

PUNITIVE DAMAGES AND ENVIRONMENTAL LAW: RETHINKING THE ISSUES

by
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EXECUTIVE SUMMARY

The current debate over punitive damages, both in environmental cases and in general, is misguided. That debate paints a false dichotomy between environmental protection and corporate profits. There *is* a problem with punitive damages, though contrary to what tort reformers may argue, the problem is not large punitive damages awards per se. The problem is not that punitive damages are assessed in “crisis” proportions—no one knows what “crisis” proportions are. Rather, the problem is that punitive damages are often assessed in inappropriate situations or in unjustifiable amounts.

Formulations like “Punitive damages are too high” or “Punitive damages are too low” suffer from the same problem as statements like “Too many people are convicted of murder.” Such statements, based on *aggregate* results, lose sight of the purpose of the law, which is to establish a fair process for achieving a fair result in *individual* lawsuits. In the legal system, a fine that is \$100 too high and one that is \$100 too low do *not* cancel each other out. A solution to the punitive damages problem must explain what a “correct result” is and how to achieve it in individual cases. This paper will argue that:

- Only recklessness, intent to harm, and intentional violations of the law should carry punitive sanctions; accidents and negligence are adequately deterred with compensatory damages, and punishment for such cases is inappropriate.
- Criminal law is a better tool than punitive damages to punish and deter. In criminal law, the burden of proof is higher, the criminal fines go to the state and not to the injured party (though the injured party may also bring a civil suit for compensatory damages), punishments are more predictable, the problem of multiple punishment for the same cause of action does not exist, and decisions to prosecute rest with public authorities vested with the task of punishing criminal conduct.
- However, if the civil law continues to be used to impose punitive damages, various reforms merit consideration.
 - a) Juries themselves aren't the problem; the more fundamental problem is unlimited discretion, whether on the part of juries or judges. Punitive damages reform must involve at least the

procedural safeguards mandated by the Supreme Court in the *Haslip* case: clear jury instructions, post-verdict review by the trial court, and appellate review.

- b) In addition, punitive damages should incorporate those features pointed out above as advantages of the criminal law. The burden of proof for awarding punitive damages should be higher; plaintiffs shouldn't keep punitive damages awards; punishments should be more predictable; and multiple awards of punitive damages for a single action should be curtailed.
- c) Punitive damages should concentrate on how much defendants benefited from their reckless or malicious conduct. All penalties already incurred by defendants, like regulatory fines or compensatory damages, should be subtracted from this number. Multipliers may be appropriate, in cases where the underlying conduct was hard to detect.
- d) The ratio between compensatory and punitive damages should be irrelevant. Relying on this sort of simple formula, or using a ratio as a cap on punitive damages, makes it more difficult to come up with appropriate deterrent fines, and it magnifies any previous errors in the calculation of compensatory damages and regulatory fines.
- e) The wealth of the defendant generally should not be a consideration in establishing damages.

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The week that the jury in the Exxon Valdez trial came in with their final verdict, juror Nancy Provost's granddaughter had been learning about big numbers in her fifth-grade math class. "Billions and millions and trillions," says Provost. "She goes, 'I've got to find a big number, over a hundred thousand dollars.'" Provost handed her the front page of the September 17 Anchorage Daily News. The lead story was an article on the previous day's punitive damages verdict against Exxon Corporation. "\$5,000,000,000," screamed the headline. "I said, 'How about this?'" Provost recalls. "My son-in-law says, 'You know, Grandma made that money.'" Provost and ten other jurors did indeed "make" that \$5 billion verdict, a big number in a fifth-grade classroom, a big number in a corporate boardroom—even if the boardroom happens to belong to a multibillion-dollar corporation like Exxon—a big number, period.

—Emily Barker, *The American Lawyer*¹

I. INTRODUCTION

The doctrine of punitive damages is one of the most hotly contested aspects of the judicial system. Objections to the doctrine of punitive damages go all the way to the 19th century, when Justice Foster of the New Hampshire Supreme Court said of punitive damages:

*The idea is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law.*²

Justice Foster was referring to the symmetry by which tort law was to be entirely compensatory and criminal law entirely punitive. More recently, legal scholar Peter Huber has criticized punitive damages as having “an open-ended, anything-goes quality that can too easily stoke the ambitions of eager plaintiffs, the zealous advocacy of their lawyers, and the vindictive or sympathetic passions of juries.”³ According to legal commentator Walter Olson, punitive damages are “a peculiar holdover from the law's moralistic past... [a] vestigial tailbone of the civil law.”⁴

¹ Emily Barker, “The Exxon Trial: A Do-It-Yourself Jury,” *The American Lawyer*, November 1994, p. 68.

² *Fay v. Parker*, 53 N.H. 342 (1872), p. 382, cited in Stephen Daniels and Joanne Martin, “Myth and Reality in Punitive Damages,” *Minnesota Law Review*, vol. 75 (1990), p. 1.

³ Peter W. Huber, *Liability: The Legal Revolution and Its Consequences* (New York: Basic Books, 1990), p. 118.

⁴ Walter K. Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* (New York: Truman Talley Books, 1991), p. 280. Note that not all commentators view “moralism” negatively; many, in fact, argue that moral distinctions are precisely what is needed in tort law and that the problem with punitive damages is that they are often used in situations where the defendant is not at fault. But more on these distinctions later in the paper.

Punitive damages in environmental cases are every bit as contested as punitive damages in the tort system at large. There are few theoretical questions that are different in environmental cases than in other cases.⁵ But questions about punitive damages are especially acute in environmental cases, especially in “toxic tort” litigation, which generally relates to injuries caused by the production or handling of hazardous materials, like asbestos⁶ or pesticides.⁷ Blurry questions of causality and unclear methods of calculating penalties—both hallmarks of environmental law—compound the problem. The largest punitive award ever levied against a corporation—\$5 billion—was assessed in an environmental case—against Exxon in the *Valdez* case.⁸

In today's popular debate over punitive damages, defendants in lawsuits tend to maintain that the doctrine of punitive damages is fatally flawed. Meanwhile, plaintiffs hold that punitive damages are necessary to obtain justice and that any reform of the system would put the “little guy” at the mercy of “Big Business.”

This paper will argue that neither the critics nor the supporters of the punitive damages system have it quite right. The present popular debate over punitive damages (both in environmental cases and in general) is largely misconceived, painting a false dichotomy between environmental protection and corporate profits. Contrary to what defenders of the tort system say, there *is* a problem with punitive damages, though contrary to what tort reformers may argue, the problem is not large punitive damages awards per se.⁹ The problem exists not because punitive damages are assessed in “crisis” proportions—no one knows what “crisis” proportions are. Rather, the problem is that punitive damages are often assessed in inappropriate situations or in unjustifiable amounts.

Formulations like “Punitive damages are too high” or “Punitive damages are too low” suffer from the same problem as statements like “Too many people are convicted of murder.” Such statements, based on *aggregate* results, lose sight of the purpose of the law, which is to establish a fair process for achieving a fair result in *individual* lawsuits. In the legal system, a fine that is \$100 too high and one that is \$100 too low do *not* cancel each other out. A solution to the punitive damages problem must explain what a “correct result” is and how to achieve it in individual cases. In this paper, I will argue that:

- There are important differences between civil and criminal law. Civil law is primarily a private law whose goal is to settle individual disputes arising from individual harm, and to *compensate* injured parties. Criminal law assigns blame and metes out *punishment* for transgressions against the social order and the collective moral code. The boundaries between these two areas of the law have been blurred in recent years, but these boundaries should be reestablished. Punishment should be reserved for intentional misdeeds—

⁵ Aside from my choice of examples, many of the arguments in this paper are generally applicable to the tort reform debate as a whole.

⁶ James R. May, “Fashioning Procedural and Substantive Due Process Arguments in Toxic and Other Tort Actions Involving Punitive Damages After *Pacific Mutual Life Insurance Co. v. Haslip*,” *Environmental Law*, vol. 22 (1992), p. 585, n. 60. See *Simpson v. Pittsburgh Corning*, 901 F.2d 277 (2d Cir.), cert. dismissed, 111 S.Ct. 27 (1990); *Johnson v. Celotex Corp.*, 899 F.2d 1281 (2d Cir. 1990); *Racich v. Celotex Corp.*, 887 F.2d 393 (2d Cir. 1989); *Juzwin v. Amtorg Trading Corp.*, 718 F.Supp. 1233 (D.N.J. 1989) (“*Juzwin II*”); *Leonen v. Johns-Manville Corp.*, 717 F.Supp. 272 (D.N.J. 1989); *Martin v. Johns-Manville Corp.*, 494 A.2d 1088 (Pa. 1985); *Kirkbride v. Libson Contractors, Inc.*, 555 A.2d 800 (Pa. 1989). See also Steve France, “Asbestos Solution Proposed,” *ABA Journal*, June 1991, p. 16; Mark Hansen, “Misfaxed Papers Stop Asbestos Trial,” *ABA Journal*, August 1991, p. 22.

⁷ May, “Fashioning Procedural and Substantive Due Process Arguments,” p. 585, n. 65. See *Villari v. Terminex Int'l, Inc.*, 677 F.Supp. 330 (E.D.Pa. 1987).

⁸ Natalie Phillips, “\$5,000,000,000 Jury Sets Oil Spill Damages,” *Anchorage Daily News*, September 17, 1994, p. A1.

⁹ One proposed remedy of the tort reformers—limiting lawyers' contingency fees—sounds particularly strange, coming, as it does, from a group that would generally bristle at the very mention of price controls in any other area.

recklessness,¹⁰ intent to harm, and intentional violations of the law. Punishment is inappropriate for accidents and merely negligent behavior, for which compensatory damages are enough.

- **Morally blameworthy actions which are now punished with punitive damages in civil cases should instead be punished through the criminal law. Some advantages of the criminal law are that:**
 - a) **In criminal law, the burden of proof is higher, which is appropriate because of the moral stigma attached to a criminal conviction and the need to protect the innocent from being wrongly convicted.**
 - b) **Criminal fines go to the state and not to the injured party (though the injured party may also bring a civil suit for compensatory damages), which is appropriate because: 1) awarding punitive fines to injured parties is a bad way to encourage plaintiffs to sue and is no substitute for an attorney's fee recovery system; 2) once compensatory damages have already been paid, the defendant's wrongdoing, if it is truly wrong, is an offense against society at large; and 3) allowing the injured party to keep punitive fines can give people too much of an incentive to sue in borderline frivolous cases.**
 - c) **Criminal punishments, because they are laid out in statutes, are generally more predictable than jury-determined punitive damages awards, and are therefore fairer because they give potential wrongdoers advance notice of the likely consequences of their conduct.**
 - d) **Criminal law only punishes wrongdoers once for each offense (instead of once for each injured party), which is appropriate because the magnitude of a criminal offense lies in the reprehensibility of its intent and not the harm it caused or how many people it affected. Indeed, criminal law even allows punishment when, by some fluke, no one was injured (a case where the tort system wouldn't allow recovery).**
 - e) **Decisions to prosecute criminal violations rest with public authorities vested with the task of punishing criminal conduct, which is appropriate because criminal violations are offenses against societal norms and not just injuries to a particular person.**
- **However, if the civil law continues to be used to impose punitive damages, we should keep in mind that:**
 - a) **The civil law is still an inappropriate vehicle for imposing punishment. Any “punitive damages” award will still be punitive, since it will impose costs in excess of the harm caused, so procedural safeguards are necessary. But the punishment rationale should be dropped. Deterrence should be the only goal of punitive damages awards.**
 - b) **Juries themselves aren't the problem; the more fundamental problem is unlimited discretion, whether of juries or judges. Punitive damages reform must involve at least the procedural safeguards mandated by the Supreme Court in the *Haslip* case: clear jury instructions, post-verdict review by the trial court, and appellate review.**

¹⁰ See section III.B for a discussion of the terms “recklessness” and “negligence.” Recklessness is the knowledge and conscious disregard of a substantial and unjustifiable risk of harm. Negligence is when the defendant should have known, but didn't, of a substantial and unjustifiable risk that the damage would occur.

- c) In addition, punitive damages should incorporate those features pointed out above as advantages of the criminal law. The burden of proof for awarding punitive damages should be higher; plaintiffs shouldn't keep punitive damages awards; punishments should be more predictable; and multiple awards of punitive damages for a single action should be curtailed.
- d) To effectively deter, *total fines*—including regulatory penalties, compensatory damages, and punitive damages—should be equal to, or slightly higher than, the economic benefit to the defendant of his reckless or malicious conduct. Therefore, all penalties already incurred by defendants, including regulatory fines or compensatory damages, should be subtracted from this number to yield the optimal amount of punitive damages. Multipliers may be appropriate, in cases where the underlying conduct was hard to detect.
- e) Any sort of monetary cap on punitive damages awards is arbitrary, has nothing to do with deterrence, and should be avoided. The ratio between compensatory and punitive damages should also be irrelevant. Relying on this sort of simple formula, or using a ratio as a limit on punitive damages, makes it more difficult to come up with appropriate deterrent fines, and it compounds any previous errors in the calculation of compensatory damages and regulatory fines.
- f) The wealth of the defendant generally should not be a consideration in establishing damages.

II. THE DEBATE OVER PUNITIVE DAMAGES

A. Who Cares about Punitive Damages?

Aggregate statistics on punitive damages don't tell us whether the tort system should be reformed. But a look at some of the numbers can help us understand the arguments of the tort reformers, and imagine the magnitude of the problem, to the extent there is one.

Since the 1970s, punitive damages awards have been increasing in frequency and in amount. In particular, punitive damages awards in environmental tort cases, especially toxic tort cases, have increased.¹¹ A 1992 study, *Punitive Damages Explosion: Fact or Fiction?*, notes that total punitive damages awards in Texas, California, Illinois, and New York increased from an average of \$800,000 in the 1968–1971 period to an average of \$312.1 million in the 1988–1991 period—by a factor of 390, or by a factor of 117 if we adjust those numbers for inflation. The average award in the first period was only \$1,080, while the average award in the second period was \$778,000—nearly equal to the entire amount of punitive damages awarded during the first period.¹²

The Supreme Court has expressed “concern about punitive damages that `run wild.’”¹³ Good numbers are hard to come by because no comprehensive reporting system exists;¹⁴ a great many punitive damages awards

¹¹ Gerald W. Boston and M. Stuart Madden, *Law of Environmental and Toxic Torts: Cases, Materials and Problems* (St. Paul, Minn.: West Publishing Co., 1994), p. 204.

¹² Steven Hayward, *Punitive Damages in California: A Review and Comparison of the Evidence*, Pacific Research Institute for Public Policy, Briefing (March 1996), pp. 2–3, citing George S. Branch, James D. Miller, Stephen M. Turner, *et al.*, *Punitive Damages: Fact or Fiction?*, Washington Legal Foundation, October 1992.

¹³ *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), p. 18.

¹⁴ Victor E. Schwartz and 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*,” *The American University Law Review*, vol. 42, p. 1370, n. 31, citing Michael Rustad, “Demystifying Punitive Damages in Product Liability Cases: A Survey of a

are reversed or reduced by higher courts, which further complicates the matter.¹⁵ But some numbers provide evidence of this trend:

Quarter Century of Verdicts," *Iowa Law Review*, vol. 78 (1993).

¹⁵ *Ibid.*, p. 1371, citing U.S. General Accounting Office, *Report to the Chairman, Subcommittee on Commerce, Consumer Protection, and Competitiveness, Committee on Energy and Commerce, House of Representatives, Product Liability: Verdicts and Case Resolution in Five States* (1989), p. 38.

- In Alabama, juries awarded over \$200 million in punitive damages in 1994.¹⁶ From 1974 to 1978, aggregate punitive damages affirmed by the Alabama Supreme Court were \$409,385. From 1979 to 1983, they were \$4,239,766. From 1984 to 1988, they had risen to \$33,167,497, and, finally, from 1989 to 1993, they had climbed to \$89,616,379.³⁴ Increases in punitive damages have been observed in many jurisdictions, but Alabama has reportedly earned a reputation for punitive damage awards that “grow thick and wild”¹⁷ and are “becoming the norm.”¹⁸
- A review of *Jury Verdicts Weekly*, which reports only a portion of California jury verdicts, reveals that California state juries handed down punitive damage verdicts totaling over \$1.7 billion from 1990 to 1994 in 263 cases—for an average of about \$6.5 million per verdict.¹⁹
- One 1992 study analyzed state and federal Texas court decisions affirming punitive damage awards where at least one litigant was a business, to find out whether there has really been an “explosion” of punitive damage awards. While from 1968 to 1971, the total punitive damages affirmed in Texas were \$85,000, that number had risen to \$127,591,000 for the period 1988–1991—an increase by a factor of 1,500 in one generation.²⁰ From 1992 to 1994, in state court cases alone, Texas appellate courts affirmed \$186,683,294.60 in punitive damages.²¹
- A Pacific Research Institute study of 1,024 lawsuits filed in January 1991 in San Francisco County Superior Court shows that: 1) punitive damages are demanded in 27 percent of all cases where they are conceivably recoverable; 2) business and government defendants are four times as likely as an individual defendant to face a lawsuit that demands punitive damages; 3) lawsuits that include punitive damage demands take one-third longer to resolve (21 months) than suits without these demands (15 months); 4) the probability of a punitive damage award if a case proceeds to trial, contains a punitive damages demand, and is against a business defendant, is estimated to be 14 percent.²²

While punitive damages have been around for a long time, they didn't “skyrocket”²³ until the late 1970s and 1980s. According to Victor Schwartz and Mark Behrens, the increase was due to three important legal developments in the late 1960s and early 1970s:

- Courts moved away from applying punitive damages only in the area of intentional torts and started applying them in the new field of products liability²⁴ (paralleling other changes in tort law, including changes in the scope of recoverable injury);

¹⁶ Statement of Theodore B. Olson before the Judiciary Committee, U.S. Senate, concerning civil justice reform, April 4, 1995, pp. 3–6, citing brief *amicus curiae* of the Alabama Business Council in *BMW of North America, Inc. v. Gore*, U.S. 94-896 (filed March 23, 1995).

¹⁷ *Ibid.*, p. 14, citing G. Jaynes, “Where the Torts Blossom,” *Time*, March 20, 1995, p. 38.

¹⁸ *Ibid.*, n. 5, citing L. Himelstein, “Jackpots from Alabama Juries: A String of Mammoth Awards Has Insurers Starting to Flee,” *BusinessWeek*, November 28, 1994, p. 83.

¹⁹ *Ibid.*, pp. 14–15. Some of those verdicts may have been reduced or reversed by trial or appellate courts, or the cases may have been settled.

²⁰ *Ibid.*, p. 15, citing Branch, Miller, Turner *et al.*, *Punitive Damages Explosion*.

²¹ *Ibid.*

²² Steven Hayward, *The Role of Punitive Damages in Civil Litigation: New Evidence from Lawsuit Filings*, Pacific Research Institute for Public Policy, Briefing (1996). The numbers in Hayward don't take into account the possibility that awards may have been vacated or reduced by appellate courts.

²³ Schwartz and Behrens, “Punitive Damages Reform,” p. 1369, citing Melvin M. Belli, Sr., “Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society,” *UMKC Law Review*, vol. 49 (1980), no. 1, p. 1.

²⁴ See *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 838–842 (2d Cir. 1967); *Toole v. Richardson-Merrell, Inc.*, 60 Cal. Rptr. 398, 414–418 (Ct. App. 1967); *Moore v. Jewel Tea Co.*, 253 N.E.2d 636, 648–649 (Ill. App. Ct. 1969). See also Schwartz and Behrens, “Punitive Damages Reform,” p. 1369, n. 26, citing Michael C. Garrett, “Allowance of

- **With the advent of “mass tort” litigation, courts allowed punitive damages to be awarded repeatedly, for different plaintiffs, for what was really one act;²⁵ and**

Punitive Damages in Products Liability Claims,” *Georgia Law Review*, vol. 6, p. 613 (1972).

²⁵ See Schwartz and Behrens, “Punitive Damages Reform,” pp. 1369–1370, n. 26, citing *Toole*; *Ostopowitz v. William S. Merrell Co.*, N.Y.L.J., Jan. 11, 1967, p. 21 (N.Y. Sup. Ct. 1967); Paul D. Rheingold, “The MER/29 Story—An Instance of Successful Mass Disaster Litigation,” *California Law Review*, vol. 56 (1968), p. 116, at pp. 134-138; John C. Jeffries, Jr., “A Comment on the Constitutionality of Punitive Damages,” *Virginia Law Review*, vol. 72 (1986), p. 139; Victor E. Schwartz and Liberty Magarian, “Multiple Punitive Damage Awards in Mass Disaster and Product Liability Litigation: An Assault on Due Process,” *Adelphi Law Journal*, vol. 8 (1992), p. 101; Richard A. Seltzer, “Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control,” *Fordham Law Review*, vol. 52 (1983), p. 37.

- Courts began to allow punitive damages in contract actions like breach of an implied duty of good faith and fair dealing.²⁶

Courts have also come to look upon punitive damages as an entitlement of injured plaintiffs; they have therefore been reluctant to overturn punitive damages awards, even in cases where the same defendant has already paid punitive damages to many plaintiffs for the same actions. As Judge Henry Friendly put it in the 1967 case of *Roginsky v. Richardson-Merrell*:

We know of no principle whereby the first punitive award exhausts all claims for punitive damages and would thus preclude future judgments; if there is, Toole's judgment in California²⁷ [a previous punitive damages award against the same manufacturer], which plaintiff's brief tells us came earlier, would bar Roginsky's. Neither does it seem either fair or practicable to limit punitive recoveries to an indeterminate number of first-comers, leaving it to some unascertained court to cry, "Hold, enough," in the hope that others would follow. While jurists might comprehend why Toole in California should walk off with \$250,000 more than a compensatory recovery and Roginsky in the Southern District of New York and Mrs. Ostopowitz²⁸ in Westchester County with \$100,000, most laymen and some judges would have some difficulty in understanding why presumably equally worthy plaintiffs in the other 75 cases before Judge Croake or elsewhere in the country should get less or none.²⁹

The aggregate numbers also come with tales of some seemingly arbitrary individual punitive damage awards, like the \$2.9-million punitive damage award against McDonalds, in the New Mexico case where a woman spilled hot coffee on herself after, as she explained, she “put... [a styrofoam coffee cup with a plastic cover] between [her] knees and tried to get the top off that way.”³⁰ The trial judge reduced the award, but only to \$490,000 because he, too, wanted to send a message to McDonalds and “punish and deter” its corporate coffee policy³¹ (which, by the way, was based on the company's internal surveys of how hot its consumers wanted

²⁶ *Ibid.*, p. 1370, n. 26, citing *Gruenberg v. Aetna Insurance Co.*, 510 P.2d 1032 (Cal. 1973).

²⁷ See *Toole*.

²⁸ See *Ostopowitz*.

²⁹ *Roginsky*, pp. 839–840.

³⁰ Theodore Olson testimony, p. 17, citing “Are Lawyers Burning America?”, *Newsweek*, March 20, 1995, p. 32.

³¹ *Ibid.*, citing “Are Lawyers Burning America?”, p. 35.

their coffee to be).³² As one commentator has put it, “today, hardly a month goes by without a multi-million dollar punitive damages verdict in a product liability case.”³³

B. What Are Punitive Damages?

Damage payments in civil cases can be divided into two components: *compensatory damages* and *punitive damages*. Compensatory damages include several components:

- *Pecuniary damages*, which compensate successful plaintiffs for actual out-of-pocket expenses, like medical expenses or lost wages from injuries;
- *Nonpecuniary damages*, which compensate people for nonmonetary losses, including “pain and suffering”; and

³² According to coffee experts, the higher temperature is needed to bring out the brew's full flavor. *Associated Press*, September 14, 1994.

³³ Schwartz and Behrens, “Punitive Damages Reform,” p. 1370, n. 28, citing Malcolm E. Wheeler, “A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation,” *Alabama Law Review*, vol. 40 (1989), p. 919.

- *Hedonic losses*, for lost pleasure in life.³⁴

Compensatory damages, by definition, already fully compensate plaintiffs to the extent allowed by the law. But in addition, courts are allowed to make defendants pay punitive damages. The goal of punitive damages is not to compensate the injured plaintiff (though the plaintiff does receive the money), but to punish and deter the injurer.

Most environmental cases where punitive damages are an option are of the “nuisance” model, though many of the decisions awarding punitive damages rest on other liability theories like negligence, trespass, or strict liability (that is, where the defendant may have to pay damages regardless of whether he was negligent) for especially dangerous activities. Under the general nuisance model, the plaintiff is usually a property owner or occupant who has suffered some harm to his person or property from the actions of another, and the defendant is a past or current owner or occupier of some other land. Often, the defendant owns land adjacent to a plaintiff’s land; many of the cases involve air or water pollution, water diversion, mining operations, blasting, vibrations, noise, flooding, obstructions, and the like.³⁵ A subset of nuisance and strict liability litigation involving spills, releases, burial, or disposal of toxic wastes or other substances that have caused injury to people or property is called “toxic tort litigation.”³⁶

A majority of jurisdictions allow punitive damages in civil cases.³⁷ (Table 1 indicates the states that have eliminated punitive damages or statutorily reduced the number of situations in which they are permissible.) According to supporters of the current punitive damages system, these are some reasons for using punitive damages:

State	Statutes
Alaska	Limited—Stat. § 09.17.010 (Supp. 1991) (limiting noneconomic losses in personal injury claims based on negligence to “compensation for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life and other nonpecuniary damage”)
Iowa	Limited—Code Ann. § 668A.1(1)(A) (West 1987) (limiting punitive damages to cases where the defendant showed a “willful and wanton disregard for the rights or safety of another”)
Minnesota	Limited—Stat. Ann. § 549.20(1)(a) (West Supp. 1992) (limiting punitive damages to cases where the defendant’s actions showed “deliberate disregard for the rights or safety of others”)
New Hampshire	Eliminated—Rev. Stat. Ann. § 507:16 (Supp. 1991) (eliminating punitive damages, except when authorized by statute)

³⁴ Hedonic losses are a controversial class of payments. This breakdown is from Paul H. Rubin, “Fundamental Reform of Tort Law,” *Regulation*, No. 4, 1995, p. 30.

³⁵ Gerald W. Boston, “Environmental Torts and Punitive Damages (Part One),” *Journal of Products Liability*, vol. 14 (1992), p. 1.

³⁶ *Ibid.*, p. 2.

³⁷ Arthur F. Roeca, Esq., “Damages,” in G.Z. Nothstein, Esq., *Toxic Torts: Litigation of Hazardous Substance Cases* (Colorado Springs: Shepard’s/McGraw-Hill, 1984), p. 515.

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State	Case
Louisiana	Eliminated— <i>McCoy v. Arkansas Natural Gas Co.</i> , 143 So. 383, 385-86 (eliminating, except when explicitly authorized by statute), <i>cert. denied</i> , 287 U.S. 661 (1932); <i>Ashland Oil, Inc. v. Miller Oil Purchasing Co.</i> , 678 F.2d 1293, 1318 (5th Cir. 1982); <i>Karavokiros v. Indiana Motor Bus Co.</i> , 524 F. Supp. 385, 387 (E.D. La. 1981); <i>Killebrew v. Abbott Lab.</i> , 359 So. 2d 1275, 1278 (1978)
Massachusetts	Eliminated— <i>Burt v. Advertiser Newspaper Co.</i> , 28 N.E. 1, 5 (1981); <i>City of Lowell v. Massachusetts Bonding & Ins. Co.</i> , 47 N.E.2d 265, 271-72 (1943); <i>Ellis v. Brockton Publishing Co.</i> , 84 N.E. 1018, 1019-20 (1908)
Nebraska	Eliminated— <i>Boyer v. Barr</i> , 8 Neb. 68 (1978); <i>Abel v. Conover</i> , 104 N.W.2d 684, 688 (Neb. 1960)
Washington	Eliminated— <i>Spokane Truck & Dray Co. v. Hoefler</i> , 25 P. 1072, 1075 (1891)

Source: Kagan, “Toward a Uniform Application of Punishment,” p. 773, nn. 107–115.

- Assume that a misdeed has occurred, which we want to discourage unconditionally. If the perpetrator is likely to repeat the offense even though he has to pay compensatory damages, extra damages may have to be assessed to discourage the activity. For instance, if the wrongdoer profits by more than the damage he causes, having to pay only compensation would still leave him ahead, unless the costs of the litigation exceed the difference.³⁸
- If the misdeed is hard to detect, or if people are unlikely to sue, then only a few victims will be compensated. The offender will only pay a portion of the costs imposed by his conduct, so some extra damages may have to be assessed.³⁹

³⁸ Later in the paper, I will draw distinctions between conduct that we want to unconditionally discourage and conduct that is in itself socially useful, which we don't want to unconditionally discourage.

³⁹ Richard A. Booth, “Halt the misuse of punitive damages,” *USA Today Magazine*, September 1995, vol. 124, no. 2604, p. 64.

- Because of legal costs and other considerations, compensatory damages may not be enough to motivate people to sue when they have a good case. Assume that someone is harmed by actions that are reprehensible but not criminal, and that the harmed party is reluctant to sue. Then the financial lure of a punitive damage award may be necessary to lead them to bring willful wrongdoers to justice. This is called the “private attorney general” argument.⁴⁰
- Punitive damage awards may provide compensation to plaintiffs whose actual damages exceed those that the law allows them to recover through compensatory damages.⁴¹

These are the justifications for punitive damages that often appear in the popular debate; some are valid, and some are not. But first, some history.

C. A Brief History of Punitive Damages

The notion that total damages can exceed mere compensatory damages has a long history.⁴² The Babylonian Hammurabi Code,⁴³ the Hindu Code of Manu,⁴⁴ and the Bible⁴⁵ all contain references to the doctrine of multiple damages. The Romans assessed multiple damages for certain offenses, and justified them by invoking the need to constrain wealthy elites. In ancient Rome, quadruple damages were a creditor's remedy against

⁴⁰ Roeca, “Damages,” p. 514.

⁴¹ *Ibid.*, citing Owen, “Punitive Damages in Products Liability Litigation,” *Michigan Law Review*, vol. 74 (1976), p. 1257.

⁴² Much of the following discussion is taken from the excellent historical exposition in Michael Rustad and Thomas Koenig, “The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers,” *American University Law Review*, vol. 42 (1993), pp. 1284–1304.

⁴³ *Ibid.*, p. 1285, n. 79, citing Linda L. Schlueter and Kenneth R. Redden, *Punitive Damages* (2nd ed., 1989), vol. 1, p. 3, n. 1.

⁴⁴ *Ibid.*, n. 80, citing James Sales and Kenneth Cole, “Punitive Damages: A Relic That Outlived Its Origins,” *Vanderbilt Law Review*, vol. 37, p. 1119; and *The Ordinances of Manu* (Andrew C. Burnell trans., Oriental Books Reprint Corp., 2nd ed., 1971) (1884), providing the ancient code of Indian law containing multiple damages, as set forth in *Ma_ava-Dharma-Çastra*.

⁴⁵ *Ibid.*, n. 81, citing Exodus 22:4, Deuteronomy 22:8, and Luke 19:8.

debtors who didn't pay their debts for a year;⁴⁶ while part of the multiple damages may have been some substitute for interest, a 300 percent interest rate is a bit high, and so we must conclude that the primary purpose of this fine was punitive. Closer to home, in the 18th century, courts assessed “exemplary damages” against the government for its oppressive treatment of a dissenting newspaper in the companion cases of *Wilkes v. Wood*⁴⁷ and *Huckle v. Money*.⁴⁸ From then on, English courts used exemplary damages to punish and deter the misuse of wealth and power.

⁴⁶ *Ibid.*, p. 1286, n. 87, citing S.P. Scott, *Corpus Juris Civilis: The Civil Law*, vol. 4, p. 320 (1932).

⁴⁷ *Ibid.*, p. 1287, n. 93, citing *Wilkes v. Wood*, 98 Eng. Rep. 489 (K.B. 1763).

⁴⁸ *Ibid.*, n. 94, citing *Huckle v. Money*, 95 Eng. Rep. 768 (K.B. 1763).

In America, punitive damages were first used in the 1780s and 1790s. The first such award was in *Genay v. Norris*,⁴⁹ a malicious poisoning case. Punitive damages were later awarded in cases such as *Coryell v. Colbaugh*,⁵⁰ a suit over breach of promise of marriage, and *Boston Manufacturing Co. v. Fiske*,⁵¹ a suit over patent infringement. Punitive damages were generally used against bullies who oppressed the weak and powerless, in cases of assault and battery, rape, and (what would now be called) sexual harassment.⁵² By the end of the 19th century, the application of the doctrine shifted from powerful individuals to large corporations.⁵³ Railroads often had to pay punitive damages to women, invalids, and children who were badly treated by conductors, porters, and other railway employees.⁵⁴ Judges and juries awarded punitive damages in cases where the defendant exhibited willful and gross (but not criminal) disregard of a plaintiff's rights.

D. Out of Control?

Even assuming that punitive damages are justified, are the awards in environmental cases too high? Some point to the \$5-billion award against Exxon as an example in the affirmative. The punitive damage award was upheld by an Alaska federal district court on January 27, 1995, though it may still be appealed when the entire Exxon case is done. The Exxon spill was the sixth largest on record; in 1978, the Amoco *Cadiz* ran aground off the coast of France, spilling 68.7 million gallons of oil—six times as much as the *Valdez*.⁵⁵

Critics of punitive damages assert that:

- Compensatory damages, in many cases, are adequate to deter harm, and punishment, the traditional domain of criminal law, is not an appropriate goal for civil law.
- The winners and losers in the redistribution of wealth wrought by punitive damages awards aren't obvious. Common wisdom has it that corporations are the ones who are punished, but corporations themselves can feel no pain. The ultimate costs of punitive damages awards are borne by a company's employees, stockholders, the consumer, or all of these; excess money paid by corporations translates into potentially higher consumer prices, and lower profits translate into potentially lower dividend payments on the company's stock. One commentator presents the effect of Exxon's punitive damage assessment this way: "60 percent to 70 percent of Exxon stock belongs to individuals rather than institutions. After tax deductions, Exxon is already out \$2.5 billion, \$2 a share. The punitive damages could cost another \$4 a share. There's that much less in assets to back the pensions of possibly millions of people."⁵⁶
- Offsetting a plaintiff's litigation expenses isn't an appropriate function of civil litigation (aside from provisions that explicitly allow successful parties to collect attorney fees). If the law doesn't allow plaintiffs to recover certain damages (for instance, attorneys' fees, or as-yet-unthought-of forms of pain and suffering), they shouldn't be able to recover for those damages through the catch-all proxy

⁴⁹ *Ibid.*, p. 1290, n. 106, citing *Genay v. Norris*, 1 S.C.L. (1 Bay) 6 (1784).

⁵⁰ *Ibid.*, p. 1291, n. 112, citing *Coryell v. Colbaugh*, 1 N.J.L. 77 (1791).

⁵¹ *Boston Manufacturing Co. v. Fiske*, 3 F.Cas. 957 (C.C.D. Mass. 1820) (No. 1681).

⁵² Rustad and Koenig, "The Historical Continuity of Punitive Damages Awards," pp. 1292–1293.

⁵³ *Ibid.*, pp. 1294–1295.

⁵⁴ *Ibid.*, pp. 1296–1297.

⁵⁵ Even though the Amoco *Cadiz* spill was much larger, its legal ramifications were far less severe—the facts weren't the same, and the *Cadiz* spill took place in a less litigious time. A U.S. court ordered the company to pay French plaintiffs \$235 million—none of it punitive damages. Shanthy Nambiar, "Exxon on trial! Again? CE Roundtable," *Chief Executive*, January 1995, no. 100, p. 62.

⁵⁶ Nina Munk, "We're partying hearty!", *Forbes*, October 24, 1994, pp. 89–90.

of punitive damages. If the plaintiffs don't like these restrictions, they can push for changes in the law, but using punitive damages as a back-door way of collecting money the law doesn't entitle them to is a blunt instrument for a delicate job.

- Multiple awards of punitive damages to multiple plaintiffs, which are often assessed, especially in consumer products liability cases, are excessive punishment.⁵⁷

⁵⁷ Roeca, "Damages," pp. 514–515, citing Ghiardi and Kircher, *Punitive Damages, Law and Practice* (1982).

Despite its \$5-billion punitive damages award, Exxon is still prospering, but this may be misleading. Exxon reported a profit of \$5.28 billion in 1993 on revenues of \$111 billion, and according to Standard & Poor's, it still has a coveted triple-A credit rating (which is the highest one can get).⁵⁸ But Exxon hasn't had to pay the \$5 billion yet. According to Philip Dodge, senior vice president at Southeast Research Partners in Florida, if appeals fail and Exxon has to pay the full \$5 billion, the company's debt ratio could increase by as much as 30 percent, and a big part of operating profit could be used to service the debt. Any money actually paid may have a delayed effect; the full payment period on the \$1 billion settlement with the state of Alaska, for instance, extends past the year 2000.⁵⁹

III. TO PUNISH AND DETER: THE CASE FOR THE CRIMINAL LAW

A. The Trouble with the Debate

Defenders of the system of punitive damages point out that while punitive damages critics concentrate on products liability and medical malpractice, the expansion of punitive awards has mainly been in the areas of intentional torts and business/contract actions; the areas that get the most media attention aren't the areas with the most punitive damages awards.⁶⁰ According to some commentators, "judges and juries award punitive damages with striking rarity to individuals in suits against manufacturers."⁶¹ The point is also made that statements like "the average punitive damage award increased, in inflation-adjusted dollars, from \$43,000 in 1965–1969 to \$729,000 in 1980–1984—a jump of 1500 percent"⁶² are misleading, in that they report

⁵⁸ Worldwide profit numbers are arguably misleading anyway, to the extent that different departments or geographical areas in a company may be independent of one another. It may take substantially less than the total profits of a company to make Exxon stop operating in Alaska.

⁵⁹ Nambiar, "Exxon on trial!"

⁶⁰ Rustad and Koenig, "The Historical Continuity of Punitive Damages Awards," p. 1306, n. 181.

⁶¹ *Ibid.*, p. 1307.

⁶² *Ibid.*, n. 181, citing President's Council on Competitiveness, *Agenda for Civil Justice Reform in America* (August

mean awards, not *median* awards. When dealing with means, a small number of very large awards can dramatically skew the results.⁶³

Just about every substantive point made by one side in the debate is disputed by the other side. For instance, means *are* often more useful than medians. For instance, if a company faces n punitive damage awards, where μ is the mean award and m is the median, the total amount that the company will have to pay in punitive damages will approach $n\mu$ as n increases.⁶⁴ The median is an essential statistic, and should be used together with the mean, but alone isn't very useful to the company trying to calculate its expected liability exposure.⁶⁵

But to merely point out that punitive damages are high shows nothing. All punishments seem high to the person being punished.

1991), p. 6.

⁶³ *Ibid.*

⁶⁴ By the Central Limit Theorem of probability theory, if there are n punitive damages awards, if a_1, \dots, a_n are the amounts of the n punitive damages awards, each identically distributed and having a mean μ , and if A is the average amount of a punitive damage award ($A = \sum_{i=1}^n a_i / n$), then for any $\delta > 0$, $P(|A - \mu| \leq \delta) \rightarrow 1$ as $n \rightarrow \infty$.

⁶⁵ Of course, mean and median awards may not be the same across types of cases. Toxic torts, oil spills, medical malpractice, and products liability are all different animals. Using overall means (or medians) will skew the results and lead one astray when particular means or medians are called for. There, the problem isn't in whether one uses a mean or a median, but in what sort of data one has, and the answer in such cases is to develop better means and medians.

But one can quibble with the rationale for imposing punishment in many cases. As Kenneth Adams of Dickstein, Shapiro & Morin, one of the lead plaintiffs' attorneys in the Exxon case, put it, the fine sends a signal to Exxon; "prevention is better than recklessness. What went wrong was fundamental bad management."⁶⁶ This isn't literally true; "prevention" and "recklessness" aren't opposites. It's possible to have accidents without being reckless. Political scientist Aaron Wildavsky draws distinctions between "anticipatory" societies, which try to prevent all accidents, and "resilient" societies, which try to find better ways of managing accidents when they occur. Anticipation, Wildavsky argues, has its place but can't be pushed too far. In the first place, preventing all accidents is impossible, since, by definition, though one can predict the likelihood of an accident, one can't know them all. Accidents are inevitable, even with all possible care. Second, trying to anticipate all possible harm or risk means that resources will be misspent pursuing expected accidents, which would lower the resources available to improve technology generally, enhance safety elsewhere, or be able to respond resiliently when an inevitable but unanticipated accident occurs.⁶⁷

In short, there is such a thing as too much prevention.

Nonetheless, punitive sanctions may *sometimes* be warranted. If someone achieves ill-gotten gains through reprehensible activity, then forcing him merely to give up these gains, once discovered, may not discourage him from engaging in the activity in the first place. If compensatory damages are all one has to pay, one may perceive advantages to being reckless or malicious and just paying the money if one is discovered. But a key to these hypothetical scenarios is some notion of recklessness, maliciousness, or intent to harm.

The question "What makes gains ill-gotten?" should be the central question of the punitive damages debate. This section will argue that:

- We can't deter everything we don't like, nor do we want to.
- Deterrence gets more expensive as we have more of it, and it gets more expensive faster and faster. The cost of each marginal gain is higher than the previous one.
- When the activity we're trying to deter is an accidental by-product of an otherwise socially useful activity, the costs of getting rid of the activity can exceed the benefits of altogether eliminating the by-product. The only way to get the "optimal" amount of such activities is by making everyone bear their full costs through payment of compensatory damages.
- We should reserve punishment for cases where there are truly "ill-gotten gains"—intent to harm or violate the law, or instances of recklessness.
- In such cases, the criminal law is a more effective means of punishing bad behavior (and gives government the opportunity to punish blameworthy acts, even when they caused no injury). Tort law should be reserved for compensation.
- The criminal law will be fairer in the following respects:
 - 1) the burden of proof is higher when imposing punishment than when requiring compensation;
 - 2) the criminal fines go to the state and not to the injured party (though the injured party may also bring a civil suit for compensatory damages);
 - 3) punishments are more predictable, because appropriate ranges of punishment are written into the statute establishing the criminal violation;
 - 4) because of the guarantee against double jeopardy, the problem of multiple punishment for the same cause of action does not exist; and

⁶⁶ Nambiar, "Exxon on trial!"

⁶⁷ For more on this, see Aaron Wildavsky, *Searching for Safety* (New Brunswick: Transaction Books, 1988). See also William F. Baxter, *People or Penguins: The Case for Optimal Pollution* (New York: Columbia University Press, 1974).

- 5) decisions to prosecute rest with public authorities vested with the task of punishing criminal conduct and endowed with the discretion to distinguish between violations they feel are worth prosecuting and those they don't.

B. Why We Can't Deter Everything, and Why Only Intent to Harm and Recklessness Should Carry Punitive Sanctions

We can distinguish four types of damage cases:

- *Intent or knowledge*—where the defendant caused damage intentionally or knowingly;
- *Recklessness*—where the defendant knew and consciously disregarded a substantial and unjustifiable risk that the damage would occur;
- *Negligence*—where the defendant should have known, but didn't, of a substantial and unjustifiable risk that the damage would occur; and
- *Innocent accidents*—where the damage occurred, but the risk of its having happened was justifiable or insubstantial.

Pinning down just what “substantial” and “justifiable” mean in this context may involve having recourse to generally accepted industry standards, the currently existing regulatory structure, or the ever-elusive “reasonable person.”

In the first three of these cases, *compensatory damages* must be paid. That the plaintiffs should be compensated, or “made whole,” for the damage they've suffered isn't disputed. In the case of innocent accidents, where a case really can be made that no one was at fault, the costs rest where they fall.⁶⁸ So either the law provides for the compensation of victims, or it denies them the right to recover altogether; in either case, the compensation question is taken care of. The question, though, is: When should defendants be *punished* for their behavior?

The first two categories, intent and recklessness, involve knowledge and usually some deliberation. In either case, the defendant intends to either harm someone or to put someone under a substantial and unjustifiable risk of harm. “From a moral standpoint,” Judge Friendly tells us, “there is not too much difference between the driver who heads his car into a plaintiff and the driver who takes the wheel knowing himself to be so drunk that he probably will hit someone and not caring whether he does or not.”⁶⁹ These sorts of cases, we want to punish, because intent to harm is reprehensible. Indeed, the *Model State Punitive Damages Act* advocates a malice standard: “The plaintiff must establish that the defendant's actions showed malice. This burden of proof may not be satisfied by any degree of negligence including gross negligence.”⁷⁰ So far, 13 states require by statute that plaintiffs seeking punitive damages establish that the defendant acted with malice (in at least some types of lawsuits), and two states require proof of malice through case law (see Table 2).

Negligence and innocent accidents, though, are different. Accidents will always happen, even under the most responsible management. This isn't hyperbole; unless one completely avoids a particular industry, eliminating all chance of an accident is *literally* impossible. We can reduce accidents, though; by spending more resources in prevention, we can prevent more accidents, but these efforts cost money, and the higher the level of safety, the more it costs to prevent each additional accident. If we were to try to eliminate all accidents, we would end up going to extreme lengths, spending countless resources that would be better spent elsewhere. For example,

⁶⁸ There is also a good case to be made for compensating accident victims, but it is tangential to the punitive damages argument.

⁶⁹ Roginsky, p. 838.

⁷⁰ *Model State Punitive Damages Act*, § 6.

research conducted at the Harvard Center for Risk Analysis indicates that different “life-saving interventions” can have wildly different costs per life-year saved (see Table 3).

Table 2: States That Have Established a Malice Standard for Punitive Damages by Statute or Case Law	
State	Case
Arizona	Rev. Stat. Ann. § 12-653.02-.03 (1992) (libel or slander)
California	Civ. Code § 3294(a) (West Supp. 1993) (breach of noncontractual obligation)
Delaware	Code Ann. tit. 18, § 6855 (Supp. 1992) (health care malpractice insurance action)
Illinois	Ann. Stat. ch. 110, § 2-1115.05(b) (1995) (requiring evil motive or a reckless and outrageous indifference to a highly unreasonable risk of harm and with a conscious indifference to the rights and safety of others)
Montana	Code Ann. § 27-1-221 (1991) (requiring finding of actual malice or actual fraud)
Nevada	Rev. Stat. § 41.337 (1991) (libel or slander)
New Jersey	Rev. Stat. Ann. § 2A:58C-5 (West 1987) (product liability)
North Dakota	Cent. Code § 32-03-07 (Supp. 1991) (breach of noncontractual obligation)
Ohio	Rev. Code Ann. § 2315-21 (Baldwin 1992) (requiring that acts or omissions of defendant demonstrate malice, aggravated or egregious fraud, oppression, or insult)
Rhode Island	Gen. Laws § 28.5-29.1 (Supp. 1992) (requiring conduct to be motivated by malice or ill-will and that such conduct involve reckless or callous indifference to statutorily protected right of others)
South Dakota	Codified Laws Ann. § 21-1-4.1 (1987) (requiring willful, wanton, or malicious conduct on part of defendant)
Texas	Civ. Prac. & Rem. Code Ann. § 41.003 (1995) (fraud, malice, or wilful act or omission or gross neglect in wrongful death actions; and specifically excluding ordinary negligence, bad faith, or a deceptive trade practice)
Virginia	Code Ann. § 8.01-52 (Michie 1992) (allowing recovery of punitive damages for willful or wanton conduct or recklessness evincing conscious disregard for safety of others)

State	Case
Maine	<i>Firth v. City of Rockland</i> , 580 A.2d 694, 697 (1990); <i>Tuttle v. Raymond</i> , 494 A.2d 1353, 1361-62 (1985)
Maryland	<i>Owens-Illinois v. Zenobia</i> , 601 A.2d 633, 653 (1992)

Source: Rustad and Koenig, “The Historical Continuity of Punitive Damages Awards,” p. 1279, n. 64; and other sources.

The most expensive life-saving intervention the Harvard group looked at was chloroform private well-emission standards at 48 pulp mills, which cost \$99,351,684,000 per life-year saved.⁷¹ That's almost \$100 billion. That's 100 million times the amount of money needed to save one life-year through flu vaccinations (at \$1,000 per life-year saved). A liability rule that encourages too much investment in trivial safety devices takes resources away from countless other uses, some of which may save more lives. In other words, *there is such a thing as overdeterrence*. The way to deter appropriately is to make people bear the full costs of their actions, and that goal is already served by compensatory damages (which include out-of-pocket costs, as well as “pain and suffering” awards).

⁷¹ Saving one year of one life is one life-year saved. Saving 10 years of one life, or one year of 10 lives, both correspond to 10 life-years saved.

Table 3: Costs per Life-year Saved of Different “Life-saving Interventions”

Intervention	Cost/life-year saved
Influenza vaccination	\$1,000
Helmet protection	\$2,000
Smoking cessation advice	\$6,000
Breast cancer screening	\$17,000
Speed limit	\$45,000
Highway improvement	\$64,000
Radon control	\$141,000
Asbestos control	\$1,865,000
Benzene control	\$14,153,000
Radiation control	\$27,386,000

Source: Tammy O. Tengs, Miriam E. Adams, Joseph S. Pliskin *et al.*, “Five-Hundred Life-Saving Interventions and Their Cost-Effectiveness,” *Journal of Risk Analysis*, vol. 15, no. 3 (1995), pp. 369–390.

As for negligence, it's tempting to say that all one has to do to be nonnegligent is to avoid negligence. But not acting negligently is more complicated than it seems. Negligence, after all, is when you don't know, but should know, of a substantial and unjustifiable risk that damage will occur. In other words, negligence isn't an intentional act, but is a failure of knowledge. Failures of knowledge are unintentional and therefore, in a sense, “accidents”; like innocent accidents, negligent accidents can be remedied, but only by spending resources to educate oneself and act in accordance with that knowledge. By spending more and more money, one can identify and remedy one's negligent activities—but totally eliminating accidents, negligent or otherwise, is impossible. Negligent actors should bear the costs of their actions. If they are forced to do so, they will avoid acting negligently as long as the costs of avoidance are less than the costs of the negligent accidents themselves. Thus, compensatory damages are already an adequate deterrent to negligence.

Courts and legislatures, when describing the sort of conduct justifying punitive damages, tend to use phrases like “willful, wanton misconduct,” “reckless or conscious disregard for the safety of others,” or “oppressive, fraudulent, malicious, or outrageous conduct.”⁷² As one classic handbook on the law of damages describes the purpose of punitive damages:

⁷² Roeca, “Damages,” p. 515.

*Since [punitive] damages are assessed for punishment and not for reparation, a positive element of conscious wrongdoing is always required. It must be shown either that the defendant was actuated by ill will, malice, or evil motive (which may appear by direct evidence of such motive, or from the inherent character of the tort itself, or from the oppressive character of his conduct, sometimes called “circumstances of aggravation”), or by fraudulent disregard of the rights of others. “Gross negligence” is a somewhat ambiguous expression. In the sense of extreme carelessness merely, it would probably not suffice, but only when it goes further and amounts to conscious indifference to harmful consequences.*⁷³

Or, as another commentator puts it more specifically, in the case of chronic environmental damage:⁷⁴

- 1. In those exceptional circumstances where an activity is engaged in for a purely improper purpose or motive, liability predicated on the actual or express malice standard is a distinct possibility.... Moreover, when there exists direct or circumstantial evidence of spite, ill-will, or revenge as the real purpose or motive behind the activity, punitive damage liability reaches its highest probability. In these cases, risk and utility considerations are largely irrelevant because the utility which the defendant gains (satisfaction from seeing harm inflicted) is not a kind of utility that is socially recognizable or legally cognizable....*
- 2. In the decisions in which the punitive damage liability was sustained on the basis of evidence supporting a standard of recklessness, conscious indifference to the rights of others, or similar standard, there were present several common factual demonstrations.*
 - 1) Defendant possessed a knowledge or awareness that its operations were discharging or emitting some hazardous or harmful substances into the air, water or ground....*
 - 2) Defendant possessed the knowledge or awareness that its activities were producing harm to the plaintiff or invading the plaintiff's rights to the beneficial use of its land....*
 - 3) In all of the cases the defendant had knowledge of a means or method by which to reduce or eliminate or abate the risk or harm resulting from its activities....*
 - 4) After the defendant is possessed of the knowledge identified in items 1), 2) and 3) and then fails to act, the risk of punitive liability attaches.*⁷⁵

This is the theory—intent and recklessness can support a punitive damages decision; lesser wrongs can't. In practice, though, these conditions are often observed in the breach.⁷⁶ Courts often stray from these rules of thumb. The standard varies from “reckless indifference and disregard of the law” to a standard just short of

⁷³ *Ibid.*, citing McCormick, *Handbook of the Law of Damages* § 79, pp. 280–282 (1935).

⁷⁴ I use the adjective “chronic” because conditions 2(1) and 2(2), for instance, don't apply to cases of “episodic” environmental harm such as oil spills. For the episodic cases, the language in the following passage can be changed, for instance, in the following way: 2(1) “Defendant possessed a knowledge that its operations carried with them a substantial and unjustifiable risk of discharging...,” and 2(2) “Defendant possessed the knowledge or awareness that its activities had a substantial and unjustifiable risk of producing harm....” This is, in effect, the definition of recklessness.

⁷⁵ Boston, “Environmental Torts and Punitive Damages (Part One),” pp. 37–38.

⁷⁶ Punitive damages are misapplied in other types of cases as well, and the problems presented here exist across the board. But for the purposes of this paper, I am going to concentrate on environmental cases.

actual intent to commit the specific act in question.⁷⁷ Different courts differ on to what extent one can imply the defendant's state of mind from his conduct.⁷⁸

⁷⁷ Albert J. Slap and Alan C. Milstein, "Punitive Damages in Toxic Tort Actions: Vindication for Victims," *Trial*, November 1989, p. 86.

⁷⁸ *Ibid.*, citing *Baker v. Marcus*, 114 S.E.2d 617 (Va. 1960); and *Branch v. Western Petroleum, Inc.*, 657 P.2d 267 (Utah 1982).

Some courts divorce the availability of punitive damages from the precise nature of the defendant's conduct, by considering violations of laws (even without intent) to be grounds enough for considering punitive damages. The boundaries set up by environmental laws may demarcate the line that someone has to cross for his actions to exceed simple carelessness.⁷⁹ In *Tant v. Dan River*,⁸⁰ homeowners sued the corporation Dan River for negligence in allowing its boiler system to emit a black, sooty material which damaged their homes and property. The South Carolina Supreme Court upheld the punitive award, saying that:

*The testimony and evidence at trial indicated Dan River was aware of emission problems with its boiler system prior to receiving complaints from the homeowners. Internal memoranda indicated Dan River had knowledge the boiler system was in "poor mechanical shape because of age," and was "on the ragged edge" relative to compliance with state regulations. Approximately three weeks after the homeowners initially complained of damage from emissions, a Dan River employee filed an internal report confirming that emissions from the boiler chimney were "at times well above the state and federal air pollution control standards" and reporting he had recorded as many as ten violations in a single day. A jury question as to punitive damages is presented when there is evidence of a statutory violation.*⁸¹

This is how, in fact, punitive damages are often applied. But the actual circumstances where punitive damages may be appropriate are not quite as broad as indicated in the above standard from the *Dan River* case:

- If someone is harmed as a result of malice or recklessness, *punishment is appropriate*.
- If someone deliberately violates a law, for instance, by engaging in criminal activities such as fraud, *punishment is appropriate*.
- If the harm is a result of an accident or mere negligence, *punishment isn't appropriate* (though compensatory damages and statutory fines may be appropriate).

Sometimes, determining whether something was intentional, reckless, negligent, or accidental is more difficult than it seems. In most asbestos litigation, the plaintiff worked in a shipyard during World War II, in an atmosphere permeated with asbestos dust. In most jurisdictions, juries determine whether the defendant's

⁷⁹ *Ibid.*, citing *Iron Mountain Security Storage Corp. v. American Specialty Foods, Inc.*, 457 F.Supp. 1158, 1165 (E.D.Pa. 1978).

⁸⁰ *Ibid.*, citing *Tant v. Dan River, Inc.*, 345 S.E.2d 495 (S.C. 1986). See also Boston, "Environmental Torts and Punitive Damages (Part Two)," *Journal of Products Liability*, vol. 14 (1992), p. 171.

⁸¹ Boston, "Environmental Torts and Punitive Damages (Part Two)," p. 171, citing *Tant*, p. 496. Statutory violations being enough for punitive damages isn't typical; see *Murphy v. Amoco Production Co.*, 729 F.2d 552 (8th Cir. 1984), where Amoco didn't comply with an environmental statute it believed to be unconstitutional. The court held that while the violation was clearly intentional, because the defendant honestly believed the statute was unconstitutional, there was no "oppression, fraud, or malice" and so no grounds for punitive damages.

conduct during the 1930s and 1940s can be considered “conscious disregard for safety.” But it's difficult for a jury to forget its modern notions of what is currently common knowledge or acceptable, reasonable behavior—including its modern awareness of environmental pollution, health hazards, and medical technology.⁸² Half a century ago, responsible business practice was a lot different, and much of today's knowledge about health and environmental risks simply didn't exist. As one commentator put it, “It is a laborious task to take a jury back those same 20 or more years, arm them with the information then available, and ask them to plot the course of conduct for a defendant manufacturer, disregarding the medical state of the art as it exists [today].”⁸³ And yet it must be done.

C. Why We Should Prefer to Punish Using the Criminal Law

The criminal law already exists as a way of punishing intentionally bad behavior. In 1958, Henry Hart, law professor at Harvard University, described different proposed distinctions between criminal and civil law:

⁸² Roeca, “Damages,” p. 520.

⁸³ *Ibid.*, pp. 520–521, citing Parnell, “Manufacturers of Toxic Substances, Tort Liability and Punitive Damages,” *Forum*, vol. 17 (1982), p. 967.

- “Can crimes be distinguished from civil wrongs on the ground that they constitute injuries to society generally which society is interested in preventing?”⁸⁴ No; society's also interested in people honoring contracts and avoiding traffic accidents.
- “Does the distinction lie in the fact that proceedings to enforce the criminal law are instituted by public officials rather than private complainants?”⁸⁵ No; the government brings all sorts of civil enforcement actions—for instance, for an injunction or to recover a civil penalty.
- Are crimes any things that are called crimes? “So vacant a concept is a betrayal of intellectual bankruptcy. Certainly, it poses no intelligible issue for a constitution-maker concerned to decide whether to make use of ‘the method of the criminal law.’ Moreover, it is false to popular understanding, and false also to the understanding embodied in existing constitutions. By implicit assumptions that are more impressive than any explicit assertions, these constitutions proclaim that a conviction for crime is a distinctive and serious matter—a something, and not a nothing. What is that something?”⁸⁶

The key—the “something,” as Hart puts it—is society's moral condemnation. We condemn murder, for instance, in a way that we don't condemn run-of-the-mill (non-alcohol-related) traffic accidents. According to John Coffee, professor of law at Columbia University, what most distinguishes criminal law from civil law (and particularly from tort law) is:

*its operation as a system of moral education and socialization. The criminal law is obeyed not simply because there is a legal threat underlying it, but because the public perceives its norms to be legitimate and deserving of compliance. Far more than tort law, criminal law is a system for public communication of values. As a result, the criminal law often and necessarily displays a deliberate disdain for the utility of the criminalized conduct to the defendant. Thus, while tort law seeks to balance private benefits and public costs, criminal law does not..., possibly because balancing would undercut the moral rhetoric of the criminal law. Characteristically, tort law prices, while criminal law prohibits.*⁸⁷

This generally ought to be the case, but in practice the distinction is sometimes blurred. One big exception to the rule is the practice of awarding punitive damages in civil cases. This is, in fact, what Justice Foster of the New Hampshire Supreme Court meant when he said that punitive damages “deform[ed] the symmetry of the body of the law.”

But the distinction between civil law and criminal law isn't merely academic. There are real differences between the two sorts of law. For one thing, civil law requires a plaintiff. This is problematic for punitive damages. Compensation centers on the harm to the plaintiff, but punishment centers on the inherent

⁸⁴ Henry M. Hart Jr., “The Aims of the Criminal Law,” *Law and Contemporary Problems* 23 (1958): 401, p. 403.

⁸⁵ *Ibid.*, p. 404.

⁸⁶ *Ibid.*

⁸⁷ John C. Coffee Jr., “Does ‘Unlawful’ Mean ‘Criminal’?: Reflections on the Disappearing Tort/Crime Distinction in American Law,” *Boston University Law Review*, vol. 71 (1991), pp. 193–194 (first italics are mine, second italics are the author's).

reprehensibility of the act. How, then, does one punish reprehensible behavior that (fortunately) didn't harm anyone? The criminal law already has a way of dealing with this. In criminal law, it's the bad act, not the injury, that creates the cause of action, so the government can punish wrongdoers for their intent, whether or not they harmed anyone.

There are other differences between civil and criminal law. For example:

- The standard of proof required to impose punishment is higher in criminal law—which is appropriate, since punishment is a more serious matter than compensation, and we should therefore maintain high levels of protection to avoid mistakes in punishment;
- The injured party doesn't keep criminal fines—which is appropriate, since:
 - 1) punitive damages are a blunt and inappropriate way of compensating plaintiffs for taking the trouble to sue;
 - 2) the defendant's conduct should be properly thought of as an offense against society at large, not an offense against the plaintiff in particular (since the plaintiff has already been compensated as far as the law allows), so the damages awards should go to the state; and
 - 3) if kept by the plaintiff, punitive damages awards can introduce an element of moral hazard on the plaintiff's side, since they can give him too large an incentive to sue in borderline frivolous cases.
- Criminal punishments are usually more predictable than civil fines, since criminal violations generally have fixed, definite penalty ranges. While judges, as a general rule, have had broad discretion, they are bound by the minimum and maximum penalties in the statute. This is appropriate, because fairness requires that potential offenders be put on notice as to the specific consequences of their actions.
- The guarantee against double jeopardy ensures that no one is criminally punished twice for the same cause of action.
- Decisions to prosecute criminal violations rest with public authorities vested with the task of punishing criminal conduct and endowed with the discretion to distinguish between violations they feel are worth prosecuting and those they don't. This, too, is appropriate; since the defendant's conduct is a harm to society at large, the decision of whether and how to prosecute him should rest with representatives of society at large—that is, the executive branch.

As the following sections will explain, these are important safeguards to maintain because of the serious nature of punishment. By contrast, the current, ad hoc, system of determining punitive damages has significant costs. According to lawyer Theodore Olson of the Civil Justice Reform Group,

Despite their similarity to criminal fines, punitive damages are generally imposed without any of the systemic protections afforded by our form of government to shield defendants from arbitrary and extreme punishments in criminal cases.... In criminal cases, arbitrary action is checked to a significant degree by the division of the power to punish among the three branches of government that typically wield power at the federal and state levels. The legislative branch has the responsibility prospectively to define proscribed conduct and suitable levels of punishment. The executive branch has the duty to serve as the “disinterested prosecutor with the unique responsibility to serve the public, rather than a private client, and to seek justice that is unfettered.” The judicial branch customarily imposes a penalty within legislative constraints after considering the recommendations of the prosecutor, and administers a panoply of procedural safeguards to ensure that alleged wrongdoers are treated fairly.

Thus, before criminal punishment may be imposed, an individual has the right to foreknowledge of a generalized but clear legislative statement of what is prohibited and what shall be the penalty for deviation from the prescribed norm; a “prosecution” by a public official sworn to uphold the public welfare, bound by an oath to comply with the Constitution and held accountable to seek justice and not retribution or private gain; and a judicially supervised enforcement proceeding to ensure that punishment may be imposed only for

*violating clear standards and that punishments will be consistent, predictable and not excessive.... These important institutional controls... are almost completely lacking in the punitive damage system.*⁸⁸

D. Some Advantages of Criminalizing Punitive Sanctions

1. Higher Burdens of Proof

⁸⁸ Theodore Olson testimony, pp. 3–6.

For compensatory damages, the burden of proof is not very stringent. For criminal prosecutions, on the other hand, the burden of proof is substantial, as anyone who has watched the O.J. Simpson trial now knows. As Olson puts it, “Criminal defendants receive numerous procedural rights not available to punitive damage defendants [in a civil suit]. For example, a criminal defendant may be entitled to a specific finding of criminal intent beyond a reasonable doubt by a unanimous jury before he can be fined \$500, but the same individual or corporation may be fined \$5 million or \$5 billion for the same conduct in a civil suit with none of these protections.”⁸⁹ Moreover, rights like the privilege against self-incrimination usually don't apply in civil cases.⁹⁰

Why are higher burdens of proof necessary for punishment?

Let's first consider the pitfalls of awarding compensatory damages. When awarding compensation, courts can make two sorts of mistakes. One is to deny a compensatory award to a deserving plaintiff, unjustly leaving the defendant with his money. Another mistake is to award compensatory damages to an undeserving plaintiff, unjustly depriving the defendant of his money. In the compensatory damages context, we usually feel that either of these injustices are equally bad, and so we feel no need to guard against one of them more vigilantly than against the other.

In the criminal context, we think differently; as the saying goes, “Better to release n guilty men than to convict an innocent man.”⁹¹ The greater we feel n should be, the more willing we are to guard against unjustly convicting the innocent, and the more stringent our burden of proof should be.

⁸⁹ *Ibid.*, p. 11.

⁹⁰ *Juzwin v. Amtorg Trading Corp.*, 705 F.Supp. 1053 (D.N.J. 1989) (“*Juzwin I*”), p. 1055.

⁹¹ Credited (perhaps apocryphally) to just about everyone, including Socrates ($n = 1$), Voltaire ($n = 1$, $n = 100$), Ayatollah Hossein Ali Montazeri (“in Islam,” $n = 1$), USC basketball coach George Raveling ($n = 4$), lawyer Bruce Rosen ($n = 9$), Justice Cardozo ($n = 10$), Justice Douglas ($n = 10$), William Blackstone ($n = 10$), Missouri circuit court judge Frank Connett ($n = 12$), Hong Kong politician Martin Lee ($n = 99$), London police commissioner Sir Peter Imhert ($n = 100$), Benjamin Franklin ($n = 100$), and Fort Worth Police Department doctor of psychology Ian McKenzie ($n = 5,000$). The adage is reported without attribution (typically as an “old adage” or a “centuries-old dictum”) for $n = 1$, $n = 5$, $n = 10$, $n = 20$, $n = 100$, and $n = 1,000$. A British lawyer is said to have reported a value of $n = 99$ to a professor from the People's Republic of China, who then asked him, “Better for whom?” Dominic Lawson, “Notebook: The voters want cash, Mr. Clarke,” *Daily Telegraph*, April 8, 1995, p. 17. Compare, for an opposite perspective, Major Nungo, Colombian military prosecutor: “Better to condemn an innocent man than to acquit a guilty one, because among the innocent condemned there may be a guilty man.” “Colombia: dirty work at the crossroads,” *Latin America*, January 30, 1976.

How does this apply to the punitive damages context? The punitive damages verdict, as its name implies, is punitive; it comes with the stigma of blameworthiness attached to it, and it doesn't serve to compensate anyone. If someone's unjustly assessed a punitive damages award, that person loses a lot of money and reputation. But if the opposite mistake is made—if a punitive damages award is not awarded where it should be, there may be not enough deterrence, but none of the parties to the present case are actually hurt. All plaintiffs *have already been compensated by compensatory damages*.

Since the costs of unjustly awarding punitive damages are much greater than the costs of mistakenly not awarding them, it makes sense to use higher standards of proof for punitive damages verdicts. One obvious way of doing this is by actually prosecuting intent to harm and recklessness cases criminally, and calling punitive damages “criminal fines.”

2. The Plaintiff Wouldn't Keep the Money

According to Olson:

*The punitive damage system... is driven exclusively by private litigants and their lawyers, who have a personal, private interest in the outcome of the litigation and are unfettered by executive duties and responsibilities or by the accountability imposed by the democratic process. Indeed, plaintiffs' lawyers are bound to serve their private clients, not the public, and almost always have a direct, material and purely personal interest in inflicting the greatest possible punishment in every case.*⁹²

Of course, this only describes the actions of those who set the machinery in motion. Just because lawyers want the greatest punishment doesn't mean that punishment is inevitably rendered. The lawyers have to convince a jury, and the defendants have an opportunity to convince the jury otherwise; the decision is still the jury's. But allowing private plaintiffs to keep punitive fines does carry with it some problems.

First, since punitive damages punish offenses to society at large, not to the individual injured party (who has already been compensated by compensatory damages), allowing the injured party to keep the money is inherently inappropriate. These sorts of fines *ought* to go to the government (in its capacity as guardian of public peace).

Second, allowing injured parties to keep punitive awards increases the incentive for frivolous suits.

Note that while the British “loser pays” system makes frivolous suits less likely (as it makes meritorious suits more likely), neither the British system nor the American system can bar frivolous suits. The American plaintiff will bring a weak case if his potential judgment is large relative to *his own* attorney's fees; the British plaintiff will bring a case just as weak if his potential judgment is large relative to *total* attorney's fees. Anything that increases the size of the potential judgment—such as the availability of punitive damages—will increase the probability of any lawsuit, including a frivolous one. Conversely, anything that decreases the size of the potential judgment—such as removing the availability of punitive damages—will decrease the probability of any lawsuit, including a meritorious one.

But a “loser pays” system is the best way to encourage meritorious suits and discourage frivolous suits. If such a system is adopted, the problem of poor plaintiffs not having the means to sue rich corporations should become a nonissue. The problem of frivolous environmental suits, however, is especially acute in a world where standing, mootness, ripeness—and other doctrines that once kept frivolous suits out of court entirely—have been significantly eroded.⁹³

⁹² Theodore Olson testimony, pp. 9–10.

⁹³ See Michael Greve, *The Demise of Environmentalism in American Law* (Washington: The AEI Press, 1996) for a discussion of the erosion of standing and other doctrines. (See also Huber, *Liability*; and Olson, *The Litigation*

3. Punishments Would Be More Predictable

At present, says Olson, “most courts give juries exceedingly wide latitude in calculating the amount of the award.”⁹⁴ The result is that:

*Punitive damages are assessed and spontaneously imposed by juries randomly selected for a single case with little more guidance than a vague and general admonition to consider the primary goal of deterrence and the secondary goal of retribution. But juries cannot be expected to evaluate punishment levels based upon consideration of society's priorities and standards the way that legislatures do when they establish criminal penalties. Juries lack the information, training and time to do anything like that. Thus, individual juries establish their own punishment regime, applicable only to a single case, but often with far-reaching implications for society, without the tools, information, competence, experience or leavening features of the legislative process.*⁹⁵

Explosion.) Greve's thesis is that the erosion of standing rules has begun to be reversed in recent years.

⁹⁴ Theodore Olson testimony, p. 11.

⁹⁵ *Ibid.*, p. 8.

Supporters of punitive damages sometimes argue that the unpredictability of punitive damages is, in fact, their strength; anything predictable would simply be considered a “cost of doing business.” But costs of doing business have a deterrent effect, just like any other costs, and have the added advantage that outside observers can estimate what that deterrent effect will be for any corporation. In addition, overly broad jury discretion raises due process concerns. Fairness requires that potential offenders be put on notice as to what the punishment will be for their misdeeds, if they should commit them. Potential offenders already know their potential exposure to compensatory damages; it's the amount of actual damage they cause. But no one can predict what a jury will award in punitive damages; punitive damages awards tend to vary greatly. As Judge Lee Sarokin commented on punitive damages, “No statute would be permitted which failed to set the maximum possible penalty faced by a defendant. Although the penalty imposed in a civil matter may far exceed that provided for under a criminal statute for the same conduct, none of the same safeguards are provided.”⁹⁶ If every jury is different, the uncertainty undercuts this ideal.

And not all courts follow the general rule of thumb of limiting punitive damages awards to cases of intentional infliction of harm or recklessness. “Penalties are regularly assessed pursuant to constantly evolving common-law tort theories that arise ad hoc from court decisions, often *after* the conduct for which the punishment is imposed. The standards of liability not only are vague, highly subjective and retroactive, but vary widely from state to state, ranging from ‘malice’ at one end of the spectrum to ‘rudeness’ at the other with everything from ‘recklessness’ to ‘negligence’ in between,”⁹⁷ according to Olson.

If, instead, recklessness and intent to harm were made into criminal violations, the statute that established these violations would say what the punishment was going to be. And if plaintiffs in cases of negligence or accidents were limited to compensatory damages, then potential defendants would know that their liability would be limited to the harm that they caused.

4. The Problem of Multiple Punitive Damages Would Be Alleviated

Even if one accepted the concept of assessing punitive damages in civil cases, the practice of awarding punitive damages to several plaintiffs for the same cause of action is inappropriate. In product-liability cases, companies can be sued by hundreds or thousands of separate people, and uncoordinated juries may award punitive damages in each of the cases. Any individual award may be reasonable, but if so, then a hundred such awards combined clearly aren't. The cumulative effects of these awards aren't reviewable by a court, since each award comes from a separate case. Moreover, multiple punitive damage awards can bankrupt a company or otherwise deplete the assets that would otherwise go to pay future plaintiffs' compensatory damages. “If there is a limited fund, priority should be given to compensating those who have been injured rather than conferring windfalls on those who have already been compensated,”⁹⁸ according to Judge Sarokin. Or, in the words of Judge Friendly,

⁹⁶ *Juzwin I*, p. 1055.

⁹⁷ Theodore Olson testimony, pp. 6–7.

⁹⁸ *Juzwin I*, p. 1055.

The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering.... We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill. [One could instruct] the jury that it “may consider the potentially wide effect of the actions of the corporation and, on the other hand..., the potential number of actions similar to this one to which that wide effect may render the defendant subject.” Yet it is hard to see what even the most intelligent jury would do with this, being inherently unable to know what punitive damages, if any, other juries in other states may award other plaintiffs in actions yet untried.⁹⁹

⁹⁹ Roginsky, p. 839.

Judge Friendly went on to imagine a system in which the jury is allowed to assess one punitive award to be held and appropriately distributed among all successful plaintiffs, but conceded that “even as to this the difficulties are apparent.”¹⁰⁰ Most plaintiffs in mass toxic tort actions will sue separately, independently of one another, and no one knows ahead of time how many plaintiffs will exist. Multiple claims could be consolidated into one larger lawsuit, but that can generally only be done under limited circumstances,¹⁰¹ and it wouldn't preclude other plaintiffs from coming along later.¹⁰² In reality, then, a defendant will probably have to deal with many separate plaintiffs, each with its own jury which will decide how much to assess in punitive damages.

Some manufacturers have claimed that multiple awards of punitive damages violate their fundamental due process and double jeopardy rights, but these arguments have mostly failed in court;¹⁰³ such guarantees generally protect people against abuses by government, and are not applied to problems of private litigation. The litigation against the pharmaceutical manufacturer Richardson-Merrell illustrates the problem; after fraudulent behavior was discovered that led to the marketing of the hazardous drug MER-29, over 1,500 personal injury actions were brought against the manufacturer. Only three cases actually resulted in awards of punitive damages, but some courts recognized that awarding punitive damages to multiple plaintiffs for the same cause of action could cause the bankruptcy of the company.¹⁰⁴

Whether punitive damages can lead to bankruptcy is, in itself, an irrelevant question. If I, whose net worth is less than \$1 million, save \$1 million by engaging in reprehensible conduct, it may be appropriate for plaintiffs to drive me into bankruptcy. Indeed, since I can't pay the full \$1 million, such punishment may not be harsh

¹⁰⁰ *Ibid.*, pp. 839-840, n. 11.

¹⁰¹ Alan Schulkin, “Mass Liability and Punitive Damages Overkill,” *Hastings Law Journal*, vol. 30 (1979), pp. 1803–1804.

¹⁰² Under limited circumstances, a class action suit can preclude future claims, but this happens rarely, and it's unclear whether this is desirable. We don't want to preclude legitimate suits, or make the success of some plaintiffs depend on the success of others. Moreover, mandatory class actions are generally unavailable in toxic tort contexts. See David Lafferty, “Juzwin v. Amtorg Trading Corp.: Multiple Assessments of Punitive Damages in Toxic Tort Litigation,” *Pace Environmental Law Review*, vol. 8 (Spring 1991), p. 647, citing *In re School Asbestos Litig.*, 789 F.2d 996, 1006 (3d Cir. 1986); *In re Temple*, 851 F.2d 1269, 1273 (11th Cir. 1988); *In re Dalkon Shield IUD Prod. Liab. Litig.*, 521 F.Supp. 1188 (N.D. Cal. 1981), cert. denied, 459 U.S. 1171 (1983), vacated, 693 F.2d 847 (9th Cir. 1982).

¹⁰³ Roeca, “Damages,” p. 520, n. 110, citing *Neal v. Carey Canadian Mines*, 548 F.Supp. 357 (E.D. Pa. 1982), p. 376.

¹⁰⁴ *Ibid.*, p. 519. To the extent that courts refuse to award punitive damages against companies that may go into bankruptcy, they may end up policing the double jeopardy problem (if for the wrong reasons), but this is a very messy and incomplete, and therefore undesirable, way of dealing with the problem.

enough. The real problem occurs when defendants are being punished more than once for a single cause of action, which, on its face, is inappropriate.

If we were to deal with this situation using the criminal law, on the other hand, all plaintiffs would be adequately compensated with compensatory damages, while a separate, *unique* criminal trial for the separate offense of inflicting harm *intentionally* or *recklessly* would decide the question of blameworthiness and inflict one punishment. (How to deal with the problem if punitive damages continue to be awarded by juries in civil cases is addressed later in this paper.)

5. Other Protections

These aren't the only protections that criminal law offers. Under criminal law, thanks to the privilege against self-incrimination, defendants have slightly more protection against having to give evidence that would lead to the imposition of punishment—though this may be of little benefit, as the privilege against self-incrimination generally doesn't apply to corporations (which are the most affected by punitive damages), and in any case doesn't protect written documents. Also, under criminal law, it is more difficult for the government to amend its accusation in mid-trial than it is for a private plaintiff to amend his pleading in a civil case—though here, too, the differences may well be slight in practice. For a fuller discussion of these, the interested reader is referred to Walter Olson's discussion in *The Litigation Explosion*.¹⁰⁵

Perhaps more importantly, under criminal law, decisions to prosecute rest with public authorities; these authorities are vested with the task of punishing criminal conduct, and endowed with the discretion to distinguish between violations they believe are worth prosecuting and those that are not. Judgments of social blameworthiness are reflections of a certain societal morality, which should be enforced not at the whim of individuals with their own views of who should and shouldn't be prosecuted, but at the discretion of representatives of the community. The threat of private “vigilantism” is already especially acute in a world where plaintiffs do not need to be harmed to bring suit; in a previous day, because of the doctrines of standing, ripeness, and mootness, such claims generally wouldn't even see the inside of a courtroom. When, through citizen suits, plaintiffs can bring environmental cases under actual environmental laws without having standing (i.e., actually being harmed), and where courts read unclear laws broadly enough to create legal requirements where none existed previously, allowing punishment to proceed at the whim of individual plaintiffs would mean giving important law enforcement functions to courts, who must hear the cases that plaintiffs bring. This, in turn, would lead to a usurpation of executive authority by the judiciary.¹⁰⁶

Over the centuries of its evolution, criminal law has come to embody a host of protections for innocent defendants. These protections are appropriate for situations—like cases where punitive damages are being sought—where people are being punished. These rules would make it more difficult to impose a punitive damages award, but that's not why the protections are valuable. Rather, they are valuable because of the serious nature of punishment. First, since mistakenly punishing the innocent is considered much more serious than mistakenly not punishing the guilty, punishment should embody a great deal of defendant protection. Second, the innocent as well as the guilty have legitimate privacy interests and deserve to know what they're being accused of and how much they stand to lose if convicted—all the more so since defendants should be presumed innocent until proven guilty. And third, even the guilty should be punished fairly and predictably.

IV. CASE STUDIES: DOS AND DON'TS

¹⁰⁵ Olson, *The Litigation Explosion*, ch. 5–6.

¹⁰⁶ As noted above, see Greve, *The Demise of Environmentalism* (and also Huber, *Liability*; and Olson, *The Litigation Explosion*), for a discussion of the erosion of standing and related doctrines. See Greve particularly for a discussion of judicial deference to the abstract and often unattainable stated goals of environmental legislation.

Even though this paper argues that punishment should be reserved for the criminal law, the same general principles set forth earlier in the paper still apply if punitive damages continue to be awarded by courts. Intent to harm or recklessness merits punishment; mere negligence or accidental harm doesn't.

Later in this paper, I will argue that if punitive damages continue to be awarded in civil cases, their purpose should be to deter and they should bear some relation to the amount of money the defendant saved (if any) by his behavior.

These principles allow us to evaluate specific punitive damages awards to determine whether or not they were justified. The following examples illustrate cases where defendants were rightly punished (the cases of asbestos manufacturers and Ramsey Associates), where defendants were wrongly punished (the case of the Exxon *Valdez*), and where defendants were rightly not punished (the case of Ashland Oil and the Love Canal case involving Hooker Chemical and Occidental Petroleum).¹⁰⁷ Keep in mind that punishment (is the defendant morally blameworthy?) must be distinguished from concepts such as liability (should the defendant pay?): a firm may rightly be required to pay compensatory damages, but also not be subject to punitive damages or other punishment.

A. Those Who Were Rightly Punished

I. Asbestos Manufacturers

Who should get punitive sanctions? One example in the environmental arena is the set of failure-to-warn product-liability cases involving the Johns-Manville Corporation and other manufacturers and distributors of asbestos products. In general, when a manufacturer doesn't warn consumers about the dangers of its product, it will appropriately have to pay damages to injured plaintiffs. In the asbestos cases, plaintiffs have alleged,¹⁰⁸ some successfully, that Johns-Manville knew about the dangers of inhaling airborne asbestos fibers in 1947 and didn't tell anyone. This element of intentional failure to warn brings the asbestos cases into the realm of justified punitive liability.

Kenneth Smith, Johns-Manville's medical director, had researched and written on asbestos inhalation in the late 1940s and early 1950s, and in the early 1950s recommended to high-ranking Johns-Manville corporate officials that appropriate warnings be placed on all asbestos containers. Smith's repeated recommendations were ignored, and no warnings were given until 1964. One court concluded that this conduct justified a punitive damages award because "Johns-Manville engaged in outrageous conduct by exhibiting a reckless indifference to the health and well-being of plaintiff."¹⁰⁹

Asbestos manufacturers have been punished countless times for the same deceptive conduct. Since each punitive damage award tried to be a complete punishment, the aggregate amount of punitive damages may have been vastly in excess of the reasonable amount necessary for deterrence. Of course, we don't know how harshly they would have been punished if they had been prosecuted criminally. Their punishment, which would have been determined by statute, may have been greater than the sum of the punitive damages that they've actually had to pay; they may even have had to serve time in prison. And we don't know how many times they would have been punished; their offense could be made a crime by each of the 50 states, as well as the federal government, and the same broad cause of action could be defined as, say, two different crimes. If

¹⁰⁷ In all fairness, I should point out that there probably exist cases where people were wrongly not punished. Unfortunately, since the defendants in these cases didn't have to pay punitive damages, these cases don't show up in the punitive damage literature. The reader is invited to fill in the gaps with his or her own examples of cases where someone acted recklessly or with intent to harm and wasn't punished.

¹⁰⁸ Roeca, "Damages," p. 518, n. 103, citing *Neal*; *In re Related Asbestos Cases*, 543 F.Supp. 1152 (N.D. Cal. 1982); *Janssens v. John-Manville Sales Corp.*, No. 79-9659-CA (Fla. July 31, 1981).

¹⁰⁹ *Ibid.*, nn. 104–105, citing *Neal*, pp. 375–376.

all this were the case, they could have been punished up to 102 times—twice for each state and the federal government—assuming they engaged in punishable activities in every jurisdiction. But if the facts, as alleged in the cases, are correct, then the cause of action, in general, did merit punishment.¹¹⁰

2. Ramsey Associates

¹¹⁰ The facts, in fact, are in dispute. It has been claimed that: 1) The risks of asbestos have been greatly exaggerated; 2) whether or not the asbestos manufacturers covered up evidence of asbestosis and lung cancer, some such effects had been known in the medical literature for years, and other effects weren't yet certain in the late 1940s and early 1950s; and 3) if there is blame to go around, the federal government, which is statutorily insulated from being sued, should bear a large portion of it. See, for instance, Cassandra Moore, *Haunted Housing* (Washington, D.C.: Cato Institute, 1996). However, I leave the resolution of these issues for another time and accept the facts as alleged for the purposes of this paper.

Punitive sanctions may also be appropriate in certain nuisance cases, when the nuisance is caused intentionally. For example, in *Coty v. Ramsey Associates*,¹¹¹ Ramsey Associates had applied to build a motel on some land that they owned, but because of opposition by its neighbor Coty, local authorities had approved a much smaller motel than Ramsey Associates wanted to build. As a result, Ramsey Associates applied for a zoning permit to operate a pig farm. Gerald Boston describes the case:

Defendant [Ramsey Associates] fenced in the area and then dumped rusty storage tanks, followed by sixteen truckloads of chicken manure directly across from plaintiffs' properties. One of the drivers of the manure-carrying trucks told the police that defendants had finally "gotten even" with plaintiffs. While defendants contended that the manure was for crop fertilizer, an expert at trial opined that it was so greatly in excess of recommended amounts that it would destroy any attempted growth. Following this, defendants brought in ten junked automobiles and one hundred pigs and cows. The animals were fed at the location closest to the plaintiffs' homes and during the winter died of starvation and their decomposing carcasses were left lying there with accompanying stench and later infestation of flies. The trial court found that the defendants had used the farm as a pretext to abuse and kill animals which had no purpose other than to intentionally annoy and harass plaintiffs and cause them economic injury.

The court said that the defendants had “no purpose” other than annoyance in mind—because the defendants neither made nor tried to make money from their actions. The court awarded a total of \$380,000 in punitive damages to plaintiffs. The defendants, on appeal, held that they were legally using their property, and even an admittedly “improper motive” didn't change that. But legality is no defense to the creator of a nuisance. The Vermont Supreme Court held that “where a defendant has acted solely out of malice or spite, such conduct is indefensible on social utility grounds and nuisance liability attaches.”¹¹²

B. Those Who Were Wrongly Punished: Exxon and the *Valdez*

Who should be exempt from paying punitive damages? Let's consider the case of Exxon. The punitive damages verdict in the Exxon case was out of line with punitive damages verdicts in general. It is larger than any award of punitive damages ever made by any jury, and five times larger than the largest award affirmed by an appellate court (the \$1-billion award in *Texaco v. Pennzoil*¹¹³). Apart from *Texaco*, no award greater than \$25 million had survived appellate review before the Exxon award, and the Exxon award is 200 times larger than \$25 million. Even in proportion to Exxon's wealth, the award is aberrantly large; this award was 14 percent of Exxon's net worth, and punitive damages are almost always below 1 percent of net worth.¹¹⁴

¹¹¹ *Coty v. Ramsey Associates*, 546 A.2d 196 (1988), described in Boston, “Environmental Torts and Punitive Damages (Part One),” pp. 33–35.

¹¹² *Coty*, p. 202.

¹¹³ *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. App. 1987).

¹¹⁴ *In re the Exxon Valdez*, case no. A89-095 Civil (HRH) (Consolidated), Re: All Cases, Brief in Support of Motion for Judgment on Plaintiffs' Punitive Damages Claims (Phase III Issues), September 30, 1994, (“Exxon brief”), pp. 13–15.

Of course, large doesn't mean wrong. Maybe the other awards were too small, or the Exxon case could have had its own peculiar characteristics. But we should keep in mind that most cases where large punitive damage awards have been upheld are cases of intentional tortious conduct where the defendant profited by his conduct, and all such cases have involved companies that weren't already punished by a criminal fine.¹¹⁵

These circumstances are absent here.

First, Exxon's punitive damage award was levied on account of recklessness (not removing a drunk captain), not actual intent to harm, which was present in most of the other cases.

¹¹⁵ *Ibid.*, p. 15.

Second, if we want punitive damages to deter, we should look to how much defendants benefited by their behavior as a guide to how much it'll take to prevent them from doing it again. But what if a defendant didn't benefit at all? In that case, the losses the defendant has already sustained may be adequate to prevent him from repeating the offense. "Ladies and gentlemen," Exxon trial lawyer Jim Neal told the jury, "we didn't build [a] \$130-million state-of-the-art tanker, put \$16 million worth of crude oil on it, and recklessly and callously turn it over to a drunk. We can make mistakes, but we ain't that stupid."¹¹⁶ Whether Exxon was "that stupid" is difficult to determine; what is clear, though, is that Exxon lost a lot of money, even without the punitive damages.

- The jury was instructed that punitive damages couldn't be awarded in an amount greater than that necessary to punish and deter. But the goal of punishment may already have been served through criminal proceedings, not even counting the substantial damage to Exxon's reputation that resulted from the spill. Exxon had already been prosecuted criminally in a separate case, and its criminal sanction was already the largest criminal sanction for an environmental crime in history¹¹⁷—\$150 million, of which \$125 million was remitted because Exxon accepted responsibility for the spill and the cleanup. (Exxon also paid \$100 million in restitution to state and federal governments as part of the criminal sentence.)¹¹⁸ The court found that this sentence contained "an appropriate amount of punishment," and contained "an appropriate element of encouragement of respect for the law."¹¹⁹ One justification for punitive damages, therefore—that they are necessary to punish behavior not covered by criminal law—is absent in the Exxon *Valdez* case.
- The goal of specific deterrence (deterring Exxon) was served by Exxon's criminal fines, civil liabilities, and remedial expenses, which are estimated to have come to \$4 billion,¹²⁰ the largest single cost in Exxon's history.¹²¹

¹¹⁶ Barker, "The Exxon Trial," p. 70.

¹¹⁷ Exxon brief, p. 2.

¹¹⁸ *Ibid.*, p. 21, citing 42 Tr. 7498:14–22 (Raymond).

¹¹⁹ *Ibid.*, p. 17, citing Transcript of Change of Plea at 71, *U.S. v. Exxon Corp.*, No. A90-015-CR (D. Alaska, Oct. 8, 1991).

¹²⁰ Or \$2.7 billion after adjusting for taxes and other credits. Exxon brief, p. 3. The \$4 billion squares with another estimate that the total bill (counting the \$5-billion punitive damages verdict) was almost \$9 billion. Munk, "We're partying hearty!", p. 89.

¹²¹ Exxon brief, p. 23.

Besides the \$25-million criminal fine, this includes \$100 million in restitution to state and federal governments imposed as part of the criminal sentence, \$900 million in settlement of government claims for natural resource damages (with the possibility of a \$100-million reopener),¹²² \$2.1 billion in cleanup expenditures through 1992,¹²³ \$304 million in settlement of private damage claims paid through the Exxon claims program,¹²⁴ \$22.5 million in settlement of native subsistence claims,¹²⁵ \$287 million in compensatory damages awarded to fishermen,¹²⁶ \$9.7 million in compensatory damages awarded to the Native corporation and municipality plaintiffs in a state court trial,¹²⁷ \$46 million in casualty losses for the vessel and cargo,¹²⁸ and potential additional liability of up to \$309 million.¹²⁹ Exxon also changed its policies after the spill to greatly reduce the probability of the spill happening again¹³⁰—though this, in itself, doesn't resolve whether punitive damages are necessary, since Exxon may have changed its policies under the expectation that it would have to later pay punitive damages.

So did Exxon save any money by its misdeeds? They lost a great deal of money in lost oil, a lost ship, remedial expenses, civil liabilities, and criminal fines.¹³¹ These amounts clearly overwhelm any possible savings from not taking enough care in removing alcoholic captains from duty.¹³² In fact,

¹²² *Ibid.*, p. 21, citing 42 Tr. 7478:13–7479:6 (Raymond). The \$100 million “reopener” means that if certain enumerated conditions came to pass, Exxon would have to pay \$100 million in addition to the existing \$900 million fine.

¹²³ *Ibid.*, p. 21, citing 42 Tr. 7478:9–10 (Raymond); 41 Tr. 7286:18–22 (Harrison). See also Munk, “We’re partying hearty!”, p. 89.

¹²⁴ *Ibid.*, p. 21, citing 41 Tr. 7286:25–7287:1 (Harrison); 42 Tr. 7475:23–7478:8 (Raymond).

¹²⁵ *Ibid.*, p. 21., gives a number of \$20 million, citing Clerk’s Docket 5721. (Since then, an additional \$2.5 million was added. Personal communication, Exxon.)

¹²⁶ *Ibid.*, pp. 21–22. See also Booth, “Halt the misuse of punitive damages.”

¹²⁷ Exxon brief, p. 22. The Native corporation plaintiffs are legal entities in charge of tribal lands; they sued Exxon for damages to fish supplies and related damages.

¹²⁸ *Ibid.*, p. 22, citing DX 6399A.

¹²⁹ *Ibid.*, p. 22.

¹³⁰ *Ibid.*, p. 19, citing 41 Tr. 7333:18–7347:13; 42 Tr. 7356:19–7393:21 (Elmer); 42 Tr. 7481:2–7493:6 (Raymond). See also *ibid.*, pp. 25–28, describing other measures Exxon implemented in the wake of the spill.

¹³¹ While the *Valdez* oil spill wasn't the largest, it is the most expensive one on record. Costs of \$4 billion for 37,000 metric tons (10.9 million gallons) come out to about \$16,000 per barrel or \$108,000 per metric ton of oil lost. Peter G. Wells, James N. Butler, and Jane S. Hughes, “Introduction, Overview, Issues,” in *Exxon Valdez Oil Spill: Fate and Effects in Alaskan Waters*, Peter G. Wells, James N. Butler, and Jane S. Hughes, eds., ASTM STP 1219 (Philadelphia: American Society for Testing and Materials, 1995), p. 5. Wells, Butler, and Hughes do the calculation using costs of \$3 billion “to date,” which yield costs of \$12,000 per barrel or \$80,000 per metric ton. Using the full \$9 billion (including punitive damages) yields \$36,000 per barrel or \$243,000 per metric ton. In the past, costs of mechanical spill cleanup have ranged from \$10 to \$5,000 per barrel, with an average of \$600. At any rate, the typical sale price of oil was only \$15 per barrel, so any way one cuts it, it's a big loss. *Ibid.*, citing I.C. White and J.A. Nichols, “The cost of oil spills,” *Proc. International Oil Spill Conf.* (Washington, D.C.: American Petroleum Institute, 1983), pp. 541–544; T.H. Moeller, H.D. Barber, and J.A. Nichols, “Comparative costs of oil spill cleanup techniques,” *Proc. International Oil Spill Conf.* (Washington, D.C.: American Petroleum Institute, 1987), pp. 123–127; A.H. Lasday, “Economic evaluation of dispersants to combat oil spills,” in L.M. Flaherty, ed., *Oil Dispersants: New Ecological Approaches*, ASTM STP 1018 (Philadelphia: American Society for Testing and Materials, 1989), pp. 41–48.

¹³² The savings may, in fact, be negative. If they *had* removed Capt. Hazelwood, his replacement probably would have had less seniority and therefore a lower salary. (On the other hand, not reinstating Capt. Hazelwood could have entailed the cost of litigation with him.) Of course, we really should be looking at how much they saved by not having a comprehensive plan for effectively dealing with drunk captains. There, they may have saved some money, though even that is unclear. Since the *Valdez* spill, the Equal Employment Opportunity Commission has sued Exxon over Exxon's policy that alcoholics not be able to occupy safety-sensitive positions. John R. Cashin, “Strategies can control multiplying ADA lawsuits,” *Best's Review—Property-Casualty Insurance Edition*, vol. 97, no. 2 (June 1996), p. 86. Damned if you do, damned if you don't.

when plaintiffs claimed in the trial that Exxon wanted to save the *small amount of money* that would have been required to remove tanker captains with alcohol histories from duty,¹³³ they were inadvertently supporting the position that Exxon saved very little and was therefore adequately deterred by its previous \$4 billion payments. The court, too, in denying Exxon's post-trial motion to set aside the punitive damage award, argued that “the evidence established that with relatively small expense, when compared to the enormous risk, Exxon could have [e]nsured that its supertanker crews were rested and not captained by relapsed alcohol abusers.”¹³⁴

¹³³ *In re the Exxon Valdez*, case no. A89-095 Civil (HRH) (Consolidated), Re: All Cases, Reply Memorandum of Defendants Exxon Corporation (D-1) and Exxon Shipping Company (D-2) in Support of Motion for Judgment on Plaintiffs' Punitive Damages Claims (Phase III Issues), October 31, 1994, (“Exxon reply brief”), p. 16, n. 15, citing Pl. Mem. (P.D.), pp. 112–113.

¹³⁴ *In re the Exxon Valdez*, case no. A89-095 Civil (HRH) (Consolidated), Re: All Cases, Order No. 267, Exxon's Motion for Judgment on Plaintiffs' Punitive Damages Claims (Phase III); and Exxon's Motion for a New Trial on Plaintiffs' Punitive Damages Claims (Weight of the Evidence), January 27, 1995 (“Order No. 267”), p. 12.

- The goal of general deterrence (detering other companies from doing what Exxon did) may also already have been served. Other oil companies, like Exxon, changed their policies after the spill.¹³⁵ This fact alone doesn't tell us whether they would have been deterred absent the prospect of punitive damages. But it's likely that this is in fact the case; \$4 billion is greater than the net worth of most American corporations and would have bankrupted Arco, which is about a tenth the size of Exxon.¹³⁶ The federal Oil Pollution Act of 1990, which was enacted in direct response to the *Valdez* oil spill, increased tanker operators' liability from what it was before the spill.¹³⁷ So even without any punitive damages, other companies are already deterred more than they would have been without the oil spill.¹³⁸

C. Those Who Were Rightly Not Punished

I. Ashland Oil

Another group of people who shouldn't have to pay punitive damages are those who, while they may have been negligent, didn't cross the line into recklessness, intent to do harm, or intent to violate the law.

In *Arnoldt v. Ashland Oil*,¹³⁹ residents of an area near Ashland Oil's refinery in Catlettsburg, Kentucky, brought a private nuisance action against Ashland, alleging that the refinery's air emissions interfered with the use and enjoyment of their property. The circuit court awarded the plaintiffs \$10.3 million, to be divided among four plaintiffs, selected at random from a list of more than 200 plaintiffs. Compensatory damages totaled \$1.3 million and punitive damages totaled \$9 million.

Under Kentucky law, punitive damages could be awarded “only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression,

¹³⁵ Exxon brief, p. 19, citing 42 Tr. 7385:4–7387:7; 7388:4–7389:7 (Elmer).

¹³⁶ *Ibid.*, pp. 3–4.

¹³⁷ The Oil Pollution Act was a comprehensive liability scheme, which supplanted federal maritime law and broadened tanker operators' liability to include liability for removal costs, natural resource damage, real and personal property damage, subsistence use, lost revenues by federal, state, and local governments, lost profits or earning capacity, and the cost of additional public service. The Oil Pollution Act also imposes liability limitations based on the size of the vessel, and doesn't preempt state common law. 40 U.S.C. §§ 2701 *et seq.*

¹³⁸ Exxon brief, p. 24, n. 18.

¹³⁹ *Arnoldt v. Ashland Oil, Inc.*, 186 W.Va. 394, 412 S.E.2d 795 (1991).

fraud, or malice,”¹⁴⁰ where malice, under the relevant Kentucky statute, was defined as “either conduct which is specifically intended by the defendant to cause tangible or intangible injury to the plaintiff or conduct that is carried out by the defendant both with a flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm.”¹⁴¹ In other words, “malice” means, roughly, recklessness or intent to harm.

¹⁴⁰ Ky. Rev. Stat. Ann. § 411.184(2) (Supp. 1990; effective July 15, 1988).

¹⁴¹ Boston and Madden, p. 208.

The appellate court found that the trial court had misstated the burden of proof required for punitive damages, sometimes referring to “clear and convincing evidence,” sometimes “a preponderance of the evidence,” and sometimes “a clear preponderance of the evidence.” (In fact, “clear and convincing evidence” is more stringent than “a preponderance of the evidence,” but less than “beyond a reasonable doubt.”)¹⁴² The court overturned the punitive damage award on the grounds that even though the damage may have been great, Ashland's conduct wasn't “sufficient to evidence conscious wrongdoing.” The original trial court had allowed the jury to consider the question of punitive damages without evidence of conscious wrongdoing. “Because appellees,” the appellate court concluded, “did not introduce evidence which demonstrated a specific intent to cause bodily harm or injury, they likewise failed to demonstrate fraud or oppression toward appellees.”¹⁴³

2. Hooker Chemical and Love Canal

Yet another group of people who shouldn't have to pay punitive damages are those who, on the whole, acted responsibly—like Hooker Chemical, the company associated with the infamous Love Canal. From 1942 to 1953, Hooker placed 21,000 tons of chemical waste in the abandoned canal. In 1953, the land was going to be condemned and seized under eminent domain for use by the local school board. In anticipation of the condemnation, the school board was planning to build its school two years before Hooker deeded it the land. According to Hooker, while it could have let the school board condemn its land and pay compensation, it instead sold the property for \$1 so that it could insert warning language into the deed.¹⁴⁴ A year later, an elementary school was built there and a neighborhood grew up in the area.

In the 1970s, toxic chemical-laden groundwater began seeping into neighborhood yards and basements; state health officials declared an emergency at Love Canal in 1978 and relocated about 2,500 residents. Love Canal became a symbol of the evils of industrial pollution and corporate irresponsibility.¹⁴⁵

Hooker executives were keenly aware of the dangers of the chemicals at Love Canal. In 1945, Hooker analyst R.H. Van Horne wrote in a memo, “Eventually we will have a quagmire at Love Canal which will be a potential source of lawsuits in the future.” A year later, Hooker attorney Ansley Wilcox II expressed concerns about “contaminated water” in the canal, which children were using as a swimming hole. Wilcox suggested that a fence be built around the area, but no fence was built. Plaintiffs' lawyers alleged that Hooker Chemical had been reckless in a number of ways:

- knowingly dumping toxic chemicals in an area used for recreation by children;
- failing to fence in the swimming area or to institute other warning procedures;
- abandoning the property and its buried chemicals while knowing that it was becoming an increasingly popular neighborhood for families;
- giving “insufficient information” about the hazards to the school board before transferring the dump in 1953; and
- failing to assume responsibility for the dump after the health dangers became known in the late 1970s.¹⁴⁶

¹⁴² Arnoldt, pp. 805–806.

¹⁴³ *Ibid.*, pp. 806–807.

¹⁴⁴ Eric Zuesse, “Love Canal: The Truth Seeps Out,” *Reason*, February 1981, pp. 20–22.

¹⁴⁵ Sam Borenkind, “Environmental Law: How Far-Reaching?,” *National Petroleum News*, March 1991, vol. 83, no. 3, p. 60.

¹⁴⁶ Dan Herbeck, “No Love Canal Punitive Damages: Curtin Ruling Spares Occidental up to \$250 million,” *The Buffalo News*, March 17, 1994, p. 1.

Some of Hooker Chemical's actions, such as not building the fence, may have been irresponsible; other actions, such as not taking responsibility *twenty years* after transferring the property, are more debatable. There are good reasons, though, to believe that on the whole, Hooker Chemical acted responsibly in the Love Canal affair:

- A private engineering firm hired by the city of Niagara Falls in 1979 to evaluate the Love Canal dumpsite concluded that Hooker's practices met and exceeded the relatively stringent standards of the Resource Conservation and Recovery Act, which wasn't enacted until 1977.¹⁴⁷
- Hooker took special care to sell the land for \$1 *instead of just letting the school board take its property*. The entire purpose of this move was to put warning language in the deed.

¹⁴⁷ Zuesse, "Love Canal," p. 27.

- The last paragraph in the deed of Love Canal to the school board advises the school board that the property contains “waste products resulting from the manufacturing of chemicals,” and warns the school board that it assumes “all risk and liability incident to the use thereof.” An attached condition demands that as a condition of the property transfer, “no claim, suit, action or demand of any nature whatsoever shall ever be made” against Hooker, “including death... or loss of or damage to property caused by, in connection with or by reason of the presence of said industrial wastes.”¹⁴⁸
- Hooker wanted to require that the property “be used for park purposes only, in conjunction with a school building to be constructed upon premises in proximity to” them. And it wanted the board to agree that, should the property ever stop being used as a park, title to it would revert to Hooker. The school board refused to accept these restrictions, and Hooker had to settle for the warning language in the deed.¹⁴⁹
- In 1957, Hooker's attorney, Arthur Chambers, reminded the board that chemicals were buried under the surface of the land, explaining that this “made the land unsuitable for construction in which basements, water lines, sewers and such underground facilities would be necessary.” Chambers conceded that his company “could not prevent the Board from selling the land or from doing anything they wanted to with it,” but stated that he felt the property shouldn't be divided for the purpose of building homes and hoped that no one would be injured.¹⁵⁰

The Love Canal case was, in the end, correctly decided. The New York state attorney general's office was seeking a punitive damage award of \$250 million. But on March 17, 1994, U.S. District Judge John T. Curtin ruled that Occidental Chemical Corp., which took over Hooker Chemical in 1968, should pay no punitive damages. The court found Hooker negligent on a number of occasions, and criticized Hooker for turning its property over to the Niagara Falls Board of Education—“but,” Curtin wrote, “a finding of outrageous conduct and reckless disregard of the safety of others requires more. And the conduct must be judged by the law in force at the time. Occidental argued that its actions had to be judged from the context of industry practice of the time. While the advances in science and engineering made since the 1940s would lead contemporary environmentalists to condemn many of the practices used by Hooker at Love Canal, it would be unfair to judge the company by the application of knowledge obtained after the disposal and transfer were completed.”¹⁵¹

Plaintiffs in the Love Canal case were, understandably, distraught that Occidental paid no punitive damages. “I'm devastated,” said Joann Hale, a former resident of the Love Canal neighborhood. “I can't believe this. Was the judge watching the same trial I watched? I lived at the Love Canal. They made the chemicals that seeped into our backyards. That company made millions and billions of dollars. Who is going to be held responsible? [...] My husband and I both have bone tumors. Lisa was conceived and born when we were living at Love Canal. Her teeth decalcified when she was about three years old. All her teeth had to be either removed or recapped. Now she has problems with her bones, she's broken seven or eight different bones.

¹⁴⁸ *Ibid.*, p. 18.

¹⁴⁹ *Ibid.*, p. 22.

¹⁵⁰ *Ibid.*, p. 23.

¹⁵¹ Herbeck, “No Love Canal Punitive Damages.”

Carrie had an eye tumor and now, she has arthritis. Are all these things related to living near the Love Canal? I can't say. But a husband and wife, both getting bone tumors. What do you think?"¹⁵²

¹⁵² Herbeck and Lou Michel, "Occidental Sees a 'Vindication' in Court Ruling," *The Buffalo News*, March 18, 1994, p. 1.

Hale's comments neatly encapsulate much of the case against Hooker Chemical and Occidental Chemical—the company caused contamination and medical problems, it made a lot of money, it should be held responsible. But none of these issues speaks to the question of intent to harm or recklessness. Whether it caused contamination and medical problems is a factual matter to be resolved by courts, that it made a lot of money may well be true, and that it should be held responsible for the damage it caused (through compensatory damages) is undeniable. At the time of the punitive damages decision, the court had already found Occidental at least partly liable for cleanup costs, which Occidental's attorneys estimated at \$325 million.¹⁵³ The punitive damages award (or lack thereof) has no effect on a pending state case involving medical claims or a previous settlement in 1985 (in which over 1,300 residents received \$20 million). As Richard J. Lippes, an attorney for the Love Canal Homeowners Association (which is bringing the state case for medical claims), put it, “As far as the homeowners' case goes, I think Judge Curtin's decision actually helps us. We're trying to prove negligence by Hooker, and Judge Curtin states again and again that he feels Hooker was negligent. Occidental is trying to portray this decision as them winning the whole ball game. But in the big picture, that isn't true. Judge Curtin's decision focused on a very narrow issue, punitive damages.”¹⁵⁴

The comments of Lois Gibbs, the housewife-turned-activist who led Love Canal homeowners' protests in the 1970s, similarly miss the point. “[The decision] sends that same old message to corporate America. If you want to do something, like pollute the environment, just look at the cost tables and see if it is going to be worth the profit you make. You'll wind up paying medical costs and cleanup fees, but no punitive damages. How much is an arm worth, or how much is somebody's life worth? Figure out the cost tables and see if it's worth it. It sets a double standard. If I went into somebody's house and destroyed it, I would be thrown in jail. If it's a corporation, it's O.K.”¹⁵⁵ If Lois Gibbs destroyed someone's house, she would be acting *intentionally*, and would rightly deserve to be thrown in jail. But not even the plaintiffs in the Love Canal case claimed that Hooker Chemical intended to contaminate the neighborhood and cause health problems.

V. OTHERWISE, MORE DUE PROCESS PROTECTIONS

Treating intentional infliction of harm or recklessness as *criminal* violations, and leaving the tort system for compensation, is a desirable outcome. However, the doctrine of punitive damages may not be reformed in the near future, at least not in the ways proposed here. Punitive damages have been around long enough, and have a large enough constituency, that they will probably have some staying power. Still, if punitive damages remain within tort law, there are various steps we can take to make the process more sensible:

- Juries have been known to be under tremendous pressure to act sympathetically toward the plaintiff who is part of their community. But juries, in themselves, are not the problem. They can be smart and responsible, if given the chance. The basic problem is unlimited jury discretion, which can result from insufficient jury guidance.
- Punitive damages reform must involve at least the procedural safeguards mandated by the Supreme Court in the *Haslip* case: clear jury instructions, post-verdict review by the trial court, and appellate review.
- In addition, even if cases of recklessness or intentional infliction of harm aren't made criminal, certain levels of protection for the defendant should still apply. The burden of proof for awarding punitive damages should be higher than for other civil penalties, the plaintiffs shouldn't receive punitive

¹⁵³ Herbeck, “No Love Canal Punitive Damages.”

¹⁵⁴ Herbeck and Michel, “Occidental Sees a ‘Vindication’ in Court Ruling.”

¹⁵⁵ *Ibid.*

damages proceeds, punishments should be more predictable, and multiple awards of punitive damages should be curtailed.

A. Should Juries Be in this Business Anyway?

Some have suggested that punitive damages would be applied in a more principled manner if the judge, not the jury, determined the award.¹⁵⁶ (This, in fact, was done in the Love Canal case, which was heard without a jury.)¹⁵⁷ The jury would remain the trier of fact—in this case, they would still be making the decision of whether the company was liable at all for punitive damages. This would parallel the current criminal practice in most states, in which the sentence is imposed by the trial judge after the jury has convicted.¹⁵⁸ Judge-determined punitive damage awards are said to have the following advantages:

- There would be less chance that passion or prejudice would result in an inflated verdict or in overkill.
- The judge has greater experience in criminal proceedings involving punishment, is potentially more aware of the social policies and economics involved in meting out punitive awards, and is more likely to achieve consistency in the magnitude of punitive awards from one case to the next.
- The judge might review evidence which wouldn't normally be admissible because of its prejudicial effect.¹⁵⁹

This case for the determination of punitive damages awards by judges is interesting, but not decisive.

Juries can be impassioned, prejudiced, or swayed by ideological or political opinion, but judges can be, too. (In a world where judges are political appointees, it is naive to expect that they would be without passion or prejudice, or that they wouldn't owe their positions to particular passions or prejudices.) Part of the reason that juries are drawn from the population at large is that the passions and prejudices of a jury are more likely to be representative of the passions and prejudices of society as a whole than are the passions and prejudices of individual judges.

Social policies and economics are indeed important in meting out punitive awards. If punitive awards were restricted to criminal law, they would be determined democratically, through criminal statutes. In the absence of a statute, though—if the democratic process provides no input on how to set an award—or if there is no other form of guidance, the judge is as much in the dark as the jury.¹⁶⁰ Again, the judge will likely set a punitive award according to his own passions and prejudices, which may be less democratically acceptable than the passions and prejudices of a jury. As Judge Easterbrook put it in *Zazú Designs v. L'Oréal*,¹⁶¹ “A judge sanctioning misconduct may not draw a number from the Æther but must explain the choice by

¹⁵⁶ Owen, “Punitive Damages in Products Liability Litigation.” See also Mallor and Roberts, “Punitive Damages: Towards a Principled Approach,” *Hastings Law Journal*, vol. 31 (1980), p. 639. As of 1993, 3 states had adopted judge-assessed punitive damages measures. See Conn. Gen. Stat. Ann. § 52-240b (West 1991); Kan. Stat. Ann. §§ 60-3701(a)–(b), 60-3702(a)–(b) (1987); Ohio Rev. Code Ann. § 2315.21(b) (Baldwin Supp. 1987). This list is from Rustad and Koenig, “The Historical Continuity of Punitive Damages Awards,” p. 1280, n. 66.

¹⁵⁷ Borenkind, “Environmental Law” More precisely, the judge heard the case without a jury and decided *not* to award punitive damages. The rules of whether or not to have a jury determine questions of liability varies from jurisdiction to jurisdiction. Typically, the plaintiffs can choose not to have their case heard before a jury; this can happen occasionally, for instance, if they have reason to believe that the judge is already sympathetic enough to their case.

¹⁵⁸ Mallor and Roberts, “Punitive Damages,” p. 664, citing Note, “The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages,” *NYU Law Review*, vol. 41 (1966), p. 1171.

¹⁵⁹ Roeca, “Damages,” pp. 523–524.

¹⁶⁰ But see Jonathan Kagan, “Toward a Uniform Application of Punishment: Using the Federal Sentencing Guidelines as a Model for Punitive Damage Reform,” *UCLA Law Review*, vol. 40, no. 3 (1993), pp. 753–797, for an interesting discussion of how to make punitive awards consistent by adopting a sentencing guidelines-like system.

¹⁶¹ *Zazú Designs v. L'Oréal, S.A.*, 979 F.2d 499 (7th Cir. 1992).

reference to its role in compensating the wronged party or deterring conduct that injures the judicial system.”¹⁶² (One thing the judge could do is set an award that's consistent with similar awards elsewhere, but the Supreme Court already requires post-verdict review by the trial court, as well as appellate review, for precisely that reason.)¹⁶³

And it's unclear whether we want a judge to be able to consider evidence that a jury can't. If it's inadmissible because of its prejudicial effect, it may prejudice a judge just as it might prejudice a jury. There is indeed evidence, pertinent to the assessment of punitive damages, that we may not want the jury to hear if it's also determining compensatory damages. One such example is evidence of the defendant's wealth. Generally, juries don't hear about the defendant's wealth when they're calculating compensatory damages, but most jurisdictions allow them to hear such evidence when calculating punitive damages. (Though, as I'll argue later in this paper, wealth generally shouldn't be considered in punitive damages.) This is a good reason for bifurcating the trial into a compensatory phase and a punitive phase, but not a good reason for letting the judge set the punitive award.

Bickering over who should set the award—the judge or the jury—avoids the fundamental question, which is: Assuming that civil courts will be in the business of assessing punitive awards, how should these awards be determined, and what are the criteria by which to judge them? The rest of this paper will address this question.

B. Why Jury Guidance Is Essential

[Going into punitive damage negotiations, the Exxon jurors] had nothing approaching a consensus, nor even, as they had in [the compensatory damages phase], a workable method for reaching an agreed-upon number. A paper poll at the start of deliberations showed that their estimates for what Exxon should pay were all over the map. “It was between zero and twenty billion,” says [juror Jewel] Spann. “There was no formula. You just went with what you believed....”

What bothered [juror Rita Wilson] was that the other jurors had no real basis for what they thought Exxon should pay. “There wasn't anything to base punitive damages on,” Wilson says. “[The other jurors] kept saying, ‘I think I have this number, but I can be flexible....’ If the plaintiffs had just given us

¹⁶² Zazú, p. 508.

¹⁶³ Trial courts and appellate courts should avoid the doctrine in *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, p. 388: “In determining whether an award of punitive damages is excessive, comparison of the amount awarded with other awards in other cases is not a valid consideration” (citing *Bertero v. National General Corp.*, 13 Cal.3d 43, 65, n. 12, 118 Cal. Rptr. 184, 529 P.2d 608; *Leming v. Oilfields Trucking Co.*, 44 Cal.2d 343, 355-356, 282 P.2d 23; *Crane v. Smith*, 23 Cal.2d 288, 302, 144 P.2d 356). On the contrary, as pointed out in *Morgan v. Woessner*, 997 F.2d 1244, 1257 (9th Cir. 1993): “The task of the court is a comparison between the amount of punitive damages actually assessed and a figure derived from the facts of the case at hand. To arrive at this figure, the court should look to awards in similar cases and to its own experience.”

a way to figure punitive damages—[instead] they just picked a number and went with it, and that's what the jury did....”

“Everyone set an amount, and we took the high amount and argued what they'd done and not done, and we mitigated it down,” says [juror Bruce] Dean, describing their method in a nutshell. Three jurors say that juror Margaret Johnson was at the high end with \$20 billion—the top of [plaintiffs' lead trial counsel Brian] O'Neill's range. Foreman Ken Murray, Doug Graham, and Jennifer Smith all wanted to award above \$10 billion, these jurors say. Another juror pushed for \$8 billion, says Provost, and Garrison says that she was at \$5 billion from the beginning. A more conservative group, including Dean and Provost, hovered at around \$1 billion.

Some of the jurors tried to find formulas. Dean initially came up with \$861 million. “Someone said, ‘Where'd you come up with that figure?’ I said, ‘It's three times the actual damages.’ ‘Well, why'd you do that?’ ‘It's a good place to start,’” Dean recalls.

“That sounded real good to me,” Provost says. “I hung on that for a while until I moved up to [\$3.51] billion... which was what they made [as profit] in '89.”

“At one point,” says Garrison, “I sent out and asked for how much oil was [selling for] on that date, because we were thinking we could take how much was in that ship and [use it for] a formula we could be comfortable with.”

“We even considered taking the [\$3.51] billion and tripling it,” says Provost. “I couldn't do it...”

As some jurors began moving down, others began to move up. “We'd argue them out, and some of us started coming up,” says Spann. Spann also cites the judge's instructions to use their common sense: “What we finally figured out he was telling us was [that] this was a judgment call.”

Garrison, who had parked herself at \$5 billion from the beginning, sat tight in the middle ground. “And so I just hung in there, hoping. This is a nice, round number we can all [like].... There were many times that I considered going down a little bit. But then I had to consider that these people [with higher numbers] were still moving down with their figures. And if I moved down, that was going to make further that they had to move down.”

Above all, the jury wanted to deliver some verdict. “We were there to make a decision,” says Dean. “We were there to negotiate and mitigate and deliberate, and not get hung.” Adds Spann: “We didn't want to say, ‘Hey, we're not up to the job.’”

By the middle of the third week of deliberations, almost everyone was ready to go with \$5 billion. The only holdout now was Provost. “I was the last dog on [\$3.51] billion,” she chuckles. “I tell you, I was dragging my feet.

“Then one night I got to thinking, ‘No wonder it was [\$3.51] billion in '89. They paid out two billion to clean up the mess,’” Provost says. “But it took me days to even get this into my mind....”

Rita Wilson, who remains unconvinced that punitive damages against either [Valdez captain Joseph] Hazelwood or Exxon were warranted, nevertheless agreed to the verdict when polled in court with the other jurors. She shunned friends and phone calls for a week after the verdict, embarrassed that she had caved in to the will of the rest of the jury. “Five billion was just a blue-sky number, and I never heard a good reason why they came up with that number,” she says. “I felt like I had lied in federal court when I agreed to that verdict....”

Jurors Nancy Provost and Bruce Dean are still bristling over remarks that Exxon counsel Pat Lynch made after the verdict, when he told the Daily News that the jurors didn't understand the magnitude of \$5 billion. "Well, we did," sniffs Provost.

"When some people say [the jurors] don't understand what five billion dollars is, they are way off base," says Dean. "We had deciphered five billion over and over and over again. We knew exactly what we were doing."

—Emily Barker, *The American Lawyer*¹⁶⁴

¹⁶⁴ Barker, "The Exxon Trial," pp. 76–77.

It's popular to bash juries. In the wake of the O.J. Simpson trial, juries have a reputation for being ignorant and irrational. The story of the Exxon jurors is a good counterexample. The Exxon jurors were intelligent, outspoken, were concerned about doing the right thing, and seemed to make a genuine effort to be as unbiased as possible. But even the best, most commonsensical of people need guidance in matters involving punitive damages awards. "In some ways," explains juror Janette Garrison, "it was like a poker game. Wondering who was going to move up and guessing when someone would come down."¹⁶⁵ Knowing that punitive damages are meant to express society's condemnation of unwanted behavior is inadequate. How much punishment is enough, and how much is excessive? We generally trust judges to determine sentences for criminals—though even there, Congress enacted sentencing guidelines to get around the problem of different judges sentencing wildly differently and leading to garbled and inconsistent deterrent messages. But how can even a judge have any idea of what sentence to impose without some range already established by the law?

Jurors determining punitive damages have no such range. Nor do they have any guidance at all, except for whatever number the plaintiffs happen to be asking for. "Believe me," says juror Nancy Provost, "we understood what \$5 billion was. Our job was to make sure they'd never do it again."¹⁶⁶ The trouble is, we have no good way of knowing whether \$5 billion would make sure Exxon never did it again. It could be too high, or it could be too low, and either of these possibilities would be undesirable. But we could make sure the spill wouldn't happen again by making sure that Exxon couldn't benefit economically from the spill. This would mean making fines at least equal to the amount of economic benefit Exxon achieved from the spill—or, conversely, to how much it would have cost Exxon to have prevented the spill from happening. Apparently, the jurors never even attempted to do this calculation.

C. The Supremes Speak: *Haslip*, *TXO*, *BMW*

Punitive damages have, on occasion, been challenged on constitutional grounds. The Supreme Court addressed the "due process" challenges to punitive damage awards in several cases, including *Pacific Mutual Life Insurance v. Haslip* in 1991, *TXO Productions v. Alliance Resources*¹⁶⁷ in 1993,¹⁶⁸ and *BMW v. Gore*¹⁶⁹ in 1996. In *Haslip*, the court decided that punitive damages weren't in themselves unconstitutional, but did note the following:

One must concede that unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities. We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and

¹⁶⁵ Munk, "We're partying hearty!", p. 89.

¹⁶⁶ *Ibid.*

¹⁶⁷ *TXO Productions Corp. v. Alliance Resources Corp.*, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993).

¹⁶⁸ Boston and Madden, *Law of Environmental and Toxic Torts*, pp. 205–206.

¹⁶⁹ Case No. 94-896, May 20, 1996.

*the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.*¹⁷⁰

¹⁷⁰ *Haslip*, p. 1043.

In other words, “reasonableness” and “adequate guidance” are key. The Court upheld the Alabama punitive damage procedures that were at issue in *Haslip* because they contained three levels of procedural safeguards:

- *Jury instructions* that allowed “significant discretion”¹⁷¹ but were “not unlimited”¹⁷² because the instructions made it clear that the purposes of punitive damage awards were deterrence and punishment; they charged the jury to consider the gravity of the harm; and they informed the jury of when it should assess punitive damages and that the assessment of punitive damages isn't mandatory.¹⁷³
- *Post-verdict review by the trial court*, in which the trial court had to explain in the record “the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages.”¹⁷⁴
- *Appellate review* that required the appellate court to consider many factors, including the ratio between compensatory and punitive damages, how reprehensible and profitable the defendant's conduct was, and the defendant's financial position. According to the Supreme Court, such standards were a “sufficiently definite and meaningful constraint on the discretion of Alabama fact finders” and ensured “that punitive damage awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages.”¹⁷⁵

As to the ratio between compensatory and punitive damages in *Haslip*—punitive damages were about four times compensatory damages—the court decided:

*While the monetary comparisons are wide and, indeed, may be close to the line, the award here did not lack objective criteria. We conclude, after careful consideration, that in this case it does not cross the line into the area of constitutional impropriety.*¹⁷⁶

In *TXO*, though, while the court continued to hold that punitive damage awards shouldn't be “grossly excessive”¹⁷⁷ (much as it had held in *Haslip* that they should be “reasonable”), it distanced itself from this sort

¹⁷¹ *Ibid.*, p. 1044.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*, quoting *Hammond v. City of Gadsden*, 493 So.2d 1374 (1986).

¹⁷⁵ *Ibid.*, p. 1045.

¹⁷⁶ *Ibid.*, p. 1046.

¹⁷⁷ *TXO*, p. 2719.

of mathematical analysis—whether comparing the punitive damage award against other punitive damage awards and legislative penalties, or comparing the punitive damage award against the compensatory damage award in that case. The *TXO* court questioned “the utility of such a comparative approach as a test for assessing whether a particular punitive award is presumptively unconstitutional.”¹⁷⁸ The court pointed out that “such awards are the product of numerous, and sometimes intangible, factors; a jury imposing a punitive damages award must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it. Because no two cases are truly identical, meaningful comparisons of such awards are difficult to make.”¹⁷⁹

¹⁷⁸ *Ibid.*, p. 2720.

¹⁷⁹ *Ibid.*

Thus, while it found that the punitive damage award in the *TXO* case was large, the Supreme Court wasn't persuaded that the award was "grossly excessive." The court didn't find fault with the process by which the award was determined, and concluded that "a judgment that is a product of that process is entitled to a strong presumption of validity."¹⁸⁰ Still, the Supreme Court has been willing to overturn excessive awards even when awarded in accordance with the conditions of *Haslip*. In *BMW*, the Supreme Court struck down an Alabama punitive award for excessiveness, even though the Alabama process had already been found to be consistent with *Haslip*. In that case, a jury assessed (and an appellate court reduced, but upheld) punitive damages against BMW for repainting a car (because of predelivery damage) without notifying the dealer or the client of the repainting. The Supreme Court, in striking down the award, noted that: 1) BMW's behavior wasn't reprehensible; 2) the punitive-to-compensatory ratio was 500; and 3) statutory civil or criminal penalties for comparable behavior were much lower than the punitive award. So the Supreme Court's definition of "due process" is a mix of procedural and substantive tests.

Since *Haslip*, a number of courts have upheld punitive damage systems that are "substantially similar" to,¹⁸¹ "comparable" to,¹⁸² "essentially the same" as,¹⁸³ or just resemble¹⁸⁴ the factors required in *Haslip*. A number

¹⁸⁰ *Ibid.*

¹⁸¹ May, "Fashioning Procedural and Substantive Due Process Arguments," p. 597, n. 116, citing *American Employers Ins. Co. v. Southern Seeding Serv., Inc.*, 931 F.2d 1453, 1458 (11th Cir. 1991).

¹⁸² *Ibid.*, n. 117, citing *Robertson Oil Co. v. Phillips Petroleum Co.*, 930 F.2d 1342, 1347 (8th Cir. 1991).

¹⁸³ *Ibid.*, n. 119, citing *W.W. Management and Dev. Co. v. Scottsdale Ins. Co.*, 769 F.Supp. 178 (E.D.Pa. 1991).

¹⁸⁴ *Ibid.*, n. 120, citing *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1097 (5th Cir. 1991).

of courts—in Louisiana,¹⁸⁵ Maryland,¹⁸⁶ South Carolina,¹⁸⁷ Tennessee,¹⁸⁸ Virginia,¹⁸⁹ and West Virginia¹⁹⁰—have struck down punitive damage systems or jury instructions that don't conform to *Haslip*. The Supreme Court insinuated that other state punitive damages systems that don't incorporate the criteria of *Haslip* may be vulnerable to constitutional attack. The Supreme Court singled out Mississippi, which only requires that punitive damages awards be set aside if they evince “passion, bias and prejudice... so as to shock the conscience,”¹⁹¹ and Vermont, which only requires that punitive damages awards be set aside if they are “manifestly and grossly excessive,”¹⁹² as examples of vulnerable states.

¹⁸⁵ *Ibid.*, p. 597, citing *Union National Bank of Little Rock v. Mosbacher*, 933 F.2d 1440, 1448 (8th Cir. 1991), where an Arkansas jury was “told little more than the defendant’s net worth and that punitive damages serve to punish and deter.”

¹⁸⁶ Schwartz and Behrens, “Punitive Damages Reform,” p. 1373, n. 43, citing *Owens-Illinois v. Zenobia*, 601 A.2d 633, 648–654 (Md. 1992), raising the burden of proof for punitive damages to a showing of “actual malice.”

¹⁸⁷ *Ibid.*, p. 1372, n. 43, citing *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 99–106 (4th Cir. 1991); and *Gamble v. Stevenson*, 406 S.E.2d 350, 353–355 (S.C. 1991).

¹⁸⁸ *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 900–902 (Tenn. 1992), reforming the Tennessee system because of *Haslip*, through a raised burden of proof, developed review criteria, and a tightened standard for assessing punitive damages.

¹⁸⁹ Schwartz and Behrens, “Punitive Damages Reform,” p. 1372, n. 43, citing *Johnson v. Hugo’s Skateaway*, 974 F.2d 1408, 1418 (4th Cir. 1992).

¹⁹⁰ *Ibid.*, citing *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 904–910 (W.Va. 1991).

¹⁹¹ *Haslip*, p. 1045, n. 10, citing *Bankers Life & Casualty Co. v. Crenshaw*, 483 So.2d 254, 278 (Miss. 1985), *aff’d*, 485 U.S. 71 (1988).

¹⁹² *Ibid.*, citing *Pezzano v. Bonneau*, 329 A.2d 659, 661 (Vt. 1974).

The *Haslip*ification of punitive damages law, though, hasn't been complete. For instance, a federal appellate court upheld the Mississippi law, even though the Supreme Court had specifically mentioned it as being deficient.¹⁹³ Other courts have upheld appellate review even when the appellate court doesn't compare the case in question with other cases.¹⁹⁴

D. More Defendant Protections

Earlier in this paper, I listed some of the advantages of using the criminal law instead of the punitive damages doctrine. But even if we don't use the criminal law for such cases, the following protections are still appropriate:

- The standard of proof required to impose punishment should be higher. Punishment is a more serious matter than compensation, and we should therefore maintain high levels of protection to avoid mistakes in punishment. One way of doing this would be to use the “clear and convincing evidence” standard advocated in the *Model State Punitive Damages Act*.¹⁹⁵ So far, 28 states have either passed statutes requiring plaintiffs to prove punitive damages by the “clear and convincing evidence” standard, or have dictated the standard through case law (see Table 4).
- The injured party shouldn't keep the criminal fines. First, there's no relationship between the amount of a punitive damages verdict and the amount necessary to ensure that civil suits are pursued. Second, the conduct for which punitive damages are awarded (actual damage aside) is an offense against society rather than an offense against a particular individual. And third, the existence of large punitive damages awards can introduce an element of moral hazard on the plaintiff's side, by artificially increasing his likelihood of suing in borderline frivolous cases. Therefore, the damages awards should go to the state. Some states already divert punitive damages awards into the public treasury to some extent (see Table 5).¹⁹⁶

¹⁹³ May, “Fashioning Procedural and Substantive Due Process Arguments,” p. 600, citing *Eichenseer v. Reserve Life Insurance Co.*, 934 F.2d 1377, 1385 (5th Cir. 1991).

¹⁹⁴ *Ibid.*, n. 137, citing *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1098 (5th Cir. 1991).

¹⁹⁵ *Model State Punitive Damages Act*, § 6.

¹⁹⁶ If the government has already prosecuted the defendant, apart from the civil suit, then having the government receive the punitive award may introduce questions of double jeopardy. Also, if jurors perceive that as taxpayers, they may benefit from a large punitive award, they may be prejudiced against the defendant. Of course, they may be prejudiced even now, because of sympathy with the plaintiff. If the money goes to some earmarked fund (i.e., the Oil Spill Cleanup Fund), the jurors may be prejudiced to the extent that they sympathize with the goal of the earmarked fund. Any use of the punitive award, other than throwing it down a rathole, may introduce prejudice. Even throwing it down a rathole doesn't eliminate the prejudicial possibilities, since some jurors may just be against the defendant (i.e., Big Business) in general.

- **Punishments should be more predictable; fairness requires that potential offenders be put on notice as to the specific consequences of their actions. Reviewing punitive damages awards to make sure that they're in line with other awards for comparable conduct, is an appropriate task for the post-trial and appellate reviews.**
- **No one should be punished twice for the same cause of action. The next section discusses some ways of ensuring that multiple punishment doesn't happen.**

Table 4: States That Have Established a “Clear and Convincing Evidence” Standard for Punitive Damages by Statute or Case Law	
State	Statute
Alabama	Code § 6-11-20 (Supp. 1992)
Alaska	Stat. § 09.17.020 (Supp. 1992)
California	Civ. Code § 3294(a) (West Supp. 1993)
Colorado	Rev. Stat § 13-21-102.5(3) (1987) (requiring proof beyond reasonable doubt)
Florida	Stat. Ann ch. 768.73(1)(b) (Harrison Supp. 1991)
Georgia	Code Ann. § 51-12-5.1(b) (Michie Supp. 1992)
Illinois	Ann. Stat. ch. 110, § 2-1115.05(b) (1995)
Indiana	Code Ann. § 34-4-34-2 (Burns 1986) (see also case law section below)
Iowa	Code Ann. § 668A.1 (West 1987) (requiring evidence that is “clear, convincing and satisfactory”)
Kansas	Stat. Ann §§ 60-3701(c) to 60-3702(c) (Supp. 1991)
Kentucky	Rev. Stat. Ann. § 411.184 (Baldwin 1991)
Minnesota	Stat. Ann. § 5549.20(a) (West 1988)
Montana	Code Ann. § 27-1-221(5) (1992)
Nevada	Rev. Stat. § 42.005(1) (1991)
North Dakota	Cent. Code § 32-03-07 (1987) (requiring prima facie evidence as threshold support for motion to amend pleadings to allow exemplary damages claim)
Ohio	Rev. Code Ann. § 2307.80 (Anderson 1991)
Oklahoma	Stat. Ann. tit. 23, § 9.1(B)–(D) (Supp. 1986)
Oregon	Rev. Stat. § 30.925(1) (1991)
South Carolina	Code Ann. § 15-33-135 (Law. Co-op. Supp. 1992)
South Dakota	Codified Laws Ann. § 21-1-4.1 (1987)
Texas	Civ. Prac. & Rem. Code Ann. §§ 41.003-41.004 (1995)
Utah	Code Ann. § 78-18-1(1)(a) (1992)
State	Case
Arizona	<i>Linthicum v. Nationwide Life Ins. Co.</i> , 723 P.2d 675, 681 (1986)
Hawaii	<i>Masaki v. General Motors Corp.</i> , 780 P.2d 566, 575 (1989)
Indiana	<i>Ragsdale v. K-Mart Corp.</i> , 468 N.E.2d 524, 527 (Ct. App. 1984) (see also statutory section above)
Maine	<i>Tuttle v. Raymond</i> , 494 A.2d 1353, 1362-63 (1985)
Maryland	<i>Owens-Illinois, Inc. v. Zenobia</i> , 601 A.2d 633, 657 (1992)

Tennessee	<i>Hodges v. S.C. Toof & Co.</i> , 833 S.W.2d 896, 901 (1992)
Wisconsin	<i>Wangen v. Ford Motor Co.</i> , 294 N.W.2d 437, 458 (1980)

Source: Rustad and Koenig, “The Historical Continuity of Punitive Damages Awards,” pp. 1278–1279, n. 63; Schwartz and Behrens, “Punitive Damages Reform,” p. 1381, n. 98; and other sources.

The final advantage of criminalizing punitive sanctions was that decisions to prosecute would rest with public authorities vested with the task of punishing criminal conduct and endowed with the discretion to distinguish between violations they feel are worth prosecuting and those they don't. Obviously, if punitive damages remain within civil law, this will be impossible. But adopting the previous protections will help ensure that abuses are minimized.

Table 5: States That Divert Part of Punitive Damages Awards to Public Purposes

State	Policy
Colorado	Requires a third of punitive awards to be paid into the state general fund. Rev. Stat. Ann. § 13-21-102(4) (West 1987)
Florida	Requires that 35 percent of the punitive award go to the General Revenue Fund, or, in cases of personal injury or wrongful death, to the Public Medical Assistance Fund. Stat. Ann. § 768.73(2) (Supp. 1992); upheld in <i>Gordon v. State</i> , 585 So.2d 1033, 1035-1038 (Fla. App. 1991), affirmed, 608 So.2d 800 (Fla. 1992)
Georgia	Mandates that the state receive a percentage of any punitive damage claim arising from a product liability action. Code Ann. § 51-12-5.1(e)(2) (Supp. 1992); upheld in <i>Mack Trucks v. Conkle</i> , 263 Ga. 539, 540-543, 436 S.E.2d 635, 637-639 (Ga. 1993)
Illinois	Allows the judge to divide the punitive award, at his discretion, among the plaintiff, the plaintiff's attorney, and the State of Illinois Department of Rehabilitation Services. Ann. Stat. ch. 110, § 2-1207 (Smith-Hurd Supp. 1992)
Indiana	Subject to statutory exceptions, allocates 75 percent of punitive damages to a compensation fund for violent crime victims. H. 1741, 109th Reg. Sess. (enacted Apr. 26, 1995)
Iowa	Allows the plaintiff to keep the entire award if the defendant's conduct was specifically aimed at him; otherwise, the plaintiff can keep at most 25 percent of the award, with the rest going into a civil reparations trust fund administered by the state court administrator, to be spent only for indigent civil litigation programs or insurance assistance programs. Code Ann. § 668A.1(2)(b) (West 1987); upheld in <i>Shepherd Components v. Brice Petrides-Donohue & Assoc.</i> , 473 N.W.2d 612, 619 (Iowa 1991)
Kansas	Diverts half of punitive awards in medical malpractice cases into the state treasury and credits them to the health care stabilization fund. Stat. Ann. § 60-3402(e) (Supp. 1991)
Missouri	Allocates half of punitive damages, after payment of expenses and counsel fees, to Tort Victims' Compensation Fund. Rev. Stat. § 537.675 (1994)
Oregon	Allocates 60 percent of punitive damages to Criminal Injuries Compensation Account. S.

	482, 68th Leg. Ass. (enacted July 19, 1995), amending Rev. Stat. §§ 18.540 and 30.925, and repealing Rev. Stat. § 41.315
Utah	Allocates half of punitive damages in excess of \$20,000 to state treasury. Code Ann. § 78-18-1(3) (1992)

Source: Kagan, "Toward a Uniform Application of Punishment," p. 777, nn. 138–143; and appendix to Justice Ginsburg's dissent in *BMW v. Gore*.

VI. SO HOW DO WE SET PUNITIVE DAMAGES?

Punitive damages punish. There is no way around that. Any fine that exceeds compensation will have a punitive effect. Criminal law, because of its many layers of protections for the innocent, is well-suited for punishment. Civil law is inappropriate for the task. If we are to retain punitive damages within the civil law, then, the best we can hope to do is to eliminate punishment as a rationale for imposing them. While punitive damages will always be punitive, they should not try to punish, but only to deter.¹⁹⁷

If punishment is properly left to the criminal law, then criminal penalties will be determined by a democratic process. What constitutes acceptable criminal punishment—which may involve retribution and other emotional issues—is difficult to determine, and I do not attempt to address the problem here. But while setting punishment is difficult, deterring harm is relatively easy. Given that a course of conduct is reprehensible and that we want to deter it, how high should punitive damages be set to accomplish that goal?

An easy answer to the question is "Any really large amount of money." Indeed, \$10 billion will deter just about anything. More generally, it can be argued that once we've determined that a course of conduct is reprehensible, bickering over exact costs is somewhat moot; why not just make costs high and be done with it? But this answer is a bit too easy. Even in criminal law (except for the most heinous crimes), legislators usually take care to set both minimum and maximum penalties, on the philosophy that even muggers shouldn't be infinitely punished.¹⁹⁸ I will argue in this section that:

- Generally, if someone's harmful conduct was motivated by the prospect of saving money (which is likely if the defendant is a corporation), an appropriate punitive damages award should be at least equal to the amount that the defendant gained (or saved) by engaging in his harmful conduct. The use of multipliers may be appropriate for conduct that was unlikely to be discovered.
- Money is money, whether it's compensatory damages, punitive damages, or criminal penalties. A corporation will be deterred from pursuing a course of action as long as *total* government-imposed costs are at least equal to whatever benefit the corporation achieves. In assessing punitive damages, the court should figure out the appropriate deterrent amount, and subtract all government-imposed costs that the defendant has already incurred as a result of his bad behavior—compensatory damages, regulatory fines, criminal penalties, and so on.
- The tort system isn't the only way of deterring reprehensible behavior. We already have a regulatory system which is designed to prevent certain acts from happening and which already provides penalties for certain categories of bad behavior. Any regulatory fines the defendant has incurred as a

¹⁹⁷ This change of stated goals may require a change of name. Should we continue to talk about "punitive damages" if they are no longer to be punitive? Will juries be confused if judges tell them to award nonpunitive punitive damages? I leave these questions for another time. For convenience, I will continue using the term "punitive damages."

¹⁹⁸ As Gilbert and Sullivan put it, "My object all sublime I shall achieve in time—to let the punishment fit the crime—the punishment fit the crime." William S. Gilbert, *The Mikado or the Town of Titipu*, in *Asimov's Annotated Gilbert & Sullivan*, ed. Isaac Asimov (New York: Doubleday, 1988), p. 567.

result of his bad behavior, like all the other costs referred to in the previous bullet, should be kept in mind when calculating punitive damages.

- The ratio between compensatory and punitive damages, by and large, should be irrelevant. Relying on this sort of simple formula makes it more difficult to come up with appropriate punitive awards, and it compounds previous potential errors in the calculation of compensatory damages and regulatory fines.
- The wealth of the defendant, by and large, shouldn't matter, except if the plaintiff can prove that the defendant would have committed the act even if he couldn't have gained any money by it (that is, if the act was motivated by, say, spite, not profit), or except insofar as the defendant's wealth has something to do with how much he benefited from his conduct.

A. How Much Did the Defendant Benefit?

In criminal cases (like murder), we often find defendants who aren't motivated by profit, and we would be hard-pressed to calculate what "benefit," if any, these defendants achieve from their conduct. In some cases of environmental harm where punitive damages are now assessed, there may be some sort of spiteful activity. I may have a long-standing vendetta against my neighbor and take it out on him by dumping hazardous waste in his yard; the benefit to me is difficult to quantify, real though it may be. These cases, though, seem to be the exception rather than the rule in civil environmental cases. Most environmental defendants, like Hooker Chemical, are corporations that typically act not out of spite, but for profit, and the profit motive may sometimes tip decisions more toward risk than reliability, risk mitigation, and risk anticipation.

One question to ask, then, could be, "How much money did the defendant save by engaging in reprehensible conduct?" or "How much did the defendant benefit from his conduct?" Or, in other words, "How much would prevention have cost?" *Total fines* should then be made higher than this number. (Of course, everyone should pay compensatory damages, so if the amount of compensatory damages already wipes out any benefit to the defendant, then compensatory damages, as a deterrent, ought to be enough.) So, suppose I do something reprehensible that costs someone \$1 million, when achieving the same result properly would have cost me an extra \$10 million. Then my total fines should be \$10 million (or slightly higher)—\$1 million in compensatory damages and \$9 million in deterrent fines.

Some types of behavior—for instance, oil spills—are guaranteed to be detected if they happen. Other types—for instance, illegal disposal of hazardous waste—are more difficult to detect. A punitive damages system that makes no allowance for this may not deter properly; if a reprehensible action only has a one-in-three chance of being discovered and punitive damages are based on the economic benefit from each *discovered* case, it may be worth the wrongdoer's while to continue with his conduct, knowing that he will profit from two-thirds of the cases.

Thus, in cases that are unlikely to be discovered, multipliers may be appropriate.

Using economic gain or costs foregone as a baseline for calculating penalties is already done in other contexts. The EPA, for instance, routinely uses economic gain to calculate its civil penalties,¹⁹⁹ and a similar process takes place in federal securities law.²⁰⁰

¹⁹⁹ The EPA already has a number of methods of calculating the economic benefit of a course of action, including the "BEN model." These models are often critiqued, but the general point that economic benefit is calculable is not disputed. For a discussion (and critique) of EPA computer models, see Robert H. Fuhrman, "Improving EPA's Civil Penalty Policies—And Its Not-So-Gentle BEN Model," *BNA Environment Reporter*, September 9, 1994, pp. 874–884.

²⁰⁰ The 1934 Securities Exchange Act allows the issuer or owner of a security to sue a director, officer, or certain principal stockholders of a company for insider trading, but the recovery is limited to the profit realized by the defendant. Securities Exchange Act, § 16(b). Contemporaneous traders can also sue for insider trading (Securities Exchange Act, § 20A), but liability is limited to "the profit gained or loss avoided in the transaction" (Securities Exchange Act, § 20A(b)(1)) and reduced by the amount, if any, that the defendant has already had to pay in penalty to others in connection with the same transaction (Securities Exchange Act, § 20A(b)(2)). The Securities and

If the defendant is irrationally malicious, this calculation may be difficult or impossible, and we have to fall back on the standard method that legislatures sometimes use when they set criminal penalties—making the punishment “really high” and hoping it induces appropriate behavior.

B. The Effect of the Regulatory System

Exchange Commission is allowed to collect monetary penalties in civil actions ranging from \$5,000 to \$500,000 (depending on the violation), or “the gross amount of pecuniary gain,” whichever is greater. Securities Exchange Act, § 21.

The tort system isn't the only system that deters. We live in a world where most areas of human endeavor—including environmental impacts—are already subject to regulation. Drugs are subject to Food and Drug Administration regulations, workplace safety is regulated by the Occupational Health and Safety Administration, the EPA regulates environmental risks, and so on.²⁰¹ In addition, there is evidence that firms making unsafe products experience a reputation loss, quite apart from any civil liability.²⁰² The market values a certain amount of safety as one of many desirable features of a product. Therefore, it would be unrealistic to talk as if the tort system were the *only* method to produce safety.²⁰³

The existence of the regulatory system must affect the workings of a system designed to punish and deter, because it affects how much the defendant benefited through actions that resulted in harm and how likely it is

²⁰¹ Paul H. Rubin, *Tort Reform by Contract* (Washington, D.C.: The AEI Press, 1993), pp. 50–51.

²⁰² Rubin, *Tort Reform by Contract*, pp. 53–54. For a major corporation, reputation is money. See Sam Peltzman, “The Effects of FTC Advertising Regulation,” *Journal of Law and Economics*, December 1981, pp. 403–448; Gregg Jarrell and Sam Peltzman, “The Impact of Product Recalls on the Wealth of Sellers,” *Journal of Political Economy*, June 1985, pp. 512–536; Paul H. Rubin, R. Dennis Murphy, and Gregg Jarrell, “Risky Products, Risky Stocks,” *Regulation*, 1988, no. 1, pp. 35–39; W. Kip Viscusi and Joni Hersch, “The Market Response to Product Safety Litigation,” *Journal of Regulatory Economics*, September 1990, pp. 215–230. For a particular treatment of the question in the case of airplane safety, for instance, see Andrew Chalk, “Market Forces and Aircraft Safety: The Case of the DC-10,” *Economic Inquiry*, January 1986, pp. 43–60; Don M. Chance and Stephen P. Ferris, “The Effect of Aviation Disasters on the Air Transport Industry,” *Journal of Transport Economics and Policy*, May 1987, pp. 151–165; Andrew Chalk, “Market Forces and Commercial Aircraft,” *Journal of Industrial Economics*, September 1987, pp. 61–81; Severin Borenstein and Martin B. Zimmerman, “Losses in Airline Demand and Value Following Accidents,” *Transportation Safety in an Age of Deregulation*, p. 52, reprinted from “Market Incentives for Safe Commercial Airline Operation,” *American Economic Review*, December 1988; and Mark L. Mitchell and Michael T. Maloney, “Crisis in the Cockpit? The Role of Market Forces in Promoting Air Travel Safety,” *Journal of Law and Economics*, October 1989, pp. 329–355. See also Iago: “Who steals my purse steals trash. 'Tis something, nothing; 'twas mine, 'tis his, and hath been slave to thousands—but he that filches from me my good name robs me of that which not enriches him and makes me poor indeed.” William Shakespeare, *Othello*, III.iii.156–161, in *The Complete Signet Classic Shakespeare* (New York: Harcourt Brace Jovanovich, Inc., 1972), p. 1115.

²⁰³ Rubin, *Tort Reform by Contract*, p. 51.

that the conduct will happen. I divide the regulatory structure into regulations designed to punish and clean up “past sins,” and regulations designed to prevent “future sins.”²⁰⁴

- *Past-sins regulation* includes environmental enforcement, cleanup regulations, and other initiatives designed to punish and alleviate harms that have already occurred or are now occurring. The current regulatory system can make it less likely that a company will act recklessly or maliciously, because the costs of doing so are greater than if there were no regulations at all. A company that acts badly now has to face not only potential punitive damages, but also certain regulatory requirements; for instance, someone who illegally dumps hazardous waste has to deal with private plaintiffs but also with the EPA and Department of Justice, with their systems of administrative, civil, and criminal penalties. They also have to bear the costs of cleaning up the contamination, regardless of its harm to specific people. In the sense that cleanup regulations, by their cost, tend to discourage such conduct in the future and encourage regulatory compliance, they are also “forward-looking.”
- *Future-sins regulation* includes environmental enforcement, safety regulations, and other initiatives designed to prevent future harms.

This sort of regulation can make it less likely that a company will act recklessly, because some safety mechanisms are required as part of the regulatory scheme and have now become part of standard industry practice. Before 1989, the chance of an Exxon Valdez happening was probably lower than it otherwise would have been in an unregulated world. And since 1989, with the passage of new oil safety legislation, including the Oil Pollution Prevention Act, the chances of an Exxon Valdez happening again are even lower. Regulations, like punitive damages awards, can deter undesirable behavior.

²⁰⁴ I will later argue that the cost of past-sins regulation should be credited toward the punitive award, because it represents money that the defendant has already spent as a direct consequence of their bad behavior. (The costs of future-sins regulation shouldn't be subtracted from the punitive award; these costs are already borne by everyone, regardless of whether or not they act reprehensibly.)

But regulation can also make recklessness more likely. The expense of the regulatory structure can make it more likely that some firms or individuals will try to evade the regulatory system entirely. For instance, in states where used oil is classified as a hazardous waste, used oil is more expensive to recycle. Therefore, people are more likely to illegally dump the used oil in those states.²⁰⁵ The used oil which is recycled is recycled more safely because of the regulation, but at the same time, more of it may be dumped dangerously. If this happens, we have the perverse outcome that a regulatory system designed to bring about safety ends up leading to more dangerous illegal behavior.

Regulation, by laying out industry norms, can aid in defining the concepts of “recklessness” and “negligence.” The standards laid out in the regulatory system do more than try to prevent future environmental harm. They can also be a guide to potential defendants, plaintiffs, and juries as to what constitutes “negligent” or “reckless” behavior. To be reckless is to expose people to an unjustifiable and substantial risk, and what’s “unjustifiable” or “substantial” depends on the context—what industry practice is, what people expect, and so on. Existing laws and regulations can play an important role in clarifying what is expected of people in a particular industry.

But regulation can also prevent plaintiffs from doing anything about certain harms. A defendant’s non-compliance with regulatory standards can strengthen a plaintiff’s case (regardless of actual harm), but a defendant’s compliance with regulatory standards can sometimes destroy a plaintiff’s case (even if there was actual harm). Legislation can actually preempt lawsuits—the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), for instance, lays out clearly what should be on pesticide labels, and compliance with FIFRA has generally been held to preempt failure-to-warn suits.²⁰⁶ In other cases, juries can find recklessness regardless of what statutes say, but they can take regulatory requirements into account if they so choose.²⁰⁷

C. A Checklist for Calculating Punitive Damages

So in cases where there was intent to harm, intent to violate the law, or recklessness, total fines, if designed to deter, should be equal to the amount that the behavior benefited the defendant.

Put more generally, this argument proceeds as follows:

²⁰⁵ See Alexander Volokh, *Recycling Hazardous Waste: How RCRA has Recyclers Running Around in CERCLAs*, Reason Foundation Policy Study No. 197, October 1995, pp. 21–25.

²⁰⁶ This is because courts have held that FIFRA has “occupied the field” of pesticide regulation by laying out a comprehensive regulatory scheme, leaving no room for tort remedies. See *Shaw v. Dow Brands, Inc.*, 994 F.2d 364 (7th Cir. 1993). See also Boston and Madden, *Law of Environmental and Toxic Torts*, pp. 213–260.

²⁰⁷ On the question of statutory preemption, see Bruce Yandle and Roger Meiners, “Common Law Environmentalism: Can Private Law Protect Environmental Quality?,” presented at the conference of the Centre for European Policy Studies, Brussels, December 3–4, 1995. See also Elizabeth Brubaker, *Property Rights in the Defence of Nature* (London: Earthscan Publications, 1995).

- **First, the court should ask whether there was an element of recklessness, intent to violate the law, or intent to harm in an action. If there isn't, then the defendant shouldn't be liable for punitive damages.**

Otherwise:

- The court should take the amount the defendant saved by acting reprehensibly. For any particular act by the defendant, this amount is probably independent of the number of future plaintiffs.²⁰⁸
- “The amount saved” should include the costs avoided by not having complied with the regulations, and the costs avoided by having acted recklessly. Multipliers may be appropriate to account for actions that were hard to uncover.
- Since all fines deter, regardless of whether a regulatory agency or a civil court imposes them, the defendant should be able to credit what he already paid in regulatory fines and penalties against the amount of punitive damages. This amount will depend on whether his conduct was legal, how much cleanup was required by law, how vigorously enforcement agencies proceeded, and so on.
- Since all court-imposed fines deter, regardless of whether they're called “compensatory” or “punitive,”²⁰⁹ the defendant should be able to credit all compensatory damages paid to successful plaintiffs against the amount of punitive damages. After this subtraction, the amount of money the defendant saved may even be negative (see the case of the Exxon *Valdez*).

After all this has been taken into account, there is room for punitive damages.

- Punitive damages should make sure that the defendant saved no money (or reaped no benefit) by his harmful conduct. If, after compensatory damages, regulatory fines, and other penalties have been accounted for, the defendant still saved some money, the punitive damages award should be equal to whatever is left over.

Consider a few simple examples. In reality, the facts are usually complicated and the numbers are hard to come by, but doing some arithmetic can be useful for illustrative purposes. Suppose I recklessly dumped hazardous waste and, in the process, saved \$10 million compared to what I would have had to spend to dispose of the same waste legally and safely. Suppose the EPA fines me \$2 million and mandates a \$1-million cleanup, and suppose I harmed some private individuals to the tune of \$3 million. That makes \$6 million in combined costs, so I'm still \$4 million ahead. Therefore, I should pay \$4 million in punitive damages.

But now suppose that the harm I caused to private individuals is \$9 million. Then my total costs are \$2 million (EPA fine) + \$1 million (mandated cleanup) + \$9 million (compensatory damages) = \$12 million, and even without *any* punitive damages, deterrence will have been served.

D. Multiple Assessments of Punitive Damages

²⁰⁸ There may, in practice, be problems in determining how much money someone saved by acting reprehensibly. I will, for the purposes of this paper, ignore these problems and assume that the amount of money someone saved is objectively and reasonably knowable.

²⁰⁹ That compensatory damages should be considered when calculating punitive damages was recognized in *Morgan*. See also *Cummings Medical Corp. v. Occupational Medical Corp. of America, Inc.*, 10 Cal. App. 4th 1291, p. 1299–1300, 13 Cal. Rptr. 2d 585, p. 589–590 (1994), where the court reduced the punitive award to the amount of defendant's ill-gotten profits not already paid in the compensatory award.

As pointed out earlier in this paper, when many plaintiffs sue the same defendant for the same cause of action, punitive damage awards can be way out of proportion to what they should be. For instance, suppose courts calculate punitive damages according to the system laid out in this section. Then:

- If I saved \$10 million by costing one person \$1 million, I will pay \$1 million in compensatory damages and \$9 million in punitive damages, for a total of \$10 million.
- *But*, if I saved \$10 million by costing 100 people \$10,000 each (for the same grand total of \$1 million), then each court would charge me \$10,000 in compensatory damages and \$9.99 million in punitive damages, for a total of \$1 billion, which exceeds the “proper” deterrent amount by \$990 million, or a factor of 100.

If punitive damages in civil cases were abandoned and the offending activity instead became a crime, then the problem would be alleviated; there would be one criminal prosecution to determine the criminal penalty. Future plaintiffs may still come along and collect their own compensatory damages, but there would only be a *single* punitive action taken.

But if punitive damages remain in civil cases, two possible constraints can be implemented:

- If a defendant has already paid punitive damages to some other plaintiff for the same cause of action, he should be exempted from future punitive damage claims, though he should still pay all compensatory damage claims. In the above example, the first court will already have charged me \$10,000 in compensatory damages and \$9.99 million in punitive damages, for a total of \$10 million. The second court²¹⁰ should only charge me the \$10,000 that I cost the second plaintiff, and so should the other courts. I'll end up paying \$10,990,000—\$10 million to the first court and \$10,000 to each of the 99 remaining courts. This is still greater than \$10 million, the “optimal” amount, but it's an improvement over the current system. (To actually work this way, this system has to be applied in every jurisdiction.)
- Or, we could admit that different courts will differ as to what an “appropriate” punitive damage is. Each time the same defendant is sued for the same cause of action by a different plaintiff, the court could calculate its own version of what total damages should be, and compare that to what the defendant has already paid. If the defendant has already paid more than the court calculates that it should, then no punitive damages should be assessed. On the other hand, if the court finds that the defendant should have paid more than it actually has, then it could assess the difference in punitive damages. Punitive damages would be higher in this scenario than in the previous one.²¹¹ (Note, also, that if punitive damages are not diverted to the public treasury (as they ought to be), such a system would also provoke a race to the courthouse since the earliest plaintiff would be likely to get the largest punitive award.)

Barring legislative changes, these judicial changes would be hard to implement. In *Juzwin v. Amtorg Trading Corp.*, Judge Sarokin overturned an award of punitive damages, saying that “subjecting defendants to the possibility of multiple awards of punitive damages for the single course of conduct alleged in this action would deprive defendants of the fundamental fairness required by the Due Process Clause.”²¹² He also called for

²¹⁰ Defendants would be allowed to present evidence of previous fines at the time of the verdict. Even if two cases were going on simultaneously, it's highly unlikely that the punitive damages verdicts would be handed down *at exactly the same time*.

²¹¹ Alan Schulkin recommends such a system, except that he limits it to punitive damages—each court independently calculates its own punitive damages amount, and then compares that to the largest punitive damages amount that any other court has awarded. “Reductions to offset prior awards would be conditioned on the prior judgments becoming final. If a judgment which was used as an offset is reversed on appeal, the award to the later plaintiff for that amount would be rehabilitated. In that way, no matter how many cases come to trial, the defendant's punitive damage liability would not exceed the amount thought proper by the most severe jury, and the defendant would not fortuitously escape punishment.” Schulkin, “Mass Liability and Punitive Damages Overkill,” p. 1801.

²¹² *Juzwin I*, p. 1064.

legislation to resolve the problem generally by clarifying whether punitive damages should be allowed in mass tort cases, establishing standards for when they should be imposed and in what amounts, determining whether there should be limits on such damages, providing procedures for dealing with successive claims, and determining who could receive such awards. But later, he reconsidered his original opinion. He expressed concern about the fairness of retroactively applying his ruling “to those adversely affected by this ruling and the court's inability to effectuate its ruling prospectively absent uniformity either through legislation or a Supreme Court determination.”²¹³ His vacating the punitive damages award wouldn't guarantee that any other court would do the same, and considering the limitations that some states put on punitive damages, there's no particular reason to believe that the first punitive damages award must have been appropriate. Sarokin held that to bar a later punitive damage claim, at least the following must have occurred in the first trial:

- A full and complete hearing, with enough time to investigate all the harm that the defendant caused;
- Adequate representation for plaintiffs and opportunity for similar plaintiffs to collaborate in presenting the case against the defendant;
- Instructions to the jury making it clear that their punitive damage award would be the only one; and

²¹³ *Juzwin II*, pp. 1234–1235.

- “Such other conditions as will assure a full, fair and complete presentation of all the relevant evidence in support of and in opposition to the claim.”²¹⁴

Judge Sarokin had no reason to believe that *any* trial held so far had lived up to those standards. He vacated his original decision, calling again for uniform legislation to solve the problem.

E. The Red Herring of Caps and Ratios

1. The Magic Number Four

In at least one point, the Supreme Court may have erred when it decided *Haslip*. The Supreme Court seemed to dwell on the importance of the ratio of punitive damages to compensatory damages; a ratio of four, it said, “may be close to the line” of unconstitutionality.²¹⁵ There are three sorts of punitive damages ceilings—fixed ratios, fixed amounts, and hybrids. Six states—Colorado, Connecticut, Florida, Nevada, Oklahoma, and Texas—use fixed-ratio limitations, though these are sometimes flexible. Former President Bush's Council on Competitiveness advocated capping punitive damages at the amount of compensatory damages.²¹⁶ Alabama, Georgia, and Virginia cap punitive damages at fixed amounts, while Kansas has a hybrid model (see Table 6). The literature, especially on the tort-reformers' side, is filled with references to the punitive-to-compensatory ratio.²¹⁷ In light of the *Haslip* decision, some commentators have even suggested that toxic tort litigants adopt the strategy of trying to maximize compensatory damages and then asking for punitive damages equal to four times compensatory damages.²¹⁸

The Supreme Court recognized the difficulty of drawing a mathematical bright line. There's a reason for this difficulty; four, or any other number, is totally arbitrary. It offers a certain sort of predictability and consistency, but it's a fabricated consistency. Punitive damages, properly applied, may still vary considerably because in real life, different courses of conduct are differently reprehensible. The punitive-to-compensatory ratio will also vary considerably, even under ideal circumstances, because the amount of harm caused and the degree of moral reprehensibility are in general unrelated to one another. While a fixed ratio has the dubious advantage of being arithmetically beautiful, it has no better chance of yielding an appropriate result than the Exxon jurors' “Pick a number” method.

Table 6: States That Impose Punitive Damage Ceilings

State	States That Impose Punitive Damage Ceilings
Colorado	Compensatory damages (Rev. Stat. § 13-21-102(1)(a) (1991)), or 3 times compensatory damages if the wrongful conduct continues during the trial or the defendant knowingly aggravates the plaintiff's damages
Connecticut	2 times compensatory damages in product liability actions. Gen. Stat. Ann. § 52-240b (West 1991)
Florida	3 times compensatory damages unless plaintiff can produce “clear and convincing

²¹⁴ *Ibid.*, p. 1235.

²¹⁵ *Haslip*, p. 1046.

²¹⁶ Rustad and Koenig, “The Historical Continuity of Punitive Damages Awards,” p. 1281, n. 67, citing *Model State Punitive Damages Act*, § 7.

²¹⁷ See, for instance, Schwartz and Behrens, “Punitive Damages Reform,” p. 1378, referring to “the important relationship between punitive and compensatory damages.”

²¹⁸ May, “Fashioning Procedural and Substantive Due Process Arguments,” p. 612.

	evidence” to support a larger award. Stat. Ann. § 768.73(1)(a)-(b) (West Supp. 1992)
Georgia	\$250,000, unless the action is a product liability action or “it is found that the defendant acted, or failed to act, with the specific intent to cause harm.” Multiple awards stemming from the same predicate cause of action in product liability actions prohibited. Code Ann. § 51-12-5.1 (Supp. 1995)
Illinois	3 times economic damages. H. 20, 89th Gen. Ass., 1995-1996 Reg. Sess. (enacted Apr. 26, 1995)
Indiana	3 times compensatory damages, or \$50,000, whichever is greater. H. 1741, 109th Reg. Sess. (enacted Apr. 26, 1995)
Kansas	\$5 million or “defendant's highest gross annual income earned for any of the five years immediately before the act for which such damages are awarded,” whichever is smaller (unless the defendant expected to make a greater profit, in which case damages are set at 1.5 times this amount). Stat. Ann. § 60-3701(e)-(f) (Supp. 1991)
Nevada	3 times compensatory damages, or \$300,000, whichever is larger (except in product liability actions). Rev. Stat. § 42.005 (1991)
New Jersey	5 times compensatory damages, or \$350,000, whichever is greater, in certain tort cases. S. 1496, 206th Leg., 2d Ann. Sess. (1995)
N. Dakota	2 times compensatory damages, or \$250,000, whichever is greater. Cent. Code § 32-03.2-11(4) (Supp. 1995)
Oklahoma	Compensatory damages, or \$100,000, whichever is larger, in cases of recklessness; 2 times compensatory damages, \$500,000, or the economic benefit to the defendant, whichever is larger, in cases of intent and malice; any amount, in cases of intent, malice, and life-threatening behavior. Stat. Ann. tit. 23, § 9.1(B)-(D) (Supp. 1996)
Texas	2 times economic damages plus up to \$750,000 of noneconomic damages, or \$200,000, whichever is greater. Civ. Prac. & Rem. Code Ann. § 41.008 (1996)
Virginia	\$350,000. Code Ann. § 8.01-38.1 (Michie 1992)

Source: Rustad and Koenig, “The Historical Continuity of Punitive Damages Awards,” p. 1281, n. 67; Kagan, “Toward a Uniform Application of Punishment,” p. 774, nn. 117–118, 120 and 122; Lehr, Middlebrooks & Proctor, P.C., “Tort Reform Fails Again,” *Alabama Employment Law Letter*, vol. 6, no. 9 (February 1996); appendix to Justice Ginsburg's dissent in *BMW v. Gore*; and other sources.

There is, in fact, no particular reason to care about the punitive-to-compensatory ratio. As pointed out above, if we're going to assess punitive damages, the amount that will deter the perpetrator is the amount that he saved (or the amount by which he benefited) by engaging in his reprehensible conduct. Total fines should then be made equal to this number.²¹⁹ If I do something reprehensible that costs someone \$1 million but saves me \$10 million, the fact that I'm saving \$9 million is germane; the fact that \$9 million is nine times more than \$1 million isn't. Some cases will involve reprehensible conduct which fortunately caused little damage (because, for instance, it was discovered in time, or because it allowed the perpetrator to forgo expenditures that

²¹⁹ What with all the hassle (and costs) of litigation, the actual amount of money a guilty defendant will have to spend will certainly exceed the government-imposed fines (including the punitive award). If the civil justice system adopted the English rule of “loser pays,” total costs to the losing defendant will exceed his government-imposed fines by even more, so we will be erring even more on the high side.

dwarfed actual damages), and so sticking to a fixed ratio of compensatory damages to punitive damages will lead to a punitive damages award that's too low. (Some cases may involve reprehensible conduct that causes no injury, and therefore creates no basis for a tort action in the first place. And yet, that sort of action should be punished as well—another good reason to rely on criminal law, not tort law.) Other cases will involve behavior that didn't save a lot of money but which ended up costing a lot, and so sticking to the same ratio will lead to a punitive damages award that's too high.

The same argument applies to any fixed cap—caps are arbitrary. In practice, caps may become not only a ceiling but also a floor, and as a result, would lead to verdicts that are too high for some and too low for others.²²⁰

2. Why Compensatory Damages Are Important

At any rate, in such cases, the amount of compensatory damages should be immaterial to the amount of punitive damages. Tying ourselves to a particular ratio will introduce, in fact, an additional problem, which is that the amount of punitive damages will reproduce (and compound) any errors made in the calculation of compensatory damages.

Here's an example of how compensatory damages can go awry. Exxon agreed in October 1991 to pay \$1 billion to settle a \$3-billion natural resource damage claim brought by the state of Alaska and the federal government.²²¹ Part of the \$3-billion claim—under 10 percent—represented the market value of lost animals and lost fishing time. The rest represented the “nonuse” value of the Sound, the value that people get from merely *knowing* that this pristine resource exists, even if they don't use it.

To figure out how much damage was done to Prince William Sound, the state used a controversial method of natural resource damage assessment known as “contingent valuation.” Consultants showed pictures of Prince William Sound to 1,043 people across the United States and asked them how much they would pay in a one-time tax to prevent an oil spill like Exxon's from happening again. The consultants multiplied the mean amount, \$31, by the number of households, to get \$2.8 billion.

In this example, the government was seeking fines based on a contingent valuation calculation. But it could just as easily have been a private litigant seeking to introduce contingent valuation numbers as part of his claim for compensatory damages. Had this been the case, any errors in this calculation would be magnified if the plaintiff had asked for punitive damages and the jury had been guided by a fixed-ratio philosophy in setting punitive damages.

²²⁰ Schwartz and Behrens, in “Punitive Damages Reform,” p. 1380, n. 87, approve of a \$250,000 punitive damages cap, and note that the argument that \$250,000 may be too low “approaches frivolity when one considers criminal fine punishments for similar wrongful conduct.” But while criminal fines for comparable behavior do indeed seem low, Schwartz' and Behrens' argument approaches frivolity when one considers that the criminal fines could be too low, or that criminal fines also go together with imprisonment.

²²¹ Technically, a \$900-million settlement with the possibility of a \$100-million reopener.

This is especially troublesome because it is often alleged that this system of natural resource damage assessment doesn't really measure the value of natural resources. Contingent valuation, as in the experiment described above, tries to quantify nonuse values by showing people pictures of some natural resource, or describing it to them, and then asking them how much they would be willing to pay to keep that resource in its existing condition (or, alternatively, how much money they would be willing to accept to allow someone to alter that resource). The contingent valuation method suffers from a number of flaws, including the following:²²²

- *The survey process can create the very values which it claims to measure.* Some people may never have heard of the resource being valued, and wouldn't have felt a thing at its destruction if a surveyor hadn't asked them.
- *Answers are likely to be biased by strategic considerations regarding the uses to which the survey could be put.* People know they're not going to have to put their money where their mouth is—that is, be bound by the numbers they tell the surveyor. So they have no reason to try to really evaluate what they might pay; instead, they'll say some number that they think the surveyor wants to hear, or the total amount they would like to give to charity in general, or whatever amount makes them feel good inside.
- *Survey results are often inconsistent.* Since the question in the survey creates the value of the resource, people's answers are sensitive to the phrasing of the question. The question “How much would you pay to keep Alaska clean?” may generate the same result as “How much would you pay to keep Prince William Sound clean?”, even though Prince William Sound is just a small part of Alaska, and so the second answer must be much smaller than the first answer. One surveyor who asks one question about Alaska could get an answer one-tenth the size of another surveyor who divides Alaska into ten parts, does a survey on each of the parts, and adds his results together.²²³
- *People are ill-trained to evaluate the monetary value of environmental damage and rarely have experience buying environmental assets.* Asking how much a natural resource is worth to people who've never been there or seen it is like asking someone who's never seen strawberries how much they'd pay for strawberries. Our willingness to pay for strawberries isn't some spontaneously known quantity; it's created through a process of buying foods, evaluating them, deciding that certain foods aren't worth the price, increasing one's purchases of one thing, decreasing one's purchases of other

²²² See *Contingent Valuation: A Critical Assessment*, ed. Jerry A. Hausman (Amsterdam: North-Holland, 1993) for an extensive scholarly critique of contingent valuation methods. Kenneth J. Arrow, “Contingent Valuation of Nonuse Values: Observations and Questions,” in *Contingent Valuation*, provides a concise summary of problems with the method. See also Roger Bate, *Pick a Number: A Critique of Contingent Valuation Methodology and its Application in Public Policy*, Competitive Enterprise Institute, January 1994, p. 1.

²²³ Peter A. Diamond, Jerry A. Hausman, Gregory K. Leonard, *et al.*, “Does Contingent Valuation Measure Preferences? Experimental Evidence,” in *Contingent Valuation*, pp. 41–85. See also David A. Schkade and John W. Payne, “Where Do the Numbers Come From? How People Respond to Contingent Valuation Questions,” in *Contingent Valuation*, pp. 271–293.

things, and observing what prices are actually being charged in existing markets. For resources that aren't traded in markets, this process is impossible.

- *Results can't be empirically verified.*²²⁴

²²⁴ William H. Desvouges, F. Reed Johnson, Richard W. Dunford, *et al.*, "Measuring Natural Resource Damages With Contingent Valuation: Tests of Validity and Reliability," in *Contingent Valuation*, pp. 91–159.

Contingent valuation isn't, strictly speaking, a punitive damages-related problem. But the use of contingent valuation will tend to bias punitive damage amounts (either upwards or downwards, depending on the bias of the contingent valuation survey) as it biases compensatory damage amounts. In practice, one may have to determine natural resource values *somehow* for the purposes of litigation, but the use of the contingent valuation method has been notoriously sloppy in the past, and the mistakes made at this stage shouldn't be carried over into punitive damages. When determining compensatory damages, the contingent valuation method should only be applied using guidelines, accepted by economists, designed to minimize the arbitrariness of the method²²⁵—but delinking compensatory and punitive damages will ensure that whatever errors creep into compensatory damages will not spread to punitive damages as well.

3. *The Importance of Damage and Risk Assessment*

“How do you estimate the money value of environmental damage?” is an important question. Perhaps as important a question is “How do you estimate environmental damage in the first place?” It sounds like a spurious question—who, after all, would dispute that environmental damage occurred in Prince William Sound? Few, perhaps—but while harms *did* occur, the extent of the damage appears to have been exaggerated.²²⁶

In the first place, even calculating compensatory damages is problematic because no one knows quite what conditions were like in Prince William Sound before the spill. As Jeff Wheelwright, a former science editor for *Life* magazine who spent five years researching the effects of the oil spill, puts it, “Change from what?”²²⁷

In the second place, nature has a way of frustrating apocalyptic predictions. In the wake of the 1989 spill, predictions of Prince William Sound fishing yields were bleak. But in 1990 the pink salmon catch was a record 44 million fish, almost four times the number in 1988. In 1991, the number of fish was the highest on record. The number of fish dropped sharply in 1992 and 1993, and rose substantially in 1994. As long as the Department of Fish and Game has been keeping records, Alaskan catches have varied dramatically.²²⁸ At a minimum, it is not clear that the oil spill severely affected fish harvests.

The media reported 36,000 bird carcasses recovered and perhaps ten times that number presumed dead, 200 bald eagles dead, between 3,500 and 5,500 sea otters and up to 300 harbor seals dead; about 1,300 miles of oily shoreline; the air thick with hydrocarbons. All of these numbers, while tragic in themselves, tell us little unless we know how many animals there are in all. There are 20,000 sea otters in the area of the spill—so many that fisherman, who consider otters competition, shoot them. While bald eagles are relatively rare—about 8,000—in the 48 lower states, Alaska has 40,000 of them. The shoreline, after over seven years, shows

²²⁵ For interesting discussions on how to do this, see the work of Don Coursey: Don L. Coursey and William D. Schulze, “The application of laboratory experimental economics to the contingent valuation of public goods,” *Public Choice*, vol. 49 (1986), pp. 47–68; Coursey, “Markets and the measurement of value,” *Public Choice*, vol. 55 (1987), pp. 291–297; Coursey, Elizabeth Hoffman, and Matthew L. Spitzer, “Fear and Loathing in the Coase Theorem: Experimental Tests Involving Physical Discomfort,” *Journal of Legal Studies*, vol. 16 (January 1987), pp. 217–248; Coursey, John L. Hovis, and Schulze, “The Disparity Between Willingness to Accept and Willingness to Pay Measures of Value,” *Quarterly Journal of Economics*, August 1987, pp. 679–690; David S. Brookshire and Coursey, “Measuring the Value of a Public Good: An Empirical Comparison of Elicitation Procedures,” *American Economic Review*, vol. 77, no. 4 (September 1987), pp. 554–566; Coursey, “The Revealed Demand for a Public Good: Evidence from Endangered and Threatened Species,” University of Chicago, Irving B. Harris Graduate School of Public Policy Studies, Working Paper Series: 94-2.

²²⁶ See *Exxon Valdez Oil Spill*, which contains papers presented at the Third Symposium on Environmental Toxicology and Risk Assessment—Exxon Valdez Oil Spill, held in Atlanta, Ga., on April 26–28, 1993, sponsored by ASTM Committee E-47 on Biological Effects and Environmental Fate.

²²⁷ Nambiar, “Exxon on trial!”

²²⁸ Munk, “We’re partying hearty!”, pp. 84, 86.

no obvious signs of oil. Waves, storms, and cleanup crews took care of that. As Wheelwright points out in his book *Degrees of Disaster*,²²⁹ Exxon's \$2.1 billion cleanup effort, which worked mainly by scrubbing rocks and spraying them with powerful blasts of hot water, may have delayed the natural recovery of the beaches by killing many of the organisms that would have survived the spill.²³⁰ There is some evidence that:

²²⁹ Jeff Wheelwright, *Degrees of Disaster: Prince William Sound, How Nature Reels and Rebounds* (New York: Simon and Schuster, 1994).

²³⁰ Munk, "We're partying hearty!", p. 88.

- **Given the extent of shoreline oiling in 1989, the rate of oil removal and the associated repopulation has been rapid. Most of the oil has biodegraded and dissipated to background levels in the marine environment, and is now indistinguishable from the natural background of petroleum hydrocarbons in the Prince William Sound/Gulf of Alaska region. This rapid progression is similar to that observed on other spill sites in similar coastal environments.**²³¹
- **The spill's toxic effects, at most sites, were limited to the first few months to one year after the spill. After 15 to 18 months, about 75 to 90 percent of the affected shorelines were not significantly different from unoiled reference shorelines. Most of the scattered patches of residue that remain on shorelines and in nearshore subtidal sediments are a nontoxic food source for bacteria and, indirectly, higher life forms. As early as 1990, biological activity in intertidal and subtidal sediments was more often increased than decreased because of the presence of hydrocarbons.**²³²
- **Small quantities of weathered oil that remain isolated in subsurface sediments or under mussel beds continue to degrade without adverse environmental effects.**²³³

²³¹ Jerry M. Neff, Edward H. Owens, Sam W. Stoker, and Deborah M. McCormick, "Shoreline Oiling Conditions in Prince William Sound Following the *Exxon Valdez* Oil Spill," *Exxon Valdez Oil Spill*, pp. 312–346. See also "Prince William Sound Shoreline Conditions," based on "Condition of Shorelines in Prince William Sound Following the *Exxon Valdez* Oil Spill" (Part 2, Shoreline Biota, by Sam Stoker, Jerry M. Neff, Thomas R. Schroeder, and Deborah M. McCormick), *Assessing the Environments of Prince William Sound and the Gulf of Alaska Following the Exxon Valdez Oil Spill* (a summary of 25 scientific studies presented at the American Society for Testing and Materials' Third Symposium on Environmental Toxicology and Risk Assessment), available from Exxon Company USA, 1993, pp. 7–9. See also "The Fate of *Exxon Valdez* Oil," based on Hans O. Jahns and Charles Bruce Koons, "The Fate of the Oil from the *Exxon Valdez*: A Perspective," *Assessing the Environments*.

²³² Paul D. Boehm, David S. Page, Edward S. Gilfillan, *et al.*, "Shoreline Ecology Program for Prince William Sound, Alaska, Following the *Exxon Valdez* Oil Spill: Part 2—Chemistry and Toxicology," *Exxon Valdez Oil Spill*, pp. 347–397. Edward S. Gilfillan, David S. Page, E. James Harner, *et al.*, "Shoreline Ecology Program for Prince William Sound, Alaska, Following the *Exxon Valdez* Oil Spill: Part 3—Biology," *Exxon Valdez Oil Spill*, pp. 398–443. See also "The Fate of *Exxon Valdez* Oil."

²³³ "The Fate of *Exxon Valdez* Oil."

- Claims that fish, birds, and mammals continue to be at risk from continuing exposure to spill oil are not supported by hydrocarbon “fingerprinting analysis.” In 1990 and 1991, less than 1 percent of the fish, bird, and mammal samples had fingerprints of *Valdez* crude.²³⁴
- Spill-related sheens were too small to threaten fishing or recreation; fisheries operated normally in Prince William Sound and the Gulf of Alaska in 1990. By the end of the summer of 1990, sheens related to normal commercial vessels exceeded those associated with the *Valdez* spill.²³⁵
- Most of the seafloor contains no detectable *Valdez* crude. Where it was detected, it was usually a small increment to the natural hydrocarbon background resulting from seeps and other sources.²³⁶
- The rapid recovery from the *Valdez* spill in a high-energy environment confirmed nature's ability to degrade and dissipate spilled oil and is consistent with experience and scientific assessments of past spills.²³⁷

What this shows is that even the calculation of compensatory damages has problems. At issue here is not whether harm occurred, but whether assessment of these harms is clear-cut and capable of being objectively evaluated. In environmental cases, the use of contingent valuation and the shortcomings of damage and risk assessment methods may either exaggerate or underestimate estimates of actual harm. To the extent that punitive damages are tied to compensatory damages, these errors will be magnified at the punitive stage. And even without the compensatory damages linkage, it's entirely possible that because of faulty damage assessment, the Exxon jury was emotionally swayed by arguments relating to environmental damage that wasn't there, was not present to the extent alleged, or was more quickly reversible than had been anticipated.

F. When the Wealth of the Defendant Shouldn't Matter

²³⁴ A.E. Bence and W.A. Burns, “Fingerprinting Hydrocarbons in the Biological Resources of the *Exxon Valdez* Spill Area,” *Exxon Valdez Oil Spill*, pp. 84–140.

²³⁵ D.G. Taft, D.E. Egging, and H.A. Kuhn, “Sheen Surveillance: An Environmental Monitoring Program Subsequent to the 1989 *Exxon Valdez* Shoreline Cleanup,” *Exxon Valdez Oil Spill*, pp. 215–238.

²³⁶ David S. Page, Paul D. Boehm, Gregory S. Douglas, *et al.*, “Identification of Hydrocarbon Sources in the Benthic Sediments of Prince William Sound and the Gulf of Alaska Following the *Exxon Valdez* Oil Spill,” *Exxon Valdez Oil Spill*, pp. 41–83.

²³⁷ “The Fate of *Exxon Valdez* Oil.”

Most jurisdictions allow juries to consider the defendant's wealth in determining punitive damages. The *Haslip* court was impressed that Alabama courts don't let juries know about defendants' wealth,²³⁸ though it did allow courts at the post-trial and appellate review stages to consider wealth. The U.S. Court of Appeals for the Fourth Circuit *requires* that the jury be told the defendant's wealth before assessing punitive damages.²³⁹ And the Supreme Court of California has held not only that the jury's knowledge of the defendant's wealth is "essential," but also that the *plaintiff must introduce the evidence*.²⁴⁰

In *Zazú*, Judge Easterbrook commented on a \$1 million punitive award against L'Oréal in the following terms: "One million dollars cannot be justified as necessary to either compensation or deterrence. The judge discussed neither. Instead he calculated the award as a percentage of L'Oréal's (supposed) net worth—as if having a large net worth were the wrong to be deterred!"²⁴¹ One commentator reports how the principle has typically been explained to juries:

*If a 10-year-old boy delivering newspapers on his bicycle were to ride his bicycle intentionally into a 5-year-old boy, thus injuring that 5-year-old, I think anyone would agree that the newspaperboy should be punished. The newspaperboy earns \$5.00 per week. In order to make an example so that the newspaperboy does not do this again a punishment of \$10.00, or two weeks pay, seems reasonable. For two weeks, he will think about the injury he caused to the plaintiff and maybe prevent this from ever happening again. Indeed, two weeks pay is less than 5 percent of his annual salary. Now, in this case you are about to decide, defendant ABC Multi-National Corporation has annual earnings in excess of \$10 billion....*²⁴²

Wealth was certainly a major factor in the decision of how much to assess against Exxon in punitive damages. "The question is how much does it take to sting the hand of this conscienceless entity?" asked David Oesting, co-lead counsel for the plaintiffs in the Exxon case. Plaintiffs called Exxon's criminal and remediation expenses a "hiccup,"²⁴³ asserted that \$1 billion "was not worth [the Chairman's] time,"²⁴⁴ and said that

²³⁸ *Haslip*, p. 1044.

²³⁹ May, "Fashioning Procedural and Substantive Due Process Arguments," p. 599, n. 128, citing *Mattison*, pp. 105–106.

²⁴⁰ *Ibid.*, n. 129, citing *Adams v. Murakami*, 284 Cal. Rptr. 318, 319, 325–330 (1991).

²⁴¹ *Zazú*, p. 508.

²⁴² Roeca, "Damages," p. 522.

²⁴³ Exxon brief, p. 62, citing 40 Tr. 7023:12–14, 7036:6–7.

²⁴⁴ *Ibid.*

“Exxon, because of its size and wealth, can sustain a \$5 billion award and shrug their shoulders, just shrug their shoulders.”²⁴⁵ Plaintiffs emphasized not only net worth and net earnings, which punitive damages cases usually rely on, but also average cash flow (which significantly exceeds earnings because it doesn't include items like depreciation), and even the appreciation in the value of all Exxon stock since the spill.²⁴⁶

²⁴⁵ *Ibid.*, citing 43 Tr. 7583:24–7584:1.

²⁴⁶ *Ibid.*, pp. 62–63.

“I think Exxon ought to count its blessings,” juror Garrison said after the trial, “because when you have a range up to \$20 billion, what’s \$5 billion?”²⁴⁷ Plaintiffs’ attorney Brian O’Neill said the \$5-billion award against Exxon was appropriate because it was equal to Exxon’s profits for one year²⁴⁸ (though that’s not how the jury derived the number). Common wisdom has it that corporations, who, after all, have a lot of money, should be penalized more heavily, because what can make a big difference to a poor person can make no difference at all to a rich one, who will merely consider the amount to be “part of the cost of doing business.”

We should take a moment to wonder why that would be inappropriate. “If anything,” law professor Richard Booth points out, “society should be elated when corporations treat environmental damages (and indeed all sorts of damages) as part of the cost of doing business. Aside from compensating the victim, it is the very purpose of damages to make the wrongdoer internalize the full ‘social cost’ of its product. After all, what rational firm would rather pay damages than spend the same amount on prevention?”²⁴⁹

At any rate, the point isn’t how much the corporation can afford to pay; rather, the point is how much is necessary to deter. And it isn’t necessarily true that money means less to a rich person than a poor person:

- ABC Multi-National Corp. is richer than I am, so it’s less concerned about losing \$100,000 than I am. But unless there was an element of irrational spite involved, both ABC and I will pay up to \$100,000 to avoid losing \$100,000.²⁵⁰ If, for instance, the plaintiff can prove that the defendant was motivated by the sheer pleasure of causing pain, some large deterrent fine may be necessary, and it may then be necessary to find some number that will “sting.” But large corporations usually don’t take pleasure in causing pain; when they do cause pain, it’s an unintended result of business decisions that, like most business decisions, are motivated by profit. In the absence of specific proof of actual spite in the case at hand, a deterrent fine based on how much the company benefited by being reckless would deter it, regardless of its wealth.
- Corporations don’t suffer; their employees, owners, managers, and shareholders do. “Corporations,” the *Zazú* court reasoned, “are not wealthy in the sense that persons are. Corporations are abstractions; investors own the net worth of the business. These investors pay any punitive awards (the value of their shares decreases), and they may be of average wealth. Pension trusts and mutual funds, aggregating the investments of millions of average persons, own the bulk of many large

²⁴⁷ Munk, “We’re partying hearty!”, p. 89.

²⁴⁸ Phillips, “\$5,000,000,000 Jury Sets Oil Spill Damages.”

²⁴⁹ Booth, “Halt the misuse of punitive damages.”

²⁵⁰ *Ibid.* This may not be literally true for small damages, where the cost of identifying the savings may dwarf the amount of actual savings—but it is certainly true for large punitive damages awards.

corporations. Seeing the corporation as wealth is an illusion, which like other mirages frequently leads people astray.”²⁵¹

If one takes the “richer-people-need-higher-penalties-to-teach-them-a-lesson” theory seriously, one would have to know the incomes of the shareholders and calculate how much the value of the company's shares would fall in the event of a particular punitive damages award. This exercise is obviously futile.²⁵²

Different measures of wealth have additional problems. *Zazú* examines the case of corporate assets, net worth, and absolute size, and finds each of these measures wanting:

²⁵¹ *Zazú*, p. 508.

²⁵² Kenneth S. Abraham and John C. Jeffries, Jr., “Punitive Damages and the Rule of Law: The Role of Defendant's Wealth,” *The Journal of Legal Studies*, vol. 18 (June 1989), p. 422.

*Corporate assets finance ongoing operations and are unrelated to either the injury done to the victim or the size of the award needed to cause corporate managers to obey the law. Net worth is a measure of profits that have not yet been distributed to the investors. Why should damages increase because the firm reinvested its earnings? Absolute size, like net worth, also is a questionable reason to extract more per case.... Corporate size is a reason to magnify damages only when the wrongs of larger firms are less likely to be punished; yet judges rarely have any reason to suppose this.*²⁵³

The emphasis on wealth exacerbates the problem of irrational punitive damage awards. As the Supreme Court said in *Honda Motor v. Oberg*,²⁵⁴ “the rise of large, interstate and multinational corporations has aggravated the problem of arbitrary awards and potentially biased juries.... The presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.”²⁵⁵

The Exxon trial confirms this fear. Plaintiffs, in closing arguments, referred to Exxon's “mahogany polished boardroom in Houston, Texas”²⁵⁶ with “bodyguards outside,”²⁵⁷ and reminded the jurors that any award they made was “going to Alaskans.”²⁵⁸ Plaintiffs also repeatedly referred to Exxon's chairman's salary²⁵⁹ and railed against corporations.²⁶⁰ This doesn't mean, of course, that the jurors themselves were biased against large corporations. But if the jury instructions aren't clear on this point—if they don't make it clear that plaintiffs shouldn't enjoy a windfall just because a defendant happens to have deep pockets—the possibility of anti-rich-defendant awards exists.

Kenneth Abraham and John Jeffries point out:

²⁵³ Zazú, pp. 508–509.

²⁵⁴ *Honda Motor Co., Ltd. v. Oberg*, 114 S.Ct. 2331 (1994).

²⁵⁵ *Ibid.*, pp. 2340–2341.

²⁵⁶ Exxon reply brief, p. 13, n. 14, citing 43 Tr. 7575:24.

²⁵⁷ *Ibid.*, citing 43 Tr. 7586:15.

²⁵⁸ *Ibid.*, citing 43 Tr. 7635:7.

²⁵⁹ *Ibid.*, citing 43 Tr. 7573:3–11, 7578:2–7578:20, 7637:12–14.

²⁶⁰ *Ibid.*, citing 43 Tr. 7640:14–25.

The only rational deterrence explanation for taking defendant's wealth into account is one that is rarely voiced. It is the speculation that a wealthy defendant, usually a large corporation, may have engaged in a pattern of misconduct, of which any given case is merely illustrative.... On this assumption, exaggerating the punishment for wealthy defendants would not be illogical. It could be seen as a corrective for the systematic underdeterrence that results from underenforcement of compensatory tort liability. If only a few cases of corporate wrongdoing are brought to light, those instances might be punished all the more severely in order to offset corporate gain from the undiscovered cases. All this is plausible if one assumes that the defendant's size or wealth is a marker for a pattern of repetitive (and significantly undiscovered) misbehavior.

This assumption may not be altogether irrational, but it is surely wrong. Of course, it is descriptively wrong in many cases, but more than that, it is normatively wrong. Punishment cannot fairly be based on unaided speculation about what the defendant might or might not have done in various unspecified circumstances not then before the court. Yet that is exactly what evidence of the defendant's wealth invites—unaided speculation about the defendant's conduct in other cases. Of course, if a pattern of repetitive misbehavior is actually proven in court, that is another matter. In that case, the entire course of misconduct rightly may be considered. But where no such pattern is involved, inviting the jury simply to assume its existence is plainly unfair. Whether that unfairness rises to the level of a constitutional violation is a question we do not pause to discuss. We think it sufficient to say that calculating deterrence based on wholly speculative inferences that might be drawn from evidence of the defendant's wealth falls grossly short of the standards of fairness and accuracy to which our system of civil justice aspires.²⁶¹

Occasionally, trials can be bifurcated, so that one phase of the trial deals with compensatory damages while another deals with punitive damages. The *Model State Punitive Damages Act* advocates bifurcation,²⁶² and as of 1993, 13 states had enacted bifurcation through statutes or caselaw (see Table 7). Evidence of the defendant's wealth isn't admissible in a suit for compensatory damages; such evidence, as well as evidence of the defendant's liability insurance, is considered prejudicial and is likely grounds for a mistrial.²⁶³ On the other hand, as matters stand today, evidence of the defendant's wealth *is* admissible in punitive damage suits in some states. If the defendant's wealth remains admissible as evidence, and trials are not bifurcated, wealth (as well as other issues that shouldn't be considered, like prior criminal prosecutions)²⁶⁴ will become an issue in compensatory damages trials as well.

VII. CONCLUSION

In today's popular debate over punitive damages, defendants tend to maintain that the doctrine of punitive damages is fatally flawed, while plaintiffs hold that punitive damages are not only necessary to obtain justice, but that any reform of the system would put the little guy at the mercy of big business. While the punitive damages system is flawed, it's not flawed in quite the same way that the popular debate has it.

The popular debate over environmental punitive damages paints the public policy choice as one between environmental protection and corporate profits, while the real issue is how to establish a fair process for

²⁶¹ Abraham and Jeffries, "Punitive Damages and the Rule of Law" (© 1989 by The University of Chicago), pp. 420–421. This excerpt reprinted by permission of the University of Chicago.

²⁶² *Model State Punitive Damages Act*, § 5(a)–(d).

²⁶³ Abraham and Jeffries, "Punitive Damages and the Rule of Law," p. 416.

²⁶⁴ Slap and Milstein, "Punitive Damages in Toxic Tort Actions," p. 89.

achieving a fair result in individual lawsuits. These are the reforms that should be made in the system of punitive damages:

- Only recklessness, intent to harm, and intentional violations of the law should carry punitive sanctions; accidents and negligence are adequately deterred with compensatory damages, and punishment for such cases is inappropriate.
- Criminal law is a better tool than punitive damages to punish and deter. In criminal law, the burden of proof is higher, the criminal fines go to the state and not to the injured party (though the injured party may also bring a civil suit for compensatory damages), punishments are more predictable, the problem of multiple punishment for the same cause of action does not exist, and decisions to prosecute rest with public authorities vested with the task of punishing criminal conduct.
- However, if the civil law continues to be used to impose punitive damages, various reforms merit consideration.
 - a) Juries themselves aren't the problem; the more fundamental problem is unlimited discretion, whether on the part of juries or judges. Punitive damages reform must involve at least the procedural safeguards mandated by the Supreme Court in the *Haslip* case: clear jury instructions, post-verdict review by the trial court, and appellate review.
 - b) In addition, punitive damages should incorporate those features pointed out above as advantages of the criminal law. The burden of proof for awarding punitive damages should be higher; plaintiffs shouldn't keep punitive damages awards; punishments should be more predictable; and multiple awards of punitive damages for a single action should be curtailed.

Table 7: STATES THAT HAVE ESTABLISHED BIFURCATION OF TRIALS INTO COMPENSATORY AND PUNITIVE PHASES

State	Statute
California	Civ. Code § 3295 (West Supp. 1993)
Connecticut	Gen. Stat. Ann. § 52-240(b) (West 1991)
Georgia	Code Ann. § 51-12-5.1(d) (Michie Supp. 1992)
Illinois	Ann. Stat. ch. 110, § 2-1115.05(c) (1995)
Kansas	Stat. Ann. §§ 60-3701 to 60-3702 (Supp. 1991)
Minnesota	Stat. Ann. § 549.20(4) (West Supp. 1993)
Missouri	Ann. Stat. § 510.263 (Vernon Supp. 1992)
Montana	Code Ann. § 27-1-221(4) (1992)
Nevada	Rev. Stat. § 42.005(3) (1991)
New Jersey	Stat. Ann. § 2A:58C-56 (West 1987)
North Dakota	Cent. Code § 32-03.2-11(2)-(3) (allows bifurcation at either party's election, and prohibits evidence of defendant's financial condition or net worth in proceeding to determine punitive damages)
Ohio	Rev. Code Ann. § 2315.21 (Baldwin Supp. 1987)

Oklahoma	Stat. Ann. tit. 23, §§ 9.1(B)-(D) (Supp. 1996)
Texas	Civ. Prac. & Rem. Code Ann. § 41.009 (1996)
Utah	Code Ann. § 78-18-1(2) (1992)
State	Case
Maryland	<i>Owens-Illinois v. Zenobia</i> , 601 A.2d 633, 659 (1992)

Source: Rustad and Koenig, "The Historical Continuity of Punitive Damages Awards," pp. 1279–1280, n. 65; Schwartz and Behrens, "Punitive Damages Reform," p. 1383, n. 110; appendix to Justice Ginsburg's dissent in *BMW v. Gore*; and other sources.

- c) Punitive damages should concentrate on how much defendants benefited from their reckless or malicious conduct. All penalties already incurred by defendants, like regulatory fines or compensatory damages, should be subtracted from this number. Multipliers may be appropriate, in cases where the underlying conduct was hard to detect.
- d) The ratio between compensatory and punitive damages should be irrelevant. Relying on this sort of simple formula, or using a ratio as a cap on punitive damages, makes it more difficult to come up with appropriate deterrent fines, and it magnifies any previous errors in the calculation of compensatory damages and regulatory fines.
- e) The wealth of the defendant generally should not be a consideration in establishing damages.

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