g.*, RICHARD NEELY, *HOW COURTS GOVERN AMERICA* (1981); RICHARD NEELY, *THE PRODUCT LIABILITY MESS* (1988) [hereinafter NEELY, *PRODUCT LIABILITY MESS*]; RICHARD NEELY, *WHY COURTS FAIL* (1984). Justice Neely's style may return to haunt him. The Petitioner's Reply Brief in *TXO Production* gleefully seizes on two passages from one of his books: "As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because in-state plaintiffs, their families and their friends will reelect me." Reply 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 (quoting NEELY, *PRODUCT LIABILITY MESS* 4). The second passage states: "As a state

gentlemen, we decline to enter a remittitur,"¹⁸¹ Neely notes that "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."¹⁸² Expanding on this point, he classifies post-*Haslip* punitive damages cases into three categories: those involving "(1) really stupid defendants; (2) really mean defendants; and, (3) really stupid defendants who could have caused a great deal of harm by their actions but who actually caused minimal harm."¹⁸³ In an appendix, Neely neatly tabulates sixteen recent punitive damages cases under the headings "Stupid" and "Mean."¹⁸⁴ He holds as a matter of law that for really stupid defendants "the outer limit of punitive damages is *roughly* five to one,"¹⁸⁵ while in the case of really mean defendants "even punitive damages 500 times greater than compensatory damages are not *per se* unconstitutional under *Haslip* and *Garnes*."¹⁸⁶ He adds that "[t]he appropriateness of such awards depends on what it reasonably takes to attract the defendant's attention."¹⁸⁷ As Neely elaborates this point, "[t]he higher the potential payout . . . the further up the corporate hierarchy the decision is passed. A reasonable level of punitive damages therefore increases the likelihood that settlement decisions will be made by upper management employees"¹⁸⁸ This is important, he explains, because "[t]he threat of litigation is good news to the middle management employees who make many of the day-to-day decisions for large corporations. (Litigation causes work which increases middle management job security)."¹⁸⁹ Juries send their message to really mean defendants by assessing punitive damages significant enough to dislodge the matter from "bureaucratic bungling and red tape"¹⁹⁰ in middle management and involve upper level managers "who own stock in the company or who at least feel a higher level of fiduciary duty to the stockholders."¹⁹¹

Adding to the general sense of cabaret infusing the opinion, Chief

court judge, much of my time is devoted to designing elaborate new ways to make business pay for everyone else's bad luck." *Id.* (quoting NEELY, *PRODUCT LIABILITY MESS 1*).

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

182. *Id.* at 887.

183. *Id.* at 887-88.

184. *Id.* at 894-95.

185. *Id.* at 889.

186. *Id.* "*Garnes*" refers to *Garnes v. Fleming Landfill*, 413 S.E.2d 897 (W. Va. 1991), the case in which the West Virginia Supreme Court of Appeals elaborated its version of *Haslip*'s due process standard.

187. *TXO Prod.*, 419 S.E.2d at 889.

188. *Id.* at 888.

189. *Id.*

190. *Id.* at 887 n.10.

191. *Id.* at 888-89.

Justice McHugh's concurrence castigates Neely's "cavalier attempt to be clever and amusing"¹⁹² and dismisses "the ridiculous categorization proposed by the majority in its opinion today."¹⁹³ Canvassing a variety of opinions from courts around the country, McHugh discovers that they use terms such as "conscious indifference," "reckless, willful and wanton," "particularly egregious," and "reprehensible"¹⁹⁴ rather than "really mean" or "really stupid" to describe the conduct of defendants hit with punitive awards.

Predictably, Neely's effort to couch his distinctions in plain English, coupled with McHugh's annoyed admonition that this is not how lawyers are supposed to talk, provided grist for the mill of TXO and its amici, who described the "really mean/really stupid" distinction as "essentially standardless,"¹⁹⁵ "emotion-laden,"¹⁹⁶ "purely subjective,"¹⁹⁷ "hopelessly vague,"¹⁹⁸ "outlandish,"¹⁹⁹ even "totally meaningless."²⁰⁰ (One is left to wonder why "egregious" and "reprehensible" are less subjective and more precise than "really mean" and "really stupid.")

In addition to inveighing against Neely's terminology, TXO and its amici emphasized the fact that the punitive award is more than 500 times the compensatory award, a point that is particularly noteworthy since slander of title is not the kind of tort that typically shocks the conscience. TXO and several of the amici also object to allowing jurors to hear evidence about the wealth of the defendant. The two points complement each other: TXO and its amici wish for a proportionality review of the punitive award under the Due Process Clause and believe that punitive damages should be scaled at least roughly to compensatory damages, rather than to the depth of the defendant's pockets.

Regardless of the outcome in *TXO Production*, tort reformers will undoubtedly continue their efforts in legislatures and state courts. Actually, the proportionality argument may still resurface in the Supreme Court in other guises. The Court's Eighth Amendment

192. *Id.* at 895 (McHugh, C.J., concurring).

193. *Id.* at 896.

194. *Id.* (citations omitted).

195. Brief of Petitioner at 42, *TXO Prod. Corp. v. Alliance Resources Corp.* (U.S. Jan. 22, 1993) (No. 92-479) [hereinafter Brief of Petitioner].

196. *Id.*

197. Brief for the American Council of Life Insurance et al. as Amici Curiae at 20, *TXO Prod. Corp. v. Alliance Resources Corp.* (U.S. Jan. 22, 1993) (No. 92-479).

198. Brief for the Equal Employment Advisory Council as Amicus Curiae in Support of Petitioner at 7, *TXO Prod. Corp. v. Alliance Resources Corp.* (U.S. Jan. 22, 1993) (No. 92-479).

199. *Id.* at 16.

200. *Id.* at 19.

holding in *Browning-Ferris* explicitly left open the possibility of finding the Excessive Fines Clause applicable in a case in which government, suing in a civil matter, collects punitive damages, as well as in the case of statutes (such as those enacted in several states) mandating that a portion of punitive awards be forfeited to the state.²⁰¹ In any event, the political battle over punitive damages is likely to remain vigorous, and the proportionality arguments have surely not been laid to rest.

D. *The Importance of Punitive Damages*

The next Part argues that although the principle of proportionality in punishment indeed requires limits on punitive damages, there is nothing at all excessive or improper about punitive damages that are orders of magnitude larger than the injuries actually suffered by plaintiffs. The argument is primarily philosophical, but an important practical argument must be made as well, because punitive

201. See *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275 (1989) (stating that Eighth Amendment limits steps that governments may take against individuals, including imposition of excessive monetary sanctions). If some future Court, hearing such a case, accepted BFT's argument that punitive damages grossly disproportionate to compensatory damages violate the Excessive Fines Clause of the Eighth Amendment, the road might open to an equal protection argument that juries in private lawsuits that impose very high punitive damages have acted unconstitutionally. After all, it seems anomalous to forbid government from collecting a large punitive award on proportionality grounds while permitting a private plaintiff to collect the identical award for the identical offense.

Nine states have enacted statutes allocating portions of punitive awards to the state. See COLO. REV. STAT. § 13-21-102(4) (1987) (stating that "[o]ne-third of all reasonable damages collected pursuant to this section shall be paid into the state general fund" while "[t]he remaining two-thirds of such damages collected shall be paid to the injured party") (held unconstitutional in *Kirk v. Denver Publishing Co.*, 818 P.2d 262, 266-73 (Colo. 1991)); FLA. STAT. ANN. ch. 768.73(2)(a)-(b) (Harrison Supp. 1992) (providing that state General Revenue Fund or Public Medical Assistance Trust Fund receives 35% of punitive damages award) (upheld against due process and takings challenges in *Gordon v. State*, 585 So. 2d 1033, 1035-38 (Fla. Dist. Ct. App. 1991), *aff'd*, 608 So. 2d 800 (Fla. 1992), *cert. denied*, 113 S. Ct. 1647 (1993)); GA. CODE ANN. § 51-12-5.1(e)(2) (Michie Supp. 1992) (declaring that Georgia shall receive 75% of amounts awarded as punitive damages, "less a proportionate part of the costs of litigation, including reasonable attorney's fees, all as determined by the trial judge") (held unconstitutional in *McBride v. General Motors Corp.*, 737 F. Supp. 1563, 1578-79 (M.D. Ga. 1990), because only applied to product liability actions and because state's 75% share constituted "excessive fine"); ILL. REV. STAT. ch. 110, para. 2-1207 (Smith-Hurd Supp. 1992) (stating that trial court may apportion punitive damages award among plaintiff, plaintiff's attorney, and Illinois Department of Rehabilitation Services); IOWA CODE ANN. § 668A.1(2)(b) (West 1987) (declaring that 75% of punitive damages award after payment of costs and fees goes to civil reparations trust fund) (held constitutional in *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc., Inc.*, 473 N.W.2d 612, 619 (Iowa 1991), on ground that plaintiff has no vested property right in punitive damages prior to entry of judgment); KAN. STAT. ANN. § 60-3402(e) (Supp. 1991) (providing that state gets half of punitive damages in medical malpractice cases); N.Y. CIV. PRAC. L. & R. 8701(1) (McKinney Supp. 1993) (declaring that state gets 20% of punitive damages awards); OR. REV. STAT. § 18.540(1) (1991) (stating that state's Criminal Injuries Compensation Account gets half of punitive damages after deducting attorney's fees); UTAH CODE ANN. § 78-18-1(3) (1992) (stipulating that state gets half of any punitive award in excess of \$20,000).

damages serve a vital function for which neither criminal punishment nor administrative controls can substitute.

Criminal punishment is imposed mostly on the poor and marginal, but civil punishment threatens very different target groups than those addressed by the criminal law. The various private governments and their indigenous forums that enjoy the law's blessing (or benign neglect) exercise control over their subjects—be they members, customers, clients, or employees—in a manner that is generally agreeable to the dominant and established parties in the sphere of activity involved. But punitive awards by courts, or settlements negotiated in the shadow of such awards, often target the dominant party in the original transaction or relationship, which is often an organization rather than an individual.²⁰²

The ability to sanction flourishing economic actors is the major strength of punitive damages, but is also their major limitation. Because the punishments exacted by civil law are fines or impairments of earning power, such as suspensions or withdrawals of licenses, they cannot be invoked against those who lack such assets. Increasing reliance on civil punishment therefore fosters a two-tier system with organizations, the affluent, and those with modest but stable economic positions controlled by civil remedies, while the economically marginal are controlled by the criminal process. Such reliance also implies a privatization of enforcement activity in which public norms will be vindicated by private lawsuits; government will be less engaged in the direct imposition of punishment and more engaged in the supervising and monitoring of private parties' punishment efforts. And, of course, private parties are differentially equipped to undertake this kind of activity. Businesses and organizations can hire lawyers as private enforcers. For individuals, the stakes must be high enough to attract entrepreneurial lawyers who will undertake the massive investments commonly required in such cases. Where individual losses are small, this result depends on organizational or procedural devices for aggregation. Again, the poor and marginal are least likely to find champions.

In the American setting, the use of punitive damages can be viewed as a partial offset to weak administrative controls. For example, in Wisconsin a truck driver injured in an accident caused by smoke from a forest fire ignited by a railroad received a \$500,000

202. There is some overlap with prosecutions for white-collar crime. Both punitive damages and white-collar crime produce a curious reversal of views on punishment: the left is for draconian harshness, while the right is for leniency, education, and due process.

punitive award.²⁰³ Because fines were minimal, railroads had ignored the state Department of Natural Resources (DNR) rules requiring them to fix faulty exhaust systems and clear brush from tracks.²⁰⁴ After the punitive award, the "railroads got the message . . . and railroad-caused fires dropped from 339 in 1980 to 102 in 1986."²⁰⁵ A DNR fire specialist said, "The punitive damage award showed the railroads that there was a need to do what we had been trying to get them to do—clean up portions of their right-of-way and begin a locomotive exhaust maintenance program."²⁰⁶

Judges who grasp the tremendous patterning power of punitive damages may attempt to wield the power deliberately to fashion policy. For instance, a Kansas federal jury awarded \$10 million in punitive damages against the Playtex Corporation for marketing a tampon containing a fiber linked to toxic shock syndrome.²⁰⁷ The judge indicated to the company's lawyer that he would consider reducing or eliminating the punitive award if the president of Beatrice Company, Playtex's parent company, or his authorized representative, elected to appear in court to acknowledge that the jury's findings were factually established and announce the removal from the market of the company's tampons containing high-absorbency fibers.²⁰⁸ Two weeks later, the company announced that it would withdraw tampons containing the fiber in question.²⁰⁹ Praising Playtex for acting responsibly, the judge then reduced the \$10 million award to \$1.35 million.²¹⁰ The Tenth Circuit reinstated the \$10 million award, holding that the trial judge was unauthorized to reduce the jury award except for excessiveness.²¹¹ Finding the award not excessive, the court observed that "the court's order subverts the goals of punishment and deterrence that underlie the assessment of punitive damages in Kansas. Far from punishing Playtex,

203. Cary Segall, *Bill Would Ease Punitive Damages*, WIS. STATE J., Nov. 29, 1987, at 12. The judge subsequently reduced the award to \$300,000. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* These figures on the decreased number of fires invite inspection to see if the amount of traffic through vulnerable areas was undiminished. Their recital, however, shows what is believed by at least some of the actors.

207. *O'Gilvie v. International Playtex, Inc.*, 609 F. Supp. 817, 818 (D. Kan. 1985), *aff'd in part and rev'd in part*, 821 F.2d 1438, 1450 (10th Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988); Michael Bates, *TSS Award Slashed After Playtex Stops Selling Tampon*, NAT'L L.J., June 10, 1985, at 10, 10.

208. *O'Gilvie*, 609 F. Supp. at 818.

209. *Id.*

210. *See id.* at 819 (proclaiming that defendant's withdrawal of product from market represented "a commendable exercise of fortitude and decency," finding jury's punitive award "excessive and unnecessary," and explaining mechanics of remittitur).

211. *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438, 1450 (10th Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

the trial court here rewarded the company for continuing its tortious conduct long enough to use it as a bargaining chip in the remittitur proceedings."²¹²

Civil punishments thus reinforce the notion of law as a realm of moral achievement rather than technical adjustment. They broadcast that even powerful actors cannot "get away with" dreadful behavior. In emphasizing the moral inclusiveness and inescapability of the law, civil punishments contravene the reigning impulse to disassociate law from morality. Plaintiffs' lawyers typically counsel their clients to disregard their moral claims and be concerned about the bottom line; defense lawyers strive to dissociate compensation from the connotation of wrongdoing. Most settlements include a disclaimer of liability; often these are absurd, as in the case of the corporation that pays tens of millions of dollars "just to avoid the expense of litigation." This dissociation of law and morality is evident even in criminal prosecutions. Blame is deflected to meddling or overwrought accusers, and wrongdoers present themselves as victims bravely coping with the technical problem of entanglement with the legal system. That is where punitive damages come in: they are perhaps the most important instrument in the legal repertoire for pronouncing moral disapproval of economically formidable offenders.

III. AN ELEMENTARY JURISPRUDENCE OF PUNITIVE DAMAGES

Let us consider the standard justifications of punishment: retribution, deterrence, incapacitation, rehabilitation. The last two, incapacitation and rehabilitation, are unlikely to be at issue in punitive damages cases. Typically, we think of rehabilitation as a process of retraining, education, or therapy that occurs during probation or prison, and it is hard to imagine a corporate entity being "rehabilitated" by paying money.²¹³ Similarly, incapacitation usually means prison and arises in punitive damages cases only in the rare situation where a jury decides to put the defendant out of business.²¹⁴ Thus,

212. *Id.* at 1450; see Michael Bates, *\$10 Million in TSS Punitives Is Reinstated*, NAT'L L.J., July 13, 1987, at 37 (describing Tenth Circuit's reversal in toxic shock syndrome case as based on trial court's standardless action).

213. Of course, a corporate entity stung by a large punitive award may institute policies designed to prevent similar acts in the future, and this may be counted as rehabilitation. If so, however, it is a form of rehabilitation hard to distinguish from special deterrence, and we shall consider it a form of special deterrence.

214. Incapacitation may arise as a byproduct of a major punitive award, however, if it affects a company's creditworthiness or leads to increased surveillance of the company's activities.

discussion of punitive damages should focus on deterrence and retributivist theories.

Analysis should not be limited to these two theories, however, because punishment may prevent offenses in other ways besides deterrence. Deterrence suggests that people will disobey the law unless they fear punishment. This is a gross caricature of our political psychology, however. It presumes that we are Holmesian "bad men" and women;²¹⁵ it takes what Hart calls the "external" point of view on the law.²¹⁶ Many of us will willingly comply with a reasonable law once we know that it is seriously intended,²¹⁷ and an important aim of punishment is to dramatize publicly that legal norms are seriously intended. That is, punishment prevents offenses by norm projection and norm reinforcement as well as by deterrence.²¹⁸ For this reason, it makes more sense to speak of "prevention" of crimes and of civil wrongs than of "deterrence" and to note that punishment can bring about prevention either by deterrence or by norm projection.

Having said this, let us take the *Browning-Ferris* facts as a convenient example and look at the complaint about punitive damages raised by BFI. BFI claimed that \$6 million is disproportionate, "excessive," because it so far exceeded the \$51,000 in compensatory damages. BFI claimed that punitive damages should be scaled to compensatory damages.²¹⁹ Compensatory damages, however, measure the bad consequences of the wrongdoing to its victim. BFI's proposed scaling principle is thus equivalent to scaling punishment to the bad consequences of an offense. This proposed principle lies at the jurisprudential core of the issue, but unfortunately, it makes little sense in light of the three remaining rationales for punishment: norm projection, retribution, and deterrence.

215. See OLIVER W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 171 (1920) (observing that "[i]f you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict").

216. See HART, *supra* note 23, at 88 ("The external point of view may very nearly reproduce the way in which the rules function in the lives of certain members of the group, namely those who reject its rules and are only concerned with them when and because they judge that unpleasant consequences are likely to follow violation.").

217. See TOM R. TYLER, WHY PEOPLE OBEY THE LAW 3-6 (1990) (presenting analysis of 1575 Chicago-area citizens' experiences with legal authorities).

218. See JACK GIBBS, CRIME, PUNISHMENT, AND DETERRENCE 68-70, 79-81 (1975) (discussing role of punishment in engendering respect for law and reinforcing society's normative values of right and wrong).

219. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989) (discussing BFI's request that Court create federal "common-law standard of excessiveness that relies on notions of proportionality between punitive and compensatory damages"). The argument will be roughly the same in either the due process or excessive fines guise.

A. Norm Projection

Under the norm projection rationale, the purpose of punishing BFI is to emphasize that the law against predatory pricing is a serious one. This purpose can be achieved only if punitive damages are regarded by defendants as a significant amount of money; when the compensatory damages are relatively small, this implies that punitive damages must greatly exceed compensatory damages. Kelco lost \$51,000 worth of business to BFI because of its predatory pricing.²²⁰ If the punitive damages were roughly commensurate with the compensatory damages, for example treble damages of \$150,000, BFI might be tempted to treat the damages as a mere cost of doing business and to play the "enforcement lottery" by continuing its predatory practices and hoping that it will be sued successfully fewer than one time out of three so that it will still turn a profit.²²¹ Only when the punitive damages far exceed BFI's gain from predatory pricing will the company be tempted to turn its eyes away from its balance sheet and toward the law.

Thus, with lenient punitive damages awards, offenders will be tempted to treat the law not as a norm demanding compliance but merely as a type of tax on activity such as predatory pricing. The difference is fundamental. A serious norm prohibiting conduct is categorical: it says, "Don't do X!" By contrast, a tax on conduct is disjunctive: it says, "Either don't do X or else pay," thereby presenting the norm in merely optional form.²²² Only by imposing punitive damages of a different order from compensatory damages can a jury convey the message that a norm is categorical, that it demands compliance and not cost-benefit analysis. The point is to make the numbers on the balance sheet so ridiculous that the offender stops looking at the balance sheet. As Justice Neely argued in *TXO Production*, this may happen because large punitive awards

220. *Id.* at 261-62.

221. In deciding whether to play the enforcement lottery, BFI would also have to consider litigation costs. If these are high, it will avoid the lottery unless it is sued successfully considerably less than one time out of three.

222. For an insightful discussion of this distinction, see JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 320-37 (1980). One might object that from the "bad man's" point of view there is no distinction between disjunctive and categorical norms because the bad man cares only about the consequences, the price to pay, for a legal violation. Every norm will be treated as disjunctive by the bad man. See *supra* note 215 and accompanying text (discussing Holmes' description of bad man's interest in law). Holmes to the contrary, however, bad man jurisprudence flattens or even effaces the legal landscape, and indeed Holmes himself recognized that not every norm is disjunctive. He claimed that when the legislature's "absolute wish" is to prohibit an action, the ensuing legal norm must be understood in categorical form; sanctions for violating duties are not to be understood as analytically identical to taxes. OLIVER W. HOLMES, *Book Notices*, in *THE FORMATIVE ESSAYS OF JUSTICE HOLMES* 91, 92-93 (Frederic R. Kellogg ed., 1984).

catch the attention of upper levels of management and thereby lead to tighter supervision or even cashiering of the middle managers who have been engaging in the wrongful conduct.²²³

There is some reason to believe that attention-catching considerations may have moved the jury in *TXO Production*. Alliance Resource's attorney concluded his closing argument as follows:

Well, what is fair? You have a—If someone comes to town and intentionally doesn't put a quarter in the meter, stays here all day, town that needs it to pay for the police force and the fire department, they give them a fine. And at the end of the day they may have to pay a dollar. That persons [sic] reaches in his billfold at the end of the day and maybe he's got a hundred bucks in there. . . . And the next time he comes to town next Saturday, he puts his quarter in the meter. That's a fair fine. The town didn't take everything from the individual, didn't ruin them, just took one percent of what that person had in cash. One percent. You can fine TXO one percent if you want, you can fine them one dollar if you want. But I submit to you a one percent fine, the same as John Doe on this street, would be fair. That's twelve and a half million dollars, based on what they had left over.²²⁴

The jury's actual \$10 million award was in this general vicinity. Alliance Resource's attorney skillfully analogized TXO to an individual who must be fined a large enough portion of his cash to get his attention and persuade him that the community seriously means the norm he had violated to be obeyed.

This line of argument suggests that it is rational for the jury to take the defendant's wealth into account, for only in this way will a jury be able to guess at "what it reasonably takes to attract the defendant's attention"²²⁵ by bumping the matter up the corporate ladder. For purposes of norm projection, punitive damages should be

223. *TXO Prod. Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870, 888-89 (W. Va.), *cert. granted*, 113 S. Ct. 594 (1992); cf. Neil Komesar, *Injuries and Institutions: Tort Reform, Tort Theory, and Beyond*, 65 N.Y.U. L. REV. 23, 60-68 (1990) (discussing punitive damages as means of targeting deterrable potential injurers in strategy to increase prevention effectively). Komesar couches a related point in the language of deterrence:

[S]izable punitive damages awards against . . . manufacturers, especially ones based on the calculating behavior of these manufacturers, serve a beneficial purpose in the torts system. Increased awards and the accompanying increased tendency to sue are useful when there is reason to believe that the signal sent without these increases is too small because there are too few cases brought or because compensatory damage awards are set too low. Punitive damages—damages in excess of actual damages—can correct the signal and the incentive to prevent.

Id. at 62.

224. Brief of Petitioner, *supra* note 195, app. E, at 24a-25a (setting forth excerpt from closing argument of G. David Brumfield, counsel for Alliance Resources).

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

scaled to the defendant's wealth, not the size of the injury suffered by the victim.

B. Retribution

1. *Punishment as an expressive defeat*

The heart of this Article's analysis arises on retributivist theories of punishment, and the basic point is simply stated. A retributivist scales punishment to the heinousness of the offense, and that is not measured by the magnitude of harm. A moment's negligence behind the wheel, of the sort that every driver has been guilty of many times, may result in horrible consequences, while cold-bloodedly throwing a child out of a skyscraper window may result in very little harm because the child's suspenders miraculously catch on a flagpole.²²⁶

The hard problem is constructing scaling principles that make retributivist sense, and to tackle it, we must know what makes retributivism plausible. Jean Hampton's recent explanation of retributivism is very impressive in this regard. Hampton explains that culpably harming another person or being culpably negligent expresses a false view of the wrongdoer's value relative to that of the victim.²²⁷ Implicitly it says that the victim is a "low" person, the sort of person toward whom one can act in such a manner. Or it says that the wrongdoer is more valuable than the victim, indeed an especially valuable and "high" kind of person, the sort of person who is entitled to take liberties with the well-being of others. Or it says both: the wrongdoer is especially valuable and the victim is the sort of person that it is all right to treat badly. *I* am high and *you* are low. *I* can be negligent in marketing Dalkon Shields because *you*, the customer, do not matter very much.

It is crucial to Hampton's analysis of retributivism that the wrongdoer has implicitly asserted a kind of undeserved mastery and superiority over the victim. In other words, the wrongdoer has expressed a falsehood about the world of value. The purpose of punishment is to reassert the truth about the relative value of wrongdoer and victim by inflicting a publicly visible defeat on the wrongdoer—what we shall term an "expressive defeat." The magnitude of punishment must reflect the magnitude and, if possible, the nature of the asserted inequality between wrongdoer and victim.

226. See Ellis, *supra* note 66, at 58-59 (discussing concept of reasonable relationship between punitive damages and compensatory award, and arguing that actual harm does not always measure "moral egregiousness" of defendant's conduct and punishment deserved).

227. Hampton, *The Retributive Idea*, *supra* note 8, at 157.

A more heinous act expresses more contempt for the victim's value relative to the wrongdoer's, and so the retributivist believes that a more decisive defeat must be visited on the wrongdoer to reassert the public's judgment of the victim's worth. If the punishment is too lenient, society as a whole implicitly ratifies the view that the victim is the sort of person it is all right to treat badly. Hampton offers a telling example of this point: if sentences for forcible rape are low, the legal system is expressing a contemptuous view of the value of women relative to men.²²⁸

In our view, awarding compensatory damages alone may not suffice to remedy this injury to honor, but may actually iterate it. The norm of exacting from the wrongdoer compensation equivalent to the victim's loss measures the "deserved" loss of the wrongdoer by the undeserved loss of the victim.²²⁹ In spite of his or her greater culpability, the wrongdoer's loss is equated with that of his or her victim.

Interestingly enough, Hampton's theory fits the historical rationale for punitive damages quite closely, better, perhaps, than it fits the historical rationale for criminal punishment. As Dorsey Ellis explains:

The reported cases from roughly the first quarter of the seventeenth century through the first quarter of the nineteenth century . . . included cases of slander, seduction, assault and battery in humiliating circumstances, criminal conversation, malicious prosecution, illegal intrusion into private dwellings and seizure of private papers, trespass onto private land in an offensive manner, and false imprisonment. *Diverse as they may have been, all of these cases share one common attribute: they involved acts that resulted in affronts to the honor of the victim.*²³⁰

Courts spoke in the terms characteristic of Hampton's account of punishment as an attempt to reassert the true relative worth of wrongdoer and victim.²³¹ In *Grey v. Grant*,²³² the court upheld a punitive award because "the plaintiff [had] been used unlike a gen-

228. Hampton, *The Retributive Idea*, *supra* note 8, at 134.

229. Cf. WILLIAM I. MILLER, BLOODTAKING AND PEACEMAKING: FEUD, LAW AND SOCIETY IN SAGA ICELAND 301-02 (1990).

230. Ellis, *supra* note 66, at 14-15 (citations omitted and emphasis added). Ellis contends that the acts he lists were "insults that were likely to provoke reactions of outrage," *id.* at 15, and that such insults provide the courts sufficient basis for awarding punitive damages because they diminish the self-esteem of the affronted, which in the courts' eyes would lead to self-help rather than to the judicial process. *Id.* at 15-18.

231. These examples are taken from Ellis, *supra* note 66, at 16-17.

232. 95 Eng. Rep. 794 (K.B. 1764).

tleman."²³³ The court in *Huckle v. Money*²³⁴ stated that "the state, degree, quality, trade or profession of the party injured, as well as of the person who did the injury, must be and generally are, considered by a jury in giving damages."²³⁵ And in *Forde v. Skinner*,²³⁶ the jury was instructed that if the hair of female paupers was cut off in a poor house against their will "with the malicious intent . . . of 'taking down their pride,' . . . that will be an aggravation and ought to increase the damages."²³⁷

Although Hampton elaborates this theory as an account of retributivism, she also argues that the preventative function of punishment follows from the same ideas: society expresses public commitment to the value of persons not only by inflicting defeat on wrongdoers, but also by attempting to forestall insults to that value in the form of offenses.²³⁸ Rather than being an alternative to retribution, Hampton regards deterrence and other preventative rationales for punishment as an integral part of the retributive idea.²³⁹ Moreover, the commitment to human dignity that underlies retributivism also explains why cruel punishments can never be appropriate. Cruel punishments degrade and deny the value of human beings—precisely the value that punishment is intended to reaffirm.²⁴⁰ One merit of Hampton's account is that it convincingly articulates a principled and intuitively appealing rationale for retribution *and* deterrence *and* norm projection *and* restrictions on demeaning punishments.

Lawyers and judges sometimes assert that the aims of punishment are retribution and deterrence or prevention, evidently assuming that these two goals complement each other.²⁴¹ Many philosophers,

233. *Grey v. Grant*, 95 Eng. Rep. 794, 795 (K.B. 1764). The plaintiff had purchased a turtle from the West Indies that the defendant, Grant, received by mistake. *Id.* at 794. When Grey arrived at Grant's house and demanded his turtle, Grant shoved Grey and struck his face. *Id.* at 795.

234. 95 Eng. Rep. 768 (K.B. 1763).

235. *Huckle v. Money*, 95 Eng. Rep. 768, 768 (K.B. 1763).

236. 172 Eng. Rep. 687 (Horsham Assizes 1830).

237. *Forde v. Skinner*, 172 Eng. Rep. 687, 687 (Horsham Assizes 1830).

238. Hampton, *The Retributive Idea*, *supra* note 8, at 138.

239. See Hampton, *The Retributive Idea*, *supra* note 8, at 138 (summarizing idea of retributive punishment as "vindicating value through protection"). Hampton notes that society's interest in deterrence and the victim's interest in retribution are linked in that "a humbling defeat which prideful wrongdoers will intensely dislike, can deter the commission of a crime against someone (or even something) having value; and the victim can come to see the value which the humbling defeat is meant to protect as symbolically expressed through the protection." *Id.* at 143.

240. See Hampton, *The Retributive Idea*, *supra* note 8, at 135-37 (proposing limits on retributive punishment based on retributivists' interest not in diminishment of criminal to "bestial level" but in vindicating victim's value).

241. See, e.g., *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1962) (referring to "the traditional aims of punishment—retribution and deterrence").

however, have worried that far from complementing each other, retribution and prevention rely on principles that are actually inconsistent. Retribution is backward looking: it scales punishments to a wrongdoer's deeds.²⁴² Prevention, on the other hand, is forward looking, scaling punishments to predictions of their future effects.²⁴³ As Terry Pinkard summarizes:

The standard line of intuitions that run contrary to [prevention] centralize around objections to using people merely as means and to what looks like unjustified punishment of the innocent. Deterrence theory, so it is argued, does not punish people because they deserve it but in order to further some social goal; it uses them merely as a means to some other end and thus fails to respect them as persons. Because of this goal orientation, it must also at least be *open* to punishing innocent persons. . . .

Retributive theories generally fare no better. They focus on the guilty party's *deserving* punishment. The idea is . . . that by doing something (presumably, *morally*) wrong, a person deserves punishment. This puts calculations of the goodness of punishment (its beneficial or harmful consequences for society as a whole) outside of consideration; the person simply deserves the punishment, whatever the consequences.²⁴⁴

So goes the familiar dialectic. A theory such as Hampton's that avoids the impasse by identifying a common origin for retribution as well as prevention clearly has much to recommend it.

Such a theory still does not tell us how a retributivist should scale punitive damages. Admittedly, there can be no formula for punitive damages because heinousness cannot be assigned a straightforward dollar value. Once we begin to focus, however, on the requirement that punishment express as transparently as possible the true scale of values in the moral world, we have a rough-and-ready yardstick of punitive damages. A return to the Pinto case described earlier will illustrate our meaning.²⁴⁵

242. See *id.* (characterizing retribution model as one that inquires merely whether person "deserves" to be punished).

243. See *id.* (describing consequentialist nature of deterrence model of punishment in that it is interested in reducing likelihood of commission of further criminal acts).

244. TERRY PINKARD, *DEMOCRATIC LIBERALISM AND SOCIAL UNION* 178-79 (1987).

245. See *supra* notes 71-74 and accompanying text (introducing Pinto case). For a full discussion of this case, see FRANCIS T. CULLEN ET AL., *CORPORATE CRIME UNDER ATTACK: THE FORD PINTO CASE AND BEYOND* 145-308 (1987); see also DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 206-13 (1988) (discussing ethical issues of trading cost for safety in design and manufacture of Pinto); Komesar, *supra* note 223, at 64-67 (discussing Ford Pinto case and arguing that punitive damages award was inconsistent with optimal prevention); Mark Dowie, *Pinto Madness*, *MOTHER JONES*, Sept.-Oct. 1977, at 18-32 (uncovering internal company documents revealing that Ford conducted crash tests at secret site and that every test over 25 miles per hour resulted in ruptured fuel tank). But see Gary T. Schwartz, *The Myth of the Ford Pinto*

2. *Expressive defeat illustrated*

In the Pinto case, the jury awarded \$125 million in punitive damages to a boy who had been badly burned in the explosion of a Ford Pinto in which he was riding.²⁴⁶ The jury arrived at this figure after learning that Ford relied on a study that showed that the costs of recalling the Pinto for modification would outweigh the benefits, which were estimated at \$200,000 per burn death avoided and \$67,000 per injury avoided, by \$100 million.²⁴⁷ The punitive award consisted of \$100 million plus interest,²⁴⁸ but the judge later reduced the award to \$3.5 million.²⁴⁹ Although the case has been cited by critics of the tort system as a classic example of a jury run amok, the jury's award was actually a perfect case of "letting the punishment fit the tort," whereas the judge's later reduction was close to unintelligible.

On a deterrence rationale the jury's decision makes obvious sense: Ford's reliance on cost-benefit analysis indicated that it could be deterred only if it lost money through its decision, and the jury's punitive damages were calculated precisely to annihilate Ford's profit. On a retributivist view, however, it also makes sense to take the bottom line of Ford's cost-benefit analysis as a measure of wrongdoing. Ford had displayed contempt for Grimshaw's value, but more importantly, it had displayed a certain *kind* of contempt for Grimshaw's value. To use Kant's famous distinction, Ford treated Grimshaw as possessing merely a price, not a dignity.²⁵⁰ For this reason, inflicting a monetary defeat on Ford was an especially expressive form of punishment.

Moreover, Ford had determined Grimshaw's and other customers' prices through the technique of cost-benefit analysis.²⁵¹ The jury therefore chose to inflict a monetary defeat on Ford that incorporated within it a reference to Ford's own analysis, a defeat that Ford could not help but understand because the jury held up the cost-benefit analysis as a mirror in which all would recognize the

Case, 43 RUTGERS L. REV. 1013, 1020-22 (1991) (discussing misconceptions concerning much-publicized Ford documents in Pinto case).

246. *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 358 (Ct. App. 1981).

247. See *id.* at 370 (upholding trial judge's determination to allow introduction into evidence company report showing that Pinto's fuel system could have been made safe for \$100 million).

248. *Id.* at 358.

249. *Id.*

250. See IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 53 (Lewis W. Beck trans., 1969).

251. See *Grimshaw*, 174 Cal. Rptr. at 370 (finding that jury could have drawn, and did draw, reasonable inference that Ford's decision to defer making corrections was motivated by company's desire to save money).

moral truth of the situation. Finally, the jury recognized the particular kind of wickedness displayed in Ford's reluctance to recall the exploding Pintos: it was greed, allowing one's decision to be swayed by the sheer magnitude of money. Taking the amount of money by which Ford was swayed as the measure of heinousness seems especially appropriate.

A similar rationale may underlie punitive awards that at first glance seem inexplicably large in insurance bad faith actions, another common arena for punitive damages that far outweigh actual damages.²⁵² Consider the following case:

A California man, Earl Norman, visited his doctor and then filed the \$48 bill with his medical insurance company. The insurance company refused to pay, saying the visit wasn't covered in Norman's policy. Norman sued the insurance company over the unpaid \$48 bill; the jury awarded him \$4.5 million.

What possessed a jury to return an award 100,000 times as great as the unpaid doctor bill?

At the trial, Norman produced evidence showing that the insurer had paid that kind of bill routinely for years. Then Norman received a letter from the insurer urging him to buy a new and better policy at a higher premium. Norman bought the new policy. But under this new, more expensive policy, Norman's routine doctor visit was excluded from coverage.

Norman's lawyer argued that the insurance company had deliberately cut back on its coverage—and deliberately misled its customers about the change. An actuarial expert testified that the new policy, if issued to all the insurance company's customers, would save the insurer \$4.5 million.

The jury concluded that Norman had been victimized—and gave him the entire \$4.5 million as recompense.

"This is the pattern for a lot of the so-called 'crazy cases,'" says Robert Hunter, an insurance expert who heads the National Insurance Consumer's Organization, a group associated with Ralph Nader.²⁵³

Evidently, the same kind of reasoning moved the jury in *TXO Production*, which had heard evidence that TXO engaged in frequent sharp practices in dealing with its lessors.

In the Pinto case, matters would have been different if Ford had refused to recall the Pinto to save just \$2. That would have made the offense more like one of those peculiarly senseless crimes in

252. See KEETON ET AL., *supra* note 68, at 11 (noting growth in punitive damages claims for bad faith by insurance companies).

253. T.R. Reid, *Litigation Loosens the Stiff Upper Lip*, WASH. POST, Feb. 24, 1986, at A7.

which someone commits murder for almost no money at all, or with little apparent motive. In such an instance the wickedness is not greed but rather perverse indifference to another person's value. Some torts are like that.

Imagine, for example, the case of an obstetrician who is "beeped" at the end of act one of an opera because one of his patients has gone into labor. He does not want to miss the opera and so stays until the end; as a result of his absence the child suffers brain damage at birth, and the grieving parents sue for malpractice. In this example, unlike the Pinto case, the evil consists not of greed or overreliance on economic rationality, but rather of indifference to the value of his patients. Applying the Pinto paradigm in this case by assessing punitive damages amounting to (say) the price of an opera ticket would send the wrong message because the doctor was not simply trying to wring full monetary value from the opera ticket. What, then, might be an appropriate level of punitive damages? The jury might, for example, estimate the child's lifetime income had the child grown up to be a successful obstetrician and assess that amount. This approach would attempt to project the message that, but for this doctor's perverse indifference to human value, the child might herself have been a person like the obstetrician. The jury would in this way inflict on the obstetrician a defeat expressing the equal value of wrongdoer and victim.

So here, as in the Pinto paradigm, we have an example of punitive damages that punish wrongdoing by inflicting an expressive defeat on the wrongdoer. Employing Ford's own cost-benefit analysis to determine the magnitude of Ford's punishment is an example of poetic justice, the kind of justice a poet bent on moral edification builds into dramatic plots: the evildoer is caught in his own trap, or inadvertently sets in motion the chain of events that in the end brings him down. Aeschylus took as his theme in *The Oresteia* that "[t]he one who acts must suffer."²⁵⁴ Unfortunately, in life unlike poetry it is generally not true that the actor must suffer, that what goes around comes around. The purpose of retribution—to inflict expressive defeats, poetic justice, on wrongdoers—is simply to rectify this state of affairs when rectification is possible.

254. Aeschylus, *The Libation Bearers*, in *THE ORESTEIA* 173, 192 (Robert Fagles trans., Penguin Books 1979) ("Justice thunders, hungry for retribution, 'stroke for bloody stroke be paid. The one who acts must suffer.'").

3. *A proposed requirement: jury explanation coupled with judicial deference*

Obviously, the medium of monetary damages has very limited expressive power, and in many instances of high punitive damages awards one cannot infer anything from the amount beyond the message that the jury thought the defendant had behaved reprehensibly. One does not know, for example, how the *Browning-Ferris* jury arrived at a punitive award of \$6 million. Indeed, a requirement that juries provide at least a brief explanation of how they arrived at the amount of punitive damages they assessed would be an appropriate modification of current practice. The instructions that judges would necessarily give to elicit such explanations from juries would remind them that the purpose of punitive damages is to punish defendants rather than provide additional compensation to plaintiffs.²⁵⁵ This practice may have the salutary effect of severing the dependence of punitive awards on the size of compensatory damages.²⁵⁶ Such an explanation would also spell out the retributive message of the awards and assist judges in subsequent remittitur decisions.

Coupled with the requirement that juries explain punitive awards, a requirement that judges accord great deference to juries' reasoning should also be established, because a jury is especially suited to send the community's "message" through the medium of damages. Obviously, a jury explanation of a punitive award that is inconsistent with the rationale of punitive damages should provide grounds for remittitur or appellate challenge. In less extreme cases, however, judges should show the same deference to juries in punitive damages decisions as in other matters of normative judgment, such as determinations of reasonableness.

The requirement of jury explanation of punitive awards is not, as it might at first glance seem to be, an antiplaintiff rule. It is true that

255. Cf. Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727, 771 (1991) (arguing that one tool to enhance quality of jury decision-making is special verdict providing jurors with series of questions whose answers may guide jurors to next proper question, thereby establishing framework for identifying and organizing complex issues).

256. Analysis of 59 punitive damages awards against corporations from 1978 to 1982 showed:

[T]he size of the compensatory award is a better predictor of the size of punitive damages than is any of the measures of the financial status of the defendant

[T]he data support the contention that compensatory damages are used as a basis of determining punitive damages more uniformly than are defendants' financial characteristics.

Joan T. Schmit et al., *Punitive Damages: Punishment or Further Compensation?*, 55 J. RISK & INS. 453, 463 (1988).

requiring jurors to account for their discretionary decisions may cause them to diminish punitive awards. But we must not forget that the price of unexplained exercises of discretion in jury awards is often an unaccountable decision by the judge to remit. In our view, both forms of discretion are inconsistent with the fundamental retributive requirement that punishment inflict an expressive defeat on the wrongdoer. The theory of retribution that we have borrowed from Hampton emphasizes the cognitive and rational dimension of retributive punishment, without which retribution degenerates into blind vengefulness. It is to preserve this cognitive dimension that we question the current system of complementary oracular discretions, the discretion of the judge no less than that of the jury.²⁵⁷

Even without a jury explanation, the fact remains that high punitive damages awards are often an appropriate expressive vehicle. Punitive damages most often arise in the context of economically motivated wrongdoing:²⁵⁸ corner-cutting in manufacturing, recalling products as in *Grimshaw*, or ruthless business practices as in *Browning-Ferris* or *TXO Production*. This is not always the case, however. Slander and libel are contexts of noneconomically motivated wrongdoing in which punitive damages are often appropriate. But economic wrongs are the most typical. High punitive damages awards hit *homo economicus* where it hurts: an eye for an eye, a tooth for a tooth, and a bottom line for a bottom line. It is poetic justice.

C. *A Pluralist Argument for Private Law Retribution*

1. *The inadequacy of criminal law*

These observations recall our earlier discussion of the practical point of punitive damages. We contend that punitive damages are the only practical method of exercising social control over economically formidable offenders, especially organizational offenders, because criminal penalties are no substitute. This fact obviously bears on the issue of deterrence, and we shall postpone our discussion of the deterrence rationale for punitive damages until we have explained exactly why economically flourishing offenders cannot be effectively sanctioned through the criminal law.

The most important reason that criminal penalties fail is that even

257. For an important discussion of discretionary standards, see Robert C. Post, *The Management of Speech: Discretion and Rights*, 1984 SUP. CT. REV. 169, 206-23. Jury discretion in punitive damages is a form of what Post defines as "weak" discretion, which "exists when a controlling legal standard is so open textured or general that its implementation requires the exercise of judgment." *Id.* at 222.

258. See *supra* notes 121-37 and accompanying text (discussing increase in punitive damages awards in certain business/contract cases).

if egregious and morally shocking civil wrongs were criminalized, such cases would seldom be prosecuted, because it is very hard to determine that an accident resulted from egregious and morally shocking wrongs. Consider the Pinto cases once again. In each case the only objective event was a car crash and subsequent burning. The repeated pattern of such crashes indicating a defective design emerges only after we consider evidence from many different states and jurisdictions. Thus, the entire pattern will not typically be investigated by state authorities.²⁵⁹ Even federal authorities will have no reason to believe that anything other than a typical series of automobile accidents has occurred unless they perform a statistical analysis of the pattern. Suppose, then, that punitive damages were replaced by criminal sanctions in morally culpable product liability cases. Law enforcement would require statistical analyses of all patterns of automobile accidents, and appliance accidents, and pharmaceutical accidents, and heavy equipment accidents, and on and on, around the country, which is utterly impossible. Even if it were possible, the analysis would overlook those culpable injuries that do not leave a statistical fingerprint behind them. Finally, once an investigatory agency becomes convinced that an offense has occurred, it would have to investigate the offending company to establish culpable negligence. No federal agency has or could have the resources to carry out so many investigations, nor would we be likely to welcome a federal agency that is such a nosy intruder.

The punitive damages system remedies this criminal investigation problem in the most obvious way: it provides injured parties and their lawyers with financial incentives to do all of the investigation themselves. Tort lawyers work on a thirty to forty percent contingency fee and sometimes invest thousands of dollars of their firm's resources in investigation, hoping to recoup the investment by winning big-ticket awards, an incentive that is enhanced when there is a possibility of recovering punitive damages. Contingency fee lawyers have an unsavory reputation, but that is not surprising: they are professional bounty hunters, and bounty hunters are not nice peo-

259. Ford was prosecuted for reckless homicide in the wake of a Pinto explosion in an Indiana accident. Larry Bodine, *Prosecutors Undeterred by Pinto Acquittal; Defense Bar Says It's in Driver's Seat Now*, NAT'L L.J., Mar. 31, 1980, at 3, 3. The accident, however, occurred six months after the highly publicized \$125 million *Grimshaw* punitive award, and it is unlikely that Ford would have been brought before a grand jury if it had not been for the many publicized civil suits arising from Pinto explosions. See generally CULLEN ET AL., *supra* note 245, at 320-21 (exploring considerations of prosecutors in deciding to bring criminal charges against corporations). Ford was acquitted on the basis of conflicting testimony concerning the circumstances of the accident. Bodine, *supra*, at 3. Criminal defense lawyers subsequently speculated that Ford's acquittal would deter future prosecutions for corporate crime. See *id.* (providing comments from industry and white-collar defense counsel).

ple. Their motivations are all wrong; they are out for the buck. But that is irrelevant. Society needs the bounty hunter because without inducing wealthy private parties such as lawyers and law firms to invest substantial resources in the investigation of wrongdoing, we would end up with something much worse. That, of course, is wrongdoing that goes merrily along on its illegal and devastating way because nobody is around to blow the whistle.²⁶⁰

Though we have illustrated the point with examples drawn from product liability, it also holds in the world of business litigation, where a large number of punitive awards occur. Without private incentives to investigate and pursue claims, business chicanery would be controlled only by government regulation, which is often spottily enforced, and by white-collar prosecution. The sheer volume and intricacy of business dealings makes it quite unlikely that regulators and prosecutors will unearth impropriety on more than an occasional basis.²⁶¹

Even when white-collar wrongdoers are caught, they are very hard

260. We are assuming here what conventional wisdom often denies, namely that the United States is not experiencing an excess of litigation generally and, in particular, that we are not experiencing an excess of tort litigation. See Galanter, *The Day After the Litigation Explosion*, *supra* note 132, at 5-15.

There is extensive debate over whether the private incentive to sue in a costly legal system leads to inefficiencies of excessive litigation (because the plaintiff has no incentive to factor the defendant's legal costs into the decision to litigate), or inefficiencies of too little litigation (because the plaintiff has no incentive to bring a lawsuit that is socially beneficial in its preventive effects on tortious activity unless it is also beneficial to himself or herself). Compare Steven Shavell, *The Social Versus the Private Incentive To Bring Suit in a Costly Legal System*, 11 J. LEG. STUD. 333, 334 (1982) (arguing that private costs of suing are less than social costs because plaintiffs are not responsible for costs to defendants or society) and Peter S. Menell, *A Note on Private Versus Social Incentives To Sue in a Costly Legal System*, 12 J. LEG. STUD. 41, 41-42 (1983) (asserting that social and private incentives to sue are linked) with Louis Kaplow, *Private Versus Social Costs in Bringing Suit*, 15 J. LEG. STUD. 371, 372-74 (1986) (arguing that Menell and Shavell both correctly note that plaintiff will only sue where damages exceed litigation costs, but disputing Menell's contention that injurer takes into account all such costs in making its decisions) and Susan Rose-Ackerman & Mark Geistfeld, *The Divergence Between Social and Private Incentives To Sue: A Comment on Shavell, Menell, and Kaplow*, 16 J. LEG. STUD. 483, 488-89 (1987) (arguing that Shavell and Menell-Kaplow models represent "two extreme, simple cases of probabilistic accidents"). None of these analyses take into account the effects of punitive damages. Kaplow and Rose-Ackerman and Geistfeld entertain proposals to limit litigation by imposing restrictions on plaintiffs. See Kaplow, *supra*, at 379-80 (discussing desirability of rule prohibiting suits); Rose-Ackerman & Geistfeld, *supra*, at 489-90 (recommending shift to British rule whereby losing party pays all legal fees). Both assume that even in cases where the defendant is liable the defendant will choose to litigate the plaintiff's claim, rather than simply paying off the claim. By electing to fight rather than pay, the defendant creates an externality in the form of nonzero defendant litigation costs attached to the plaintiff's decision to sue. To this extent, the externality problem should be laid at the door of the defendant, not the plaintiff, and thus proposals to limit litigation by imposing restrictions on plaintiffs seem quite unfair.

261. The current savings and loan crisis illustrates the extent to which regulators and prosecutors can be blind to corporate wrongdoing. See *Insurers Following S&Ls*, BUS. INS., June 11, 1990, at 8 (arguing that there is "a fine line between fraud and mismanagement" and noting similarities between Government's failure to prosecute savings and loan fraud and its dereliction in pursuing criminal sanctions in insurance fraud cases).

to bring to justice.²⁶² Kenneth Mann proposes several variables that affect the success of criminal prosecution and shows that white-collar criminals are harder to prosecute and convict than street criminals on all variables.²⁶³ White-collar criminals have more influence over sources of damaging information; the evidence of white-collar crimes may be more dispersed and less exposed; the definition of the crimes is typically more ambiguous, so that defendant behavior is more likely to look marginally legal and get the benefit of the doubt from prosecutors and judges; white-collar criminal defendants have more resources and are more sophisticated; agencies investigating white-collar crimes are more likely to allow precharge adversary hearings in which the defendant's lawyer can argue against indictment; the government is less likely to make arrests or physical searches in white-collar cases; white-collar indictments are more delayed, allowing better preparation for defense; and the defense lawyer in white-collar criminal cases is usually better qualified.²⁶⁴ Given all these advantages, it is hard to bring the white-collar criminal to justice. Of course, the same factors are at work in civil litigation, creating the chronic disadvantages under which plaintiffs and plaintiffs' lawyers typically labor. The lower burden of proof in civil suits, however, coupled with the greater likelihood that defendants will settle when settlement involves no criminal sanction, works to mitigate these disadvantages to at least some degree.

An additional reason for not relying on criminal penalties is that corporate criminal offenders are not severely punished when they are convicted. One study noted that the average fine imposed in all corporate cases between 1984 and 1987 was \$48,000 and that 67% of these fines were \$10,000 or less.²⁶⁵ The study further noted that the low degree of punishment "allowed many corporations to treat potential fines as a 'cost of doing business.'"²⁶⁶

For these reasons, including the difficulty and expense of discovering when possible infractions have occurred, the difficulty of ob-

262. See CULLEN ET AL., *supra* note 245, at 323-34 (describing legal and structural obstacles to prosecuting white-collar criminals).

263. See KENNETH MANN, *DEFENDING WHITE-COLLAR CRIME* 3-18, 231-40 (1985) (describing advantages that white-collar criminal defense lawyers have over street-crime defense lawyers).

264. *Id.*

265. Amitai Etzioni, *Going Soft on Corporate Crime*, WASH. POST, Apr. 1, 1990, at C3. Etzioni's study of Fortune 500 industrial corporations revealed that "during the period 1975-1984, 62 percent were involved in one or more incidents of corrupt behavior such as price fixing, bribery, violation of environmental regulations and tax fraud." *Id.* In the study, involvement in corrupt behavior was defined as where "executives used the corporate structure for the criminal act and the profits accrued to the corporation and not to the individual." *Id.*

266. *Id.*

taining convictions even when possible infractions are discovered, and the difficulty of establishing penalties that do not simply encourage playing of the enforcement lottery, the criminal law is a terrible method for the social control of the villainous rich, though it may work to control the villainous poor. If punishment and not only compensation is a desirable goal, the punitive damages system, warts and all, stands out as the best hope for protection from wealthy and formidable wrongdoers.

The use of punitive damages to sanction and control white-collar wrongdoing connects in an interesting way with the retributive themes we sounded in the preceding Part. There we argued that the aim of retributive punishment is to inflict an expressive defeat on wrongdoers. They are to be humbled, in order to repudiate publicly the moral falsehood implicit in their behavior. Punishment, on this view, must be public and must attempt to shame the wrongdoer. These two requirements go together, of course: public humiliation induces shame, whereas, in the words of Bernard Williams, "[t]he basic experience connected with shame is that of being seen, inappropriately, by the wrong people, in the wrong condition,"²⁶⁷ so that "shame and its motivations always involve in some way or other, an idea of the gaze of another."²⁶⁸

In this connection, Brent Fisse and John Braithwaite concluded on the basis of seventeen detailed case studies of corporate wrongdoing that adverse publicity is one of the most potent and effective methods for sanctioning corporate offenders—not because of the financial impact of bad publicity, but because corporate offenders find bad publicity humiliating in its own right.²⁶⁹ In a subsequent study, Braithwaite explicitly argued that the proper aim of punishment is to induce shame. "What is needed," Braithwaite writes, "is punishment for organizational crime that maximizes the sense of shame, that communicates the message that white collar crime is as abhorrent to the community as crime in the streets."²⁷⁰

Viewed in this perspective, the bad publicity associated with punitive damages, particularly with awards of punitive damages large enough to reverberate within the organization's culture or even in the mass media, takes on central importance. It is at once a public rebuke and a powerful means for controlling organizational wrongdoing. A jury representing the public has found organizational

267. BERNARD WILLIAMS, *SHAME AND NECESSITY* 78 (1993).

268. *Id.* at 82.

269. BRENT FISSE & JOHN BRAITHWAITE, *THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS* 232-33 (1983).

270. JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* 143 (1989).

wrongdoing worthy of censure, and through the medium of money—a corporation's blood, one might fancifully say—has determined to announce that the wrongdoing was egregious and reprehensible (or perhaps really mean or really stupid).

2. *The concept of enforcement endowments*

Earlier, we introduced the concept of government-conferred "regulatory endowments": grants of authority to nongovernmental institutions to impose their own regulations.²⁷¹ The punitive damages system does not issue regulatory endowments, but it exhibits a closely connected phenomenon that we shall call the granting of "enforcement endowments." Plaintiffs and their lawyers are granted authority to assume certain vital law enforcement functions. They become private attorneys general.²⁷²

The reason underlying the grant of enforcement endowments is essentially identical to the reason underlying the grant of regulatory endowments: a limited government is and ought to be too small and too overstretched to regulate every area of life and to enforce such regulations. It is and ought to be compelled to delegate its regulatory and enforcement authority to nongovernmental parties. This way of thinking is actually an extension of or an analogy to the principle of federalism. Federalism insists that the national government should leave a great deal of legislation and enforcement to smaller political units, the states. The rationale behind federalism is that decentralized authority is often more participatory and less threatening than massive governmental institutions. The notion of regulatory and enforcement endowments merely extends the federalist argument across the public/private divide from governments to other entities. Viewed in this way, our argument for punitive damages and our analysis of civil punishment emerge as facets of the more general argument for legal pluralism over legal centralism.

Ours is a normative argument against legal centralism, which we have already suggested fails as a descriptive theory of legal phenomena.²⁷³ In the field of constitutional theory, legal centralism has

271. See *supra* note 38 and accompanying text (discussing concept of regulatory endowments); see also Galanter, *Justice in Many Rooms*, *supra* note 2, at 155-56 (describing ways in which courts confer authority on nongovernmental institutions to resolve disputes); Macaulay, *supra* note 11, at 450 (relating how grants of authority to self-regulate allow professional groups to ward off public scrutiny).

272. For a critical view of current arrangements to employ the lawyer as bounty hunter, see John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 220-23 (1983) (arguing that under existing arrangements private lawyers acting like attorneys general do not have correct incentives to broaden scope of law enforcement).

273. See *supra* notes 22-38 and accompanying text.

often been challenged as a normative as well as a descriptive matter. Before the Civil War, Frederick Douglass and other abolitionists insisted that the Supreme Court's interpretation of the Constitution enjoyed no priority over the interpretations of the abolitionists who regarded the Constitution as an antislavery document.²⁷⁴ When the New Deal Supreme Court voided the National Industrial Recovery Act and the Bituminous Coal Conservation Act as unconstitutional delegations of regulatory power to private trade associations,²⁷⁵ Louis Jaffe responded with a classic anticentralist article, *Law Making by Private Groups*.²⁷⁶ Former Attorney General Edmund Meese offered an anticentralist argument, ironically similar to Douglass', against the priority of Supreme Court interpretations of the Constitution,²⁷⁷ as have several recent theorists.²⁷⁸ Our argument extends the anticentralist argument from constitutional interpretation to the processes of lawmaking and law enforcement. Punitive damages, in this analysis, encourage a pluralist dispersal of law enforcement responsibility.

We do not mean to suggest a blanket superiority of indigenous law over state-made law. Sometimes indigenous punishments are oppressive, racist, or unfair. Domestic violence, to take a clear example, may amount to self-help punishment by the paterfamilias of what he deems to be a violation of familial norms, and it is clearly wrong for police and prosecutors to refuse to intervene out of respect for legal pluralism. As one of us has noted, "The big legal system faces the question of how to recognize or supervise or suppress the little systems."²⁷⁹ This question must be answered on a case-by-case basis. In the case of punitive damages, courts already supervise the process sufficiently that worries about oppressive indigenous enforcement are decidedly out of place.

274. See ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975) (analyzing writings of antislavery constitutionalists); SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 31, 38-39, 65-66 (1988) (same).

275. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 297-317 (1936); *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537-38 (1935).

276. 51 HARV. L. REV. 201, 253 (1937) (asserting that courts must not summarily strike down legislative schemes that augment public participation in lawmaking).

277. See Edwin Meese, *The Law of the Constitution*, 61 TUL. L. REV. 979, 983 (1987) (asserting that Supreme Court opinions should be binding merely on parties to dispute rather than on all persons and entire Government "forevermore").

278. See LEVINSON, *supra* note 274, at 51-53 (asserting that disorder may be prevented by granting authority to one body to interpret Constitution but recognizing problems with determining what makes up "Constitution," how it should be interpreted, and who should do interpreting); David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152 (1989); Robert M. Cover, *Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 40-44 (1983) (rejecting view that Supreme Court must impose its interpretation of legal principles on all subcommunities).

279. Galanter, *Justice in Many Rooms*, *supra* note 2, at 173.

D. Deterrence

At this point, we turn to the deterrence rationale for punitive damages, which, as mentioned earlier, is built into Hampton's argument for retribution.²⁸⁰ On the standard economic analysis, which we shall call the "efficient deterrence theory," deterrence demands simply that an offender be compelled to internalize the total cost of his or her harmful activity by paying full compensatory damages. In this way, the offender will persist in the activity only when it is economically efficient, from a societal point of view, to do so. For if the offender has been compelled to bear the full social cost of his or her activity, he or she will persist only when the activity creates benefits that outweigh the damages.

Robert Cooter has refined this argument by showing that under a negligence rule, potential injurers will take the socially efficient amount of care even without being required to internalize all of the costs of the injuries they cause.²⁸¹ Under strict liability rules, however, injurers must bear the full costs of the injuries they cause to achieve the efficient level of deterrence.²⁸² For simplicity of exposition, we shall nevertheless assume that efficiency requires injurers to internalize all costs, as is the case under strict liability, though Cooter's argument shows that under negligence rules injurers must be required to internalize only some costs. This oversimplification will not affect the basic argument for capping punitive damages that we are analyzing; it will affect only the size of the cap.

In *Browning-Ferris*, then, the economic argument proposes that BFI must be forced to absorb the losses inflicted on its competitors by its predatory pricing so that it has no incentive to engage in the anticompetitive practice.²⁸³ At first blush the economic argument suggests that there should not be any punitive damages at all, only compensatory damages, because these suffice to internalize the costs of injuries. Not every victim of harmful activity sues successfully, however. Enforcement is a kind of lottery, and to make wrongdoers internalize the costs of their harmful activity, compen-

280. See *supra* notes 239-40 and accompanying text.

281. See Robert Cooter, *Economic Analysis of Punitive Damages*, 56 S. CAL. L. REV. 79, 82-85 (1982) (noting that precautionary standard of negligence is threshold beyond which costs rise abruptly rather than marginally).

282. *Id.* at 82.

283. This point may be put more precisely as follows: if BFI is forced to internalize the full cost of its predatory pricing, it loses the motive for predatory pricing unless it stands to gain more than its competitors lose. The economic analysis of deterrence presupposes that we wish to deter harmful conduct only to the extent that the costs of the conduct outweigh the benefits. This presupposition marks a departure from many citizens' and legislators' views that some conduct is so morally obnoxious that we wish to prohibit it even at the cost of some loss in economic efficiency.

satory damages must be augmented to take account of the imperfect likelihood of successful enforcement.²⁸⁴ Punitive damages can play this role.

Suppose that the enforcement probability in a given situation is one out of ten.²⁸⁵ In terms of the efficient deterrence theory, then, damages should be augmented by an additional award nine times as large as compensatory damages, so that wrongdoers would internalize the full costs of the injuries they created. In general, if the enforcement probability is e , the punitive damages in strict liability cases should equal the compensatory damages multiplied by $[(1-e)/e]$; in this way punitive damages plus compensatory damages will equal actual damages.²⁸⁶ But then it seems to follow that punitive damages indeed should be capped at a number proportional to compensatory damages, namely, compensatory damages multiplied by $[(1-e)/e]$.

We reject this conclusion. The problem is that from the economic standpoint, punishment is no longer a vehicle of moral condemna-

284. The improbability of full enforcement arises from the fact that the enforcement probability, or the chance that parties injured by wrongful activity will obtain compensation for it, is generally less than one, indeed often much less than one. The enforcement probability will be a function of the likelihood that injured parties will sue, the likelihood that the suit will yield less compensation than actual damages (this includes the likelihood that the defendant will incorrectly escape liability), and the likelihood that the suit will yield more compensation than actual damages. If the enforcement probability is understood to mean the probability that an injured party will obtain full compensation for the injury, then transaction costs such as attorneys' fees and litigation costs will affect the enforcement probability. For the moment, we will set to one side consideration of transaction costs.

285. Such a scenario is not unrealistic. A recent study of medical malpractice in New York state hospitals concluded that only 1 out of every 10 patients who had been injured by negligent care, and who were therefore eligible for malpractice compensation, chose to sue. See HARVARD MED. MALPRACTICE STUDY, PATIENTS, DOCTORS, AND LAWYERS: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION IN NEW YORK 2-3 (1990) (examining more than 31,000 medical records in 51 New York hospitals). Similar figures were reported in studies by Patricia Danzon. See PATRICIA M. DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE AND PUBLIC POLICY 4 (1985) (estimating that only 1 in 10 injured hospital patients files claim). For a summary of evidence on underclaiming, see Richard Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443, 448 (1987) (noting that many tort victims fail to file claims for their injuries).

The phenomenon of underclaiming affects the relevance of Cooter's argument that under negligence rules, potential defendants will take an efficient level of care even without being forced to internalize the total costs of injuries, Cooter, *supra* note 281, at 82-85, and thus even if enforcement probabilities are less than one. Cooter demonstrates that the enforcement probability must be very low indeed to make it rational for potential defendants to take inefficient levels of care. *Id.* at 85. The medical malpractice studies, however, illustrate that in real life, enforcement probabilities can be very low. Other studies as well have shown that most individuals who suffer injuries choose to "lump it" or to abandon efforts at enforcement at a very early stage, thus typically yielding up considerable discounts, because of risk aversion and high transaction costs. Galanter, *Reading the Landscape of Disputes*, *supra* note 132, at 43-44.

286. Let P denote punitive damages, C denote expected compensatory damages, and A denote actual damages. We want to set P such that $P + C = A$, and we are assuming that $C = eA$. From this it follows that $P = MC$, where the multiplier M is $((1-e)/e)$. For simplicity, we are not factoring litigation costs into this discussion.

tion, even in the criminal law. As Richard Posner puts it, "The function of the criminal law, viewed from an economic standpoint, is to impose additional costs on unlawful conduct where the conventional damages remedy alone would be insufficient to limit that conduct to the efficient level."²⁸⁷ To the extent that conduct is inefficient, it is condemned, but to the extent that conduct of the identical kind improves efficiency, it should be praised. Under this theory it is not a contradiction to speak of socially beneficial theft or fraud or even homicide.

The efficient deterrence theory thus regards punitive damages as merely an augmentation of compensatory damages designed to achieve economic efficiency. The theory might well substitute the term "augmented damages" for "punitive damages": because the aim is to deter conduct only to the efficient level, the theory tenders no judgment of the intrinsic character of the conduct. Such augmented damages are "punitive" only in the economist's special nonmoralized sense of punishment. The decision to award the damages need not depend on a judgment that a defendant's conduct has been morally egregious; it depends only on the judgment that augmenting compensatory damages is more likely to lead to efficient outcomes. The efficient deterrence theory drastically revises the doctrinal elements of punitive damages, and not for the better.

Suppose that an airliner crashes because of horrendous negligence on the part of the airline, negligence so egregious that punitive damages would clearly be appropriate by prevailing legal standards. On the economic analysis just presented, one would ask only about the enforcement probability. In such a case, it is virtually certain that the survivors of all or almost all of the passengers will bring suit,²⁸⁸ and it is virtually certain that they will win because the investigation is virtually certain to unearth the negligence.²⁸⁹ Thus,

287. RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 163-64 (2d ed. 1977). See generally Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176-90 (1968) (arguing that increased cost of criminal behavior will decrease incentive to commit crimes, assuming that would-be criminals rationally weigh costs and benefits of actions).

288. See ELIZABETH M. KING & JAMES P. SMITH, INSTITUTE FOR CIVIL JUSTICE, *DISPUTE RESOLUTION FOLLOWING AIRPLANE CRASHES* 19 (1988) (reporting in study of dispute resolution following all 25 major U.S. airline accidents between 1970 and 1984 that claims were filed in 99.9% of 2113 cases for which estimates of economic loss were available).

289. Even where the enforcement rate approaches 100%, however, compensation falls short of the full social cost. Thus, in the air crash recoveries studied by the Institute for Civil Justice where the average compensation paid was \$363,680, this amount was equal to only one half (48.6%) of the economic loss to the survivors and one quarter (25.9%) of the full economic loss. ELIZABETH M. KING & JAMES P. SMITH, INSTITUTE FOR CIVIL JUSTICE, *ECONOMIC LOSS AND COMPENSATION IN AVIATION ACCIDENTS* viii tbl. S1 (1988). The problem is that in cases where the compensatory damages are large, one-shot litigants are likely to be especially risk averse, whereas insurers can be risk neutral. Thus, plaintiffs are likely to accept lower awards in return for avoiding the uncertainty of litigation. Typically, victims with

compensatory damages alone will suffice: e is approximately equal to 1, and so punitive damages will be almost 0. The airline's conduct is irrelevant.

On the efficient deterrence theory, this heinous conduct does not call for punitive damages, provided that the enforcement probability approaches 1. By the same token, morally innocent conduct would attract large "punitive" (i.e., augmented) damages if the enforcement probability is small. The low enforcement probability of medical malpractice cases, for instance, implies that even a doctor whose negligence is not in the least bit morally blameworthy should be socked with "punitive" damages equal to many times the damage done.

In both cases, the result seems very unfair. The nonmoral economic analysis may offer a more rational approach to deterrence than highly moralistic current law, but then we are no longer talking about punitive damages in the lawyer's traditional sense. Moreover, citizens and legislators may rightly insist that they are willing to tolerate some loss in economic efficiency in order to deter what they consider morally offensive conduct, albeit cost-beneficial morally offensive conduct; efficiency is just one consideration among many.²⁹⁰

This point can be expressed in the terms used in our earlier discussion of the norm projection rationale for punishment. To deter would-be offenders fully from engaging in morally outrageous behavior, the price tag must be high enough to make the enforcement lottery an unattractive option. From this perspective, the economic argument is not wrong on its own terms; it is just that its own terms

smaller injuries are overcompensated for their economic losses, whereas victims with more serious injuries are drastically undercompensated, as shown in numerous studies. See, e.g., 1 ALL-INDUSTRY RESEARCH ADVISORY COMM., *AUTOMOBILE INJURIES AND THEIR COMPENSATION IN THE UNITED STATES* 17-18 (1979) (reporting that those compensated for injuries totaling less than \$10,000 recovered more than this amount, while those recovering for injuries exceeding \$10,000 received less than their actual loss); ALFRED F. CONARD ET AL., *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS* 179 fig. 5-13 (1964) (reporting that percentage of total recovery diminishes as amount of recovery increases); DOUGLAS ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* 78 (1974) (noting that likelihood of recovery is inversely related to size of claim and that claims over \$7500 faced 50% chance of recovery, while claims under \$7500 faced 75% chance); SOULAR, *supra* note 105, at 18 (noting that chance of recovery on large claim is low); 1 U.S. DEP'T OF TRANSP., *ECONOMIC CONSEQUENCES OF AUTOMOBILE ACCIDENT INJURIES* 38-39, 44-45 (1970) (observing that percentage of claims recovered decreases as amount of claims increases). Including such phenomena in the calculation of enforcement probabilities would imply a large role for punitive damages in some sectors of the legal regime and a correspondingly small role in other sectors, but in either case, that role would have nothing to do with the heinousness of the wrongful act.

290. As Oliver Wendell Holmes put it, "I always have recognized that there might be an emotional issue and that people might say I don't like it and I want a change even if it costs me more." Letter from Oliver W. Holmes to Morris Cohen (Jan. 30, 1921), reprinted in *THE HOLMES-COHEN CORRESPONDENCE* 26, 27 (Morris Cohen ed., 1948).

are not compelling because they miss the moral point of punitive damages.

E. A Digression on the Economic Analysis of the Scaling Problem

The heart of our argument has been that retribution forms the fundamental basis of punitive damages, and thus that punitive awards should be scaled to the heinousness of the offense. The economic approach to the scaling problem, which argues that punitive awards should be decoupled from moral judgments about the egregiousness of wrongful conduct, simply misses the point. It is true that we have accepted Hampton's proposal that deterrence and other modes of prevention form an integral part of the retributive idea, but it in no way follows from this proposal that the appropriate level of deterrence is whatever yields economic efficiency. Efficiency plays no role in the normative universe of punitive damages as we conceive of it.

It may nevertheless prove instructive to examine the economic approach to the scaling problem more closely, for even on its own terms economic theory provides scant support for proposals to cap punitive damages at levels below those currently in place. The flaw in the economic approach to scaling arises from a dangerous consequence of lowering the ceiling on punitive damages. Doing so may lead to underenforcement of the law and thus to a underprotection of the values that punishment is meant to affirm.

A crucial function of punitive damages is to provide financial incentives for private parties to enforce the law—the bounty system. If punitive damages are significantly decreased, the incentive is likewise decreased, and the enforcement probability, e , goes down. In that case, however, the multiplier $[(1-e)/e]$ must go up. This implies the existence of an equilibrium point, or a cap on punitive damages where the efficient-deterrence curve and the enforcement-probability curve meet.²⁹¹ Perhaps that equilibrium point corresponds with punitive damages lower than the maximums presently experienced, but one should not accept that conclusion on faith. Indeed, given the low numbers of claims in medical malpractice²⁹² and the low levels of compensation even in such open-and-shut cases as airline catastrophes,²⁹³ one has reason to expect the opposite: punitive awards should be higher than they are now in order to achieve efficient deterrence. After all, if only one malpractice victim out of

291. See the Appendix to this Article for a demonstration of this claim.

292. See *supra* note 285.

293. See *supra* notes 288-89.

ten files a claim, the economic model implies that punitive damages in successful malpractice actions should be at least nine times the compensatory damages, even where the defendant's behavior was not morally egregious. Similarly, if risk aversion on the part of airline-disaster plaintiffs leads them to settle for considerably less than full compensation, the economic approach implies that punitive awards must make up the difference.

There is reason to believe that severe caps on punitive damages could significantly lower the enforcement probability. Assume that the market for plaintiffs' lawyers is at equilibrium, so that any increase in compensation expands the plaintiffs' bar and any decrease, such as would result from caps on punitive damages, causes plaintiffs' lawyers to exit from the profession, or at any rate the jurisdiction.²⁹⁴ Any such exit will clearly have a direct effect on enforcement probabilities because the number of enforcers has decreased. If $X\%$ of plaintiffs' lawyers exit, the direct effect will be that e decreases by $X\%$. In addition, however, the exit of plaintiffs' lawyers will have significant indirect effects that will further depress enforcement probabilities.

We may identify several such effects. Plaintiffs' lawyers "piggyback" on each others' legal theories,²⁹⁵ and thus the absence of lawyers who might have devised novel strategies of recovery affects not only their own potential clients but other lawyers and their clients as

294. We argued earlier that the bulk of punitive damages awards occur in intentional torts and business litigation, not personal injury litigation. See *supra* notes 94-120 and accompanying text (discussing incidence of punitive damages). Yet the term "plaintiffs' lawyers" often calls to mind the personal injury plaintiffs' bar, rather than business litigators. In fact, there are significant overlaps between these sections of the plaintiffs' bar. To take a striking example, Pennzoil's attorney in its massive suit against Texaco was Joseph Jamail, a renowned personal injury lawyer. See *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 3 (1987) (listing Joseph Jamail as Pennzoil attorney). Thus, our term "plaintiffs' bar" is meant generally. We are not restricting it to the plaintiffs' personal injury bar.

It is worth noting, however, that popular critics of the "litigation explosion" and the excesses of lawyers typically focus on product liability claims, other personal injury claims, and nuisance suits brought by individuals. Seldom do tort reformers admit that the contemporary surge in litigation, to the extent that it exists at all, contains a major component of business litigation. See MARC GALANTER & JOEL ROGERS, A TRANSFORMATION OF AMERICAN BUSINESS DISPUTING? SOME PRELIMINARY OBSERVATIONS 9 (Inst. for Legal Studies Working Paper No. DPRP 10-3, 1991) (documenting increase in business-versus-business litigation). The result has been a campaign directed against the personal injury bar. See, e.g., Quayle, *supra* note 1, at 567-69 (arguing that reform measures must be further implemented so as to decrease litigation expenses, control jury awards, and deter protracted litigation). It would be ironic and perhaps even disastrous if this campaign succeeded in constricting the availability of plaintiffs' lawyers representing injured individuals, without achieving a significant overall decrease in litigation. Hence our focus on plaintiffs' lawyers would be fully justified even if the term was restricted primarily to personal injury lawyers.

295. See Marc Galanter, Lawyers' Litigation Networks 15-16 (Sept. 20, 1985) (unpublished manuscript, on file with *The American University Law Review*) (reporting emergence of ad hoc information-sharing networks where attorneys can use legal theories of other attorneys in developing their cases).

well. Moreover, plaintiffs' lawyers, who typically practice in small firms or on their own, share information about defendants' weak points and legal tactics, and a thinning of their ranks shrinks the pool of information and attenuates the availability of the information that remains.²⁹⁶ Established plaintiffs' lawyers also provide apprenticeship training for those entering the profession,²⁹⁷ so that diminution of the plaintiffs' bar implies fewer and less diverse training opportunities, resulting on average in a delay in young lawyers' acquisition of proficiency. In addition, a less lucrative area of practice is less likely to attract skilled entrants. Thus, caps on punitive damages, as well as other tort reforms, will eventually depress the quality of the plaintiffs' bar as a whole. In these ways the exit of each lawyer exerts an amplified adverse effect on e : the exit of $X\%$ of plaintiffs' lawyers will diminish e by more than $X\%$.

Initially, we would expect, tort reform measures will drive the most marginal practitioners into a different line of work. It is likely, however, that draconian caps on punitive damages will eventually drive away highly skilled and successful lawyers as well. Because of their reputations, the finest plaintiffs' lawyers, whom we may call the "elite" of the plaintiffs' bar, acquire a disproportionate number of "big-ticket" cases, that is, cases with the possibility of large awards and hence large contingency fees.²⁹⁸ The finest plaintiffs' lawyers are also those with the best opportunities to practice other litigation specialties: they are good trial lawyers and good negotiators. Thus, they are the most likely to have and avail themselves of opportunities to leave the plaintiffs' bar if they find their incomes falling below what they can realize in another line of legal work.

This is important because the exit of elite plaintiffs' lawyers magnifies the adverse effects on enforcement probabilities that we have just discussed. Elite attorneys are likely to provide the best training for young lawyers, and they often unearth the best information to share. The best lawyers are most likely to devise winning theories. Moreover, the best plaintiffs' lawyers typically obtain the best settle-

296. See *id.* at 20-24 (noting importance of information-sharing between attorneys and further noting that more information that is available leads to efficient economies of scale).

297. Cf. *id.* at 21.

298. Often this is because less proficient lawyers "sell" the cases to lawyers who are likely to do a better job of realizing the case's value; they refer the case to the better lawyer in return for a finder's fee. Finder's fees are unethical, but codes of lawyers' ethics do permit lawyers to divide fees in proportion to the work they do, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (1992), and referral fees often appear under the guise of legitimate fee division. This is a generally beneficial practice, for it provides an incentive for a less-proficient lawyer to refer a case to a more proficient lawyer, thereby helping the client as well as benefiting law enforcement. Moreover, such forwarding of cases to suitable specialists is perfectly permissible within a single firm.

ments, not only because they are better-than-average negotiators, but also because defendants do not want to confront them in jury trials. Most cases settle out of court, and information about the size of settlements is often disseminated among both plaintiffs' and defense bars. This information sends signals that govern negotiations in future cases because settlement negotiations occur "in the shadow" of past settlements. If too many good lawyers exit the plaintiffs' bar, the shadow shortens, and defendants will be able to bargain harder for lower settlements. In addition, of course, the best lawyers win the highest proportion of their cases at trial, so that in addition to the effects we have just canvassed, the loss of such a lawyer will directly lower the enforcement probability more than would the exit of a less proficient lawyer.

Last, but not least, we must not ignore the effect that caps on punitive damages have on clients, some of whom will lose the incentive to subject themselves to the risks and rigors of litigation if their expected payoff diminishes. The decreased willingness of victims to seek redress further lowers e . The economic analysis sketched above, which suggests capping punitive damages at $[(1-e)/e]$ times compensatory damages, where e is the current enforcement probability, treats e as a given, an exogenous variable. It clearly is not, however. As punitive damages diminish, so does e .

Once again, we wish to emphasize that our argument, which offers a critique of the economic approach to the scaling problem on its own terms, in no way implies that we accept those terms. As we stressed at the beginning of this Part, we do not accept those terms, for we believe it is a drastic error to decouple punitive damages from the morality of the conduct that attracts them. Even so, the analysis just offered of the effect of punitive damages caps on the plaintiffs' bar, and thus on the enforcement of legal standards, is not simply a theoretical exercise. For even though deterrence should not be calibrated to economic efficiency, deterrence remains an important goal of punishment because it expresses the same commitment as retribution to the value of human beings. Thus, it is important to realize that caps on punitive damages may damage deterrence significantly. While economic efficiency is, morally speaking, beside the point, deterrence and enforcement are not.

F. Punitive Damages and the Rights of the Accused

Punitive damages cases raise an additional due process issue besides the unfettered discretion of juries to punish. The criminal law offers a number of safeguards against wrongful conviction that are

unavailable in civil suits. First, the standard of proof is higher. To be convicted of a crime, one must be proven guilty beyond a reasonable doubt,²⁹⁹ whereas in most civil cases, a plaintiff can win on a mere preponderance of evidence.³⁰⁰ Second, in the criminal law the accused enjoys a right against self-incrimination, whereas in civil cases a party cannot refuse to answer interrogatories in order to avoid liability.³⁰¹ Third, in criminal cases defendants enjoy a right to counsel, a right to *Miranda* warnings, and other familiar rights that have no civil counterparts. Fourth, the Constitution bars double jeopardy in criminal cases, whereas a civil wrongdoer can be assessed punitive damages again and again for the same course of action if it injured more than one person and each of them sues.³⁰²

For these reasons, one might argue that imposing punishments through civil rather than criminal proceedings is wrong because it makes an end run around the Constitution.³⁰³ For example, the Internal Revenue Service often seeks civil rather than criminal sanctions against taxpayers who take overly aggressive positions about

299. See *In re Winship*, 397 U.S. 358, 364 (1970) (noting that "Due Process Clause protects the accused against conviction except upon proof of guilt beyond a reasonable doubt of every fact necessary to constitute the crime with which he [or she] is charged").

300. See *Grogan v. Garner*, 111 S. Ct. 654, 655 (1991) (noting that preponderance of evidence standard is "presumed to be applicable in civil actions . . . unless particularly important individual interests or rights are at stake"). Eighteen states, however, have enacted higher standards of proof in establishing the element of moral wrongdoing needed for punitive damages. Colorado employs a beyond a reasonable doubt standard, COLO. REV. STAT. § 13-25-127(2) (1987), while the seventeen other states employ a clear and convincing evidence standard. See ALA. CODE § 6-11-20(a) (Supp. 1992); ALASKA STAT. § 09.17.020 (Supp. 1992); CAL. CIV. CODE § 3294(a) (West Supp. 1993); GA. CODE ANN. § 51-12-5.1(b) (Michie Supp. 1992); IND. CODE ANN. § 34-4-34-2 (Burns 1986); KAN. STAT. ANN. § 60-3701(c) (Supp. 1991); KY. REV. STAT. ANN. § 411.184(2) (Baldwin 1992); MINN. STAT. ANN. § 549.20(1)(a) (West Supp. 1993); MONT. CODE ANN. § 27-1-221(5) (1991); NEV. REV. STAT. § 42.005(1) (1991); N.D. CENT. CODE § 32-03.2-11 (Supp. 1991); OHIO REV. CODE ANN. § 2315.21(C)(3) (Anderson 1991); OKLA. STAT. ANN. tit. 23, § 9 (West 1987); OR. REV. STAT. § 30.925(1) (1991); S.C. CODE ANN. § 15-33-135 (Law. Co-op. Supp. 1992); S.D. CODIFIED LAWS ANN. § 21-1-4.1 (1987); UTAH CODE ANN. § 78-18-1(1)(a) (1992).

301. See *United States v. Ward*, 448 U.S. 242, 248 (1980) (noting that right against self-incrimination is "expressly limited to 'any criminal case'").

302. See *Hansen v. Johns-Manville Prods. Corp.*, 734 F.2d 1036, 1042 (5th Cir. 1984) (ruling that punitive damages awards do not constitute criminal sanctions, and thus that multiple awards of punitive damages do not violate Double Jeopardy Clause of Fifth Amendment), *cert. denied*, 470 U.S. 1051 (1985).

Under the retributivist analysis that we favor, multiple punitive damages are extremely troublesome, for if each award has been appropriately scaled to the heinousness of the deed, multiple awards amount to overpunishment. At the same time, allowing only the first, or the first few, plaintiffs to collect punitive awards seems unfair. Moreover, such limited awards threaten to disrupt the bounty system by removing the incentive for later parties to sue. We are unsure what the solution is. One possibility would be placing all the punitive awards in a collective fund, capped at an appropriate level of punishment (to be determined either by a jury or by a judge), and eventually divided among litigants.

303. See Jeffrey W. Grass, *The Penal Dimensions of Punitive Damages*, 12 HASTINGS CONST. L.Q. 241, 241 (1985) (arguing that due process should not be slighted by allowing states to delegate punitive functions to civil courts for purposes of satisfying private litigants).

their deductions, simply because dealing with the criminal process is a huge pain in the neck.³⁰⁴ This is a clear instance of civil punishment being used to avoid the strictures of the Constitution, and it seems clearly wrong. Because we have been arguing that punitive damages are preferable to criminal penalties because of certain practical reasons having to do with the enforcement of criminal penalties, it appears that here too punitive damages are merely a stand-in for the criminal law. But to reiterate the argument, punitive civil law omits many of the most prominent protections embodied in criminal law, and thus it appears to permit the infliction of punishment without constitutional safeguards.

This is in large part a doctrinal problem: do the constitutional protections relating to criminal law implicitly create civil counterparts? In *United States v. Ward*,³⁰⁵ the U.S. Supreme Court found that certain penal sanctions compel application of some of the constitutional protections of the criminally accused,³⁰⁶ whether or not the law labels the sanctions as penal. *Ward* invokes a seven-part test taken from *Kennedy v. Mendoza-Martinez*³⁰⁷ of whether a sanction is penal.³⁰⁸ Some writers have argued, not without reason, that punitive damages statutes meet the seven-part test and are therefore penal in the sense of *Kennedy*.³⁰⁹ To date, however, no court has applied the test used in *Ward* and *Kennedy* to a punitive damages determination, presumably because it would be a large additional leap to treat lawsuits prosecuted by private parties, and not the state, as the functional equivalent of criminal cases.

It should be noted that *Ward* and *Kennedy* concerned administratively imposed impairments³¹⁰ and thus preserved the state-versus-

304. See Michael C. Durst, *The Tax Lawyer's Professional Responsibility*, 39 U. FLA. L. REV. 1027, 1059-60 (1987) (noting Internal Revenue Service's need to enforce duty to pay taxes without having to resort to criminal law for every violation).

305. 448 U.S. 242 (1980).

306. *United States v. Ward*, 448 U.S. 242, 248-49 (1980).

307. 372 U.S. 144, 168-69 (1963). The Court set forth the test as follows:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote . . . retribution and deterrence, whether . . . it . . . is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are relevant to the inquiry.

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).

308. *Ward*, 448 U.S. at 249-51 (noting that only fifth part of *Kennedy* test is applicable, that being "a consideration of whether 'the behavior to which [the penalty] is already a crime'") (quoting *Kennedy*, 372 U.S. at 168-69).

309. E.g., Grass, *supra* note 303, at 245; Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 333-37 (1983).

310. See *Ward*, 448 U.S. at 244 (noting penalty in question, as imposed by governing agency, derived from § 311(b)(6) of Federal Water Pollution Control Act); *Kennedy*, 372 U.S. at 146-47 n.1 (recognizing that penalty in case arose from § 401(j) of Nationality Act of 1940,

private-party lineup of criminal cases that punitive damages cases lack. This is a decisive difference, for the political purpose behind constitutional protections such as the right against self-incrimination does not extend to civil litigation between private parties involving no criminal issues. To see why this is so, we must first discover the political purpose behind the constitutional rights of the accused. There is no question that the right against self-incrimination, to stay with that example, impedes the search for truth in the legal process. Indeed, all of the famous and controversial "rights of the accused" in criminal cases obstruct the search for truth in one way or another, and, insofar as social utility is maximized by ascertaining the truth, the rights of the accused carry distinctly anti-utilitarian overtones. So, for that matter, does the reasonable doubt standard of proof, which will lead, on the average, to fewer correct verdicts than a preponderance of evidence standard. Why would we wish to do this?

The answer lies in the classical liberal underpinnings of the Bill of Rights. Classical liberals insist on rights against the Government. They fear the power of the state and its centralized ability to coerce and repress. They fear that the state will use that power to eliminate its political enemies, as almost every state in human history has done. Our own government is hardly blameless in this respect. The Federalists used the Sedition Act to imprison their anti-Federalist opponents;³¹¹ President Nixon used the Internal Revenue Service to "get" his enemies; southern municipalities repeatedly jailed civil rights leaders on spurious charges. Classical liberals were especially concerned about the state's unique rights to imprison and execute convicted felons.

These two concerns—about the centralized power of the state and about state abuse of prisons and physical violence—undergird the special protections embodied in our criminal procedure. Once one realizes this, one realizes as well that these special concerns do not really implicate punitive damages. The most important point is that punitive damages are sought by individual plaintiffs: they involve a totally decentralized use of the legal system to impose punishment, and they raise none of the classical liberal worries about aggrandiz-

as amended, and § 349(a)(10) of Immigration and Nationality Act of 1952, which are enforced by Commissioner of Immigration and Naturalization).

311. See WILLIAM H. REHNQUIST, *GRAND INQUESTS* 47-48 (1992) (noting how Sedition Act was used by Federalist prosecutors to attack those who spoke out or wrote against President John Adams' administration); see also JAMES M. SMITH, *FREEDOM'S FETTERS* 418-20 (1956) (noting that use of sedition laws to silence political rivals was consistent with Federalist theory that "those who own the country are the most fit persons to participate in government of it").

ing state power. The second point is that punitive damages do not involve threats to life and liberty. Not that money is unimportant; but it lacks the special importance possessed by physical coercion in official hands. Thus, the special, rights-based, anti-utilitarian protections in the criminal law do not belong in the context of punitive damages, either as a matter of doctrine or as a matter of political theory.

It is perhaps instructive to speculate on the practical effects of extending *Ward* and *Kennedy* to punitive damages, thereby creating civil counterparts to the rights of the criminally accused. The most important of these rights are the Fourth Amendment right to the exclusionary rule, the Sixth Amendment right to counsel, the Fifth Amendment rights against double jeopardy and self-incrimination, and the reasonable doubt standard of proof. As a practical matter, the Fourth Amendment would make no difference in the civil context because evidence in civil litigation is not typically obtained by illegal searches and seizures by the government. Similarly, the right to counsel would make little difference in civil cases involving punitive damages because an indigent defendant is already judgment proof, and in any event, few people bother to file punitive damages claims against indigents. Double jeopardy would likewise make no difference. It would not rule out multiple punitive damages because the separate actions would amount to distinct "counts" of the same offense.

The right against self-incrimination, by contrast, would make an enormous difference. If civil defendants could invoke a right to block interrogatories, the answering of which might lead to imposition of punitive damages, then civil discovery would come to an abrupt halt, because the same interrogatories will typically be used to discover facts needed for compensatory damages. Thus, the application of *Ward* and *Kennedy* to punitive damages would entail the restriction of civil discovery to cases in which punitive damages cannot as a matter of law be assessed. Plaintiffs would be compelled to choose between waiving discovery or waiving punitive damages. Yet the constitutionality of civil discovery is firmly settled.³¹² Doctrinally, this means that *Ward* and *Kennedy* in effect imply that punitive damages as such are unconstitutional! This is not a possibility that one should take seriously. It is much more plausible to read the Fifth Amendment right against self-incrimination narrowly and liter-

312. See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 510 (1989) (noting that liberal discovery rules are permissible in civil case due to inapplicability of Fifth Amendment's right against self-incrimination).

ally: the requirement that no person "shall be compelled in any criminal case to be a witness against himself"³¹³ simply does not refer to what the Seventh Amendment calls "Suits at common law."³¹⁴

Matters are more complex, however, regarding the standard of proof. Whereas the rights of the accused may best be understood as safeguards against the abuse of state power, the beyond-a-reasonable-doubt standard of proof seems directed against the possibility of wrongful conviction and therefore stigmatization of the defendant. Because the award of punitive damages amounts to a claim that a civil wrongdoer has not only caused injury but has done so by a morally outrageous course of conduct, punitive damages stigmatize the wrongdoer in much the same way as a criminal conviction. For this reason one might expect that the rationale for proof beyond a reasonable doubt applies in punitive damages cases as surely as in criminal cases. In that case, it would make sense to follow those states that bifurcate the standard of proof in civil cases involving claims for punitive damages, establishing liability by a preponderance of evidence but insisting that punitive damages should be awarded only by establishing morally outrageous conduct by a higher standard of proof.³¹⁵

This argument has some force. It neglects, however, the fact that fear of state power plays a vital role in the rationale for proof beyond a reasonable doubt.³¹⁶ The state has enormous investigative resources. It seems plain that the rationale for requiring proof beyond a reasonable doubt is not merely generalized caution against unjustly stigmatizing people. Rather, it is the more specific fear that if the state cannot meet a high burden of proof, even given the investigative resources at its command, the possibility of wrongful conviction is too significant to be ignored.³¹⁷ Private plaintiffs seldom possess such a great advantage in resources, however. Individual plaintiffs challenging large organizations are typically vastly outgunned by their corporate adversaries, who enjoy great advantages in concealing crucial information.³¹⁸ It would be unfair to

313. U.S. CONST. amend. V.

314. U.S. CONST. amend. VII.

315. See *supra* note 300 (listing states that require higher standards of proof for recovery of punitive damages).

316. See *In re Winship*, 397 U.S. 358, 362 (1970) (noting that beyond reasonable doubt standard is "historically grounded right of our system, developed to safeguard [people] from dubious and unjust convictions" and state domination).

317. See *id.* (noting that it has been long-established constitutional principle that proof beyond reasonable doubt is required in criminal cases because of concern that wrongful convictions might result if less-stringent standard were employed).

318. See generally Charles H. Rabon, Jr., *Evening the Odds in Civil Litigation: A Proposed Meth-*

raise the burden of proof for parties who under the best of circumstances face great obstacles in acquiring evidence. Moreover, there is also an element of exaggeration in likening the stigma of punitive damages to the stigma of criminal punishment, which may include physical imprisonment and loss of civil status. For both of these reasons, we doubt that the rationale for proof beyond a reasonable doubt translates from the criminal context to the context of punitive damages.

IV. CONCLUSION

We do not have data on changes in the sheer amount of punishment in society and the way that it is distributed among indigenous institutions, civil courts (and their appended bargaining arenas), and the criminal process. The dramatic rise of prison populations suggests that there is more criminal punishment,³¹⁹ but it is clear that this is not at the expense of civil punishment, which is increasing as well. That there has been an increase overall in the amount of official punishment is not surprising. Better communications and increased mobility of persons, goods, and information mean that there are more interactions that are not controlled by the reciprocities built into continuing relationships. At the same time that there is more call for legal controls, law has become more professionalized, more refined, and more expensive. Higher transaction costs and large populations of similar cases invite more reliance on general effects such as, for example, general deterrence rather than special deterrence.³²⁰

Increased demand for public punishments encounters a problem with the supply, however. The costly sanction of imprisonment must be used sparingly. Civil punishments, on the other hand, are relatively cheap to apply and enlist private enforcement activity. Government has the opportunity to amplify its sanctioning power by

odology for Using Adverse Inferences When Nonparty Witnesses Invoke the Fifth Amendment, 42 VAND. L. REV. 507, 524-26 (1989) (observing that corporate defendants can induce employees to conceal information through various techniques and thus leave plaintiffs without evidence to gain redress).

319. See BUREAU OF JUSTICE STATISTICS, PRISONERS IN 1990 1, 7 (1991) (documenting increase in prison population and providing evidence that changes in criminal justice system may be contributing factor to prison population increase); see also Anne Kornhauser, *Prison Populations: Opening the Door Just a Crack*, CONN. L. TRIB., Aug. 19, 1991, at 20 (noting that prison population in United States has tripled over last two decades).

320. This parallels Richard Abel's observation on the shift from special to general deterrence in independent Africa with the professionalization and centralization of law, consolidation of fewer courts with wider jurisdiction, prosecution of a smaller proportion of wrongs, and imposition of harsher punishments. Richard L. Abel, *Western Courts in Non-Western Settings: Patterns of Court Use in Colonial and Neo-Colonial Africa*, in *THE IMPOSITION OF LAW* 167, 167-93 (Sandra B. Burman & Barbara E. Harrell-Bond eds., 1979).

mobilizing private sector punishments, including both civil damages and indigenous tribunals.³²¹ This is a development that deserves applause, not condemnation. It permits a decentralized and pluralistic legal order with limited government to adapt to an increasingly complex environment. Punitive damages are a part of this pattern that should be refined rather than rejected. They help to maintain the connection of law with public morality and keep law from ossifying into a merely technical discourse of control. Punitive damages help ensure that economically formidable offenders do not enjoy the benefits of wrongdoing beyond the reach of the law. They serve vital retributive and preventative functions. We have argued as well that these functions dictate the appropriate solution to the scaling problem for punitive damages. We end by restating our most important practical conclusions:

(1) We agree with the critics that punitive damages cannot be utterly discretionary and without limits, not because completely discretionary punitive damages are economically harmful, as tort reformers typically claim, but rather because retribution demands penalties that bear a significant relation to the nature of the wrongdoing.

(2) For precisely the same reason, however, we are deeply skeptical of freewheeling judicial discretion in remitting punitive awards.

(3) In our view, the limits of punitive damages have to do entirely with the heinousness of the wrongful act; they have nothing to do with the size of compensatory awards. Thus, we oppose proposals to cap punitive damages at some small multiple of compensatory damages.

(4) The appropriate measure to control punitive damages consists of a requirement that juries provide a plausible rationale for the size of punitive awards, coupled with a large dollop of judicial deference to the retributive sentiments jurors express in those awards.

321. Cf. Arei Freiberg & Pat O'Malley, *State Intervention and the Civil Offense*, 18 LAW & SOC'Y REV. 373, 378-80 (1984) (observing increasing prominence of hybrid forms of civil punishment in which state creates opportunities for private actors to inflict financial penalties on actors that contravene legal standards). This development suggests some modification of Emile Durkheim's observation that as society becomes more complex, it shifts from punitive to restitutive law. EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 49-69 (1930). Instead of the relative decline of the punitive law, we find it relocated within the "restitutive" institutions of the civil law and driven by private actors. Punitive damages offer a paradigmatic illustration of this phenomenon, one that is of great practical importance in contemporary society.

APPENDIX

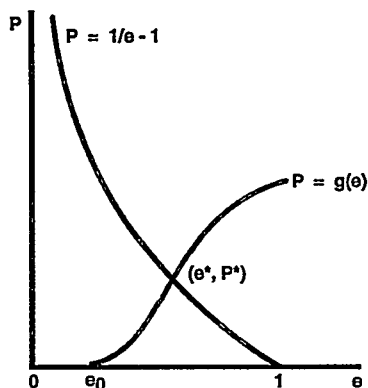
In the text, we derived a simple economic model suggesting that punitive damages should be capped at some multiple of compensatory damages in order to achieve efficient deterrence. Specifically, if e is the enforcement probability, C is compensatory damages, and P is punitive damages, the model suggests that P should satisfy:

(1) $P = [(1-e)/e]C$, where $0 < e \leq 1$. For simplicity, we let $C = 1$, in effect treating P as a measure of punitive damages per dollar of compensatory damages. Then we have:

$$(1') \quad P = (1-e)/e = 1/e - 1.$$

We argued that as P diminishes, the number of plaintiffs' lawyers diminishes as well, driving down the enforcement probability, e . In other words, the enforcement probability is itself a monotonically nondecreasing function, f , of P . Equivalently, there is a positively sloping function g (the inverse of f) such that:

(2) $P = g(e)$, $e_0 \leq e \leq 1$, where e_0 is the enforcement probability that would arise if punitive damages were completely abolished. Capping punitive damages below current rates would lower the enforcement probability, and lowering the enforcement probability would require raising punitive damages to satisfy equation (1'). We claimed that an equilibrium point exists, a point e^* , corresponding with punitive damages $P^* = g(e^*)$, where no further change in punitive damages is required. This point is simply the solution of the simultaneous equations (1') and (2). The existence of e^* is easily seen graphically: equation (1') is a downward-sloping hyperbola that intersects the e axis at (1,0), whereas (2) is an upward-sloping curve beginning at e_0 , which is < 1 , and heading "northeast." The curves cannot fail to intersect.



We also asserted that there is no reason to believe that this equilibrium point would occur at levels of punitive damages lower than existing levels. That is because there is no reason to believe *anything* about the numerical value of e^* . A computation of e^* would require unobtainable information about the exact shape of g ; that is, we would need to know how enforcement probabilities respond to a wide range of different punitive damages caps. Moreover, we would need to know the value of e_0 , the enforcement probability that would result from abolishing punitive damages and then permitting the lawyer population to achieve equilibrium. Obviously, this is not an experiment crying out to be performed; even if it was, the enforcement probability can be studied only in populations of cases (such as medical malpractice) where empirical evaluation of the incidence of injuries, independent of legal claims filed, is possible: e represents the ratio of compensation to actual damages, including damages that result in no claims. Thus, while in our model a cap on punitive damages yielding efficient deterrence may be calculated, the actual calculation remains completely beyond our reach.

