Augmented Awards: The Efficient Evolution of Punitive Damages

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I. INTRODUCTION

Things change; that's the way it is in our world. For instance, man, before he was man, relied heavily upon his sense of smell to detect food, to notice danger, and to otherwise conduct the business of life. The olfactory nerves were critical to our ancestors' survival. As time passed the olfactory nerves developed; some of them evolved into the brain. Man still smells; but, thanks to change we also think.1

Law, like living things, evolves. Focusing on the law now or the present purpose or name of a particular doctrine may distract from what law has or might become. Punitive damages in personal injury cases may now be subject to that sort of intellectual myopia. The doctrine has long been under attack.2 Critics have argued that criminal law exists to punish;3 they contend there is no acceptable modern logic for such a "twisted" use of tort law.4 The numbers of those voicing such concerns has grown in recent years.5 Courts and legislatures have also begun to reexamine the recovery of punitive damages in personal injury cases.6

2. See infra text accompanying notes 110-12.
3. See infra note 6. Of course a rational system might choose to use an administrative scheme to punish certain wrongdoers or at least to ensure that their conduct does not egregiously fall below certain standards. In some ways this is part of the purpose of such organizations as the Environmental Protection Agency, Occupational Safety and Health Administration, and the Consumer Products Safety Commission. In actuality, these organizations and the administrative schemes they oversee work hand-in-hand with the criminal law and the civil law of torts to punish and to deter wrongdoers. Much of the modern regulation of safety in the United States is accomplished through a variety of mechanisms. Occasionally one may wonder if the multiplicity of regulators, using the term in its broadest sense (although recently courts in cigarette preemption cases have recognized state tort law as "regulation," see, e.g., Pennington v. Vistron Corp., 876 F.2d 414, 420 (5th Cir. 1989)) does not lead to either under- or over-deterrence and uncertainty (for an economic analysis of the effect of uncertainty on the law of torts, see Grady, A New Positive Economic Theory of Negligence, 92 Yale L.J. 799 (1983)). Whatever conclusion one may draw, it is apparent that a society in choosing a "regulatory" scheme has a broad range of choice regarding what devices to use and how to use them. See, e.g., G. Calabresi, The Costs of Accidents: A Legal and Economic Analysis 18-20 (1970).
6. Recently the "quasi-criminal" or penal nature of punitive damages attracted the attention of the United States Supreme Court. In Browning-Ferris Indust. of Vermont, Inc. v. Kelco Disposal, Inc., 109 S. Ct. 2909 (1989), the Court, in a seven to two vote, held that the eighth amendment's prohibition against excessive fines and penalties does not apply to the award of punitive damages in a case between two private parties. Browning-Ferris involved anti-trust and intentional interference with contract claims.
As this reexamination continues, it would be remiss to ignore the fact that there may well be another role for punitive damages, or a

which one waste disposal company brought against another. The defendant Browning-Ferris had entered the Burlington, Vermont market for waste disposal in 1976. One of the services that it provided was roll-off waste collection. Until 1980, it was the only firm in the area engaged in roll-off waste collection. In that year, a former employee, Kelley, opened a competing firm, Kelco Disposal, Inc. A bitter struggle for the market ensued from which Kelco ultimately emerged the victor. At one point in the battle for market, Kelco's revenues dropped 30% and after the war was over Kelco sued Browning-Ferris, alleging that it violated section 2 of the Sherman Act and that under Vermont tort law Browning-Ferris had intentionally interfered with Kelco's contracts (actually both Kelley and Kelco sued but their claims were severed and the case that went up to the Supreme Court was Kelco's claim). A jury returned a verdict in Kelco's favor on both the state and federal claims, awarding plaintiff $51,146 in compensatory damages and $6,000,000 in punitive damages. The trial judge awarded Kelco either $153,438 in treble damages and $212,500 in attorneys' fees under the anti-trust claim or $6,066,082.74 on the state law claim. Not surprisingly, Kelco chose the latter. The court affirmed. The Court found the question of the due process challenge of a jury award of $6,000,000 on a damage award of $51,146 was not properly before the Court because the "petitioners failed to raise their due process argument before [the lower courts] and made no specific mention of it in their petition of certiorari. . ." The Court did say in dicta "[[here is some authority . . . for the view that the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme. . .]" Id. at 2909.

By way of background, the year before the Browning-Ferris case, defendants in a case that arose in Mississippi had alleged that a jury verdict of $1,600,000 in punitive damages in a bad faith insurance case offended the excessive fines clause of the eighth amendment, the due process clause, and the contract clause; however, the court did not decide those issues because, as Justice Marshall wrote for the majority, the defendants had failed to adequately raise those issues. Bankers Life and Casualty Co. v. Crenshaw, 486 U.S. 71, 108 S. Ct. 1645 (1988). Thus, the Court would not review the punitive damages award on the grounds that it either had no jurisdiction to do so or because assuming that the "not pressed or passed upon below" rule was prudential, it would exercise its discretion not to review the award. The Court did decide that a 15% penalty that unsuccessful appellants must pay in Mississippi in cases involving money judgments and other judgments that are easily valued did not violate the equal protection clause of the fourteenth amendment. Justice O'Connor concurred in part and concurred in the judgment. 486 U.S. at 86, 108 S. Ct. at 1654 (O'Connor, J., concurring in part and concurring in the judgment). She pointed out that although the Court could have asserted jurisdiction over the punitive damages due process issue, it was prudent not to do so. Justices White and Scalia held that the court had no jurisdiction to hear the constitutional attacks on the punitive damages award. 484 U.S. at 85, 108 S. Ct. at 1654 (White, J., concurring) and 486 U.S. at 89, 108 S. Ct. at 1656 (Scalia, J., concurring in part and concurring in the judgment).

In Browning-Ferris, Justice Brennan concurred with Justice Marshall joining. 109 S. Ct. 2923 (1989) (Brennan, J., concurring). Justice Brennan merely emphasized that the Court's decision did not preclude a later finding that an award of punitive damages might offend the due process clause of the fifth amendment. Justice O'Connor dissented in part and concurred in part with Justice Stevens joining. Justice O'Connor contended that the historical concerns that precipitated the inclusion of the eighth amendment in the United States Constitution were implicated by punitive damages awards in suits between private
descendent thereof, to perform a deterrence function. Deterrence is not

parties. As a result, she would have remanded the case to the Court of Appeals to apply the proportionality test used in cruel and unusual punishment cases and set forth in Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001 (1983), to determine if the $6,000,000 which the jury in the Browning-Ferris case had awarded as punitives was excessive.

Interestingly, in January 1989, a federal district court judge in Montana denied a request by various manufacturers and distributors of asbestos to bar further punitive damages against them on the ground that they had been punished enough. In Campbell v. ACandS, Inc., 704 F. Supp. 1020 (D. Mont. 1989), the court rejected defendants' claim that further awards of punitive damages would serve no deterrent effect because the conduct which plaintiff claimed caused liability could not be repeated under current governmental regulations. The court decided that the goal of deterrence extends beyond the particular defendants before the court engaging in the exact same conduct to the public in general. The court also expressed a hesitancy to take the damage question from the jury and held that Montana law, which allows the imposition of punitive damages if the "defendant has been guilty of oppression, fraud, malice, or where the defendant has acted so recklessly as to indicate wanton disregard of another's rights" was not unconstitutionally void for vagueness. Campbell, 704 F. Supp. at 1024.

Later that year, but before the decision in Browning-Ferris, a federal district court judge in New Jersey, Judge Sarokin, held that in a mass tort case involving asbestos manufacturers the potential for multiple awards of punitive damages for the same conduct was offensive to the due process guarantees contained in the fifth amendment. Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053, decision vacated on reconsideration, 718 F. Supp. at 1233 (D.N.J. 1989). In his conclusion, Judge Sarokin stated, in part:

The court concludes that a manufacturer or other mass tortfeasor cannot be subjected to repeated punitive damage awards for the same conduct. In the absence of a class action which binds all claimants, resolution of such claims requires legislation.

Due process requires that a limit be placed upon a defendant's liability for punitive damages for a single course of conduct. If a defendant's conduct has been evaluated by a factfinder, and if that factfinder has made an assessment of the amount of punitive damages necessary to deter and punish that conduct, then this court concludes that any further punishment would be unnecessary, repetitive, and a violation of due process. Thus, with respect to those defendants who are able to present competent proof that liability for punitive damages has already been imposed upon them for the conduct alleged to be the basis of a punitive damage claim in this action, the court will dismiss plaintiff's claim for such punitive damages.

Juzwin, 705 F. Supp. at 1065.

The court also held that the potential imposition of punitive damages did not trigger the double jeopardy clause of the fifth amendment, Juzwin, 705 F. Supp. at 1057-59, and that even if the eighth amendment might be implicated in punitive damages cases in general it was not in the present case because the excessive fines clause would require a "factual finding that previous awards of punitive damages have been imposed upon an individual defendant and a finding that any further monetary award would cross the line, wherever it may lie, between acceptable awards and 'excessive' ones." Juzwin, 705 F. Supp. at 1060. As Judge Sarokin noted, in the case before him he was not concerned with the right to reduce or set aside an award of punitive damages in a particular case but "the situation where a defendant is threatened with successive awards of punitive
used here in the classic sense of deterrence through punishment.7 In the

damages for the same course of conduct, wherein any single award might be appropriate
with regard to the conduct of defendant, but where the aggregate of such awards becomes
or has the potential to become excessive." Juzwin, 705 F. Supp. at 1060.

Then, on July 5, 1989, a different federal judge sitting in New Jersey, Judge Fisher,
specifically and categorically rejected Judge Sarokin's holding. Leonen v. Johns-Manville
for the Juzwin proposition that the first (successful?) plaintiff to recover punitives in a
mass tort case precluded all subsequent plaintiffs from recovering. He suggested that the
court in Juzwin ignored the salutary effect that punitive damages awards can have in
protecting consumer safety by encouraging manufacturers to make safer products. He
noted that the Juzwin decision assumed that the first jury to award punitive damages
would consider the overall harm that the defendant caused and that the first award would
be adequate punishment for the defendant. Judge Fisher considered this to be an unrealistic
assumption, especially in New Jersey where punitive damages must bear a reasonable
relation to compensatories. In response to the defendant's argument that repetitive punitive
awards jeopardized future plaintiffs' compensatory damage recoveries, Judge Fisher noted
that theoretical possibility, but pointed out that none of the defendants before the court
had made a showing that those fears were more real than speculative. Leonen, 717 F.
Supp. at 284.

Subsequently, Judge Sarokin reversed himself, not because he thought he was wrong,
but because of the potential unfairness of his decision if other courts did not follow it.
United States Supreme Court is considering a due process challenge to a punitive damages

7. When talking of deterrence in the context of punitive damages, courts most
frequently are referring to this quasi-criminal notion of deterrence—the severity of the
(opinion of Lord Devlin).

The notion of quasi-criminal deterrence is evident in the U.S. Supreme Court's recent
opinion in United States v. Halper, 109 S. Ct. 1892 (1989). In that case, the defendant
had already been sentenced to two years imprisonment and fined $5,000 for defrauding
Medicare. Subsequently, the U.S. Government brought a civil suit against him under the
Civil False Claims Act, 31 U.S.C. §§ 3729-31 (1982), which allows the government to
recover the amount of the loss plus a civil sanction of $2,000 per violation. Mr. Halper
had defrauded Medicare 65 times, which meant that under the statute he could be subjected
to $130,000 in fines. The issue before the Court was whether the fine would expose
Halper to multiple punishment in violation of the double jeopardy clause. In holding that
it would, the Court indicated that the key question was whether the fine was remedial
or punitive. Justice Blackmun, writing for the majority, stated:

To that end, the determination whether a given civil sanction constitutes pun-
ishment in the relevant sense requires a particularized assessment of the penalty
imposed and the purpose that the penalty may fairly be said to serve. Simply
put, a civil as well as a criminal sanction constitutes punishment when the
sanction as applied in the individual case serves the goals of punishment.

These goals are familiar. We have recognized in other contexts that punishment
serves the twin aims of retribution and deterrence. [Citation omitted.] Further-
more "[r]etribution and deterrence are not legitimate nonpunitive governmental
objectives." Bell v. Wolfish, 441 U.S. 520, 539 n. 20 (1979). From these premises,
it follows that a civil sanction that cannot be said solely to serve a remedial
last thirty years or so, scholars, such as Yale's Guido Calabresi,8 have employed the word deterrence in a related, but slightly different sense,9 contending that inefficient behavior can be deterred by forcing actors to accurately take account of all the costs of their activities.10

8. G. Calabresi, supra note 3, at 68-75.
9. It may be more accurate to say that the legal economist uses the term in essentially the same fashion but merely views the entire problem of deterrence as a question of risk allocation. Thus, to the legal economist, a criminal sanction is merely the cost of engaging in certain proscribed activity. See, e.g., R. Posner, Economic Analysis of Law 5-6 (2d ed. 1977).
10. At least since the 1961 publication of an article in the Yale Law Review by Guido Calabresi, wherein the author ruminated on the legal and economic issues that risk distribution suggested, deterrence has had an added meaning. Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 Yale L.J. 499 (1961). In a footnote, Calabresi, in passing, credits some earlier writers for at least raising the significance of what he calls the "allocation of resources" justification. Id. at 501 n.12. In "The Costs of Accidents," G. Calabresi, supra note 3, Calabresi refers to this added meaning as "general deterrence." Id. at 27. General deterrence is an approach to tort regulation which:

[I]nvolves ... letting the market determine the degree to which, and the ways in which, activities are desired given such costs. Similarly, it involves giving people freedom to choose whether they would rather engage in the activity and pay the costs of doing so, including accident costs, or, given the accident costs of doing so, including accident costs, engage in safer activities that might otherwise have seemed less desirable. I call this approach general, or market, deterrence. ... General deterrence implies that accident costs would be treated as one of the many costs we face whenever we do anything. Since we cannot have everything we want, individually or as a society, whenever we choose one thing we give up others. General deterrence attempts to force individuals to
An award in excess of compensatory damages may efficiently deter wherever compensatories, coupled with whatever other criminal or civil fines are applicable, understate the costs the relevant activity imposes

consider accident costs in choosing among activities.

Id. at 69. As Calabresi points out, the theoretical underpinnings of his notion of general deterrence is simply "the old one of allocation of resources which for years has been studied in the branch of economics called welfare economics; the free market solution is the one traditionally given by welfare economists." Id. Theoretically, one will be deterred from engaging in an activity which costs the actor more than it benefits him. Put somewhat more technically (at least as technically as I dare to put it), the actor's marginal costs for the activity will be greater than her marginal benefits. See infra text accompanying notes 43-70. As Calabresi notes, general deterrence operates in two ways to reduce the costs of accidents. First, by forcing people to consider all the costs of their activities, it encourages them to engage in safer activities. And, secondly, it encourages them to more safely engage in the activities they do undertake. G. Calabresi, supra note 3, at 73. A basic prerequisite to the successful operation of Calabresi's general deterrence theory is that actors accurately take account of all the relevant costs of their activities. He states:

Failure to include accident costs in the prices of activities will, according to the theory, cause people to choose more accident-prone activities than they would if the prices of these activities made them pay for these accident costs, resulting in more accidents than we want. Forbidding accident-prone activities despite the fact that they can "pay" their costs would, in theory, bring about an equally bad result from the allocation point of view.

Id. at 70. Judge Posner also has written extensively on the law and efficient behavior. See, e.g., R. Posner, supra note 9. In characterizing two views of the law of remedies, Professor Laycock has written:

One might say that the substantive law forbids the cutting of other people's trees, and that the usual remedy for a violation is a money judgment for the value of the trees. Or one might say that the law forbids nothing; it merely specifies the consequences of various choices. Thus the law says that if Smith cuts Brown's trees, he will suffer a money judgment for their value; Smith has a free choice.

Laycock, Modern American Remedies 7 (1985). The second view of remedies is Laycock's description of the law and economics view of remedies, which he proceeds to critique. Id. at 7-8. Obviously for the remedy (and the law) to be efficient, the costs that society forces the actor to pay must accurately reflect all the societal costs of the activity (that the actor has not already taken account of in some other part of his or her costing calculus).

If the law only requires the actor to pay compensatory damages as the damage component of accident costs, then persons who cause or may cause accidents will act efficiently (in terms of the activities in which they engage and the manner in which they engage in them) only if compensatory damages accurately measure the costs of their accidents, excluding accident avoidance costs. Total accident costs include not only the damages that a person's conduct imposes upon others (and society) but also accident avoidance costs that the actor incurs. As Clarence Morris noted, in "a case in which it is desirable to repair a plaintiff's loss and to condemn a defendant's conduct, there is still difficulty of accomplishing these two very different ends with one money judgment. The sum required to make the plaintiff whole may be much too severe or much too lenient as admonition for the defendant." Morris, supra note 7, at 1175.

A short description of Dean Calabresi's theory of general deterrence and Clarence
upon society. In the vernacular of the economist, an increased, or augmented, award in such a case may operate to remove an "externality." It would do so by forcing the actor to accurately take account of all the costs of his activity. Such an augmented award would be efficient whenever the increased deterrence from the award outweighed the cost of obtaining that deterrence.\footnote{11}

In many types of tort cases legal rules prohibit the recovery of real losses because the administrative costs of awarding those losses is too high. As such, there are two problems. First, people are not compensated—a sad fact which is beyond the scope of this paper. Second, actors need not consider those losses in their cost calculations. An augmented award reflecting these otherwise unrecoverable losses to someone whom the law does allow to recover from the actor society wishes to deter might cause a deterrence gain without an undue administrative drain. One representative legal rule discussed below\footnote{12} is the rule that prohibits the recovery of negligently inflicted economic losses absent personal injury or property damage; but which allows recovery of economic losses if the plaintiff suffered some accompanying damage to person or property. Assuming this rule is driven by administrative concerns,\footnote{13} an augmented award to those whom we currently allow to recover may more efficiently deter without unduly increasing administrative costs which direct compensation would do.

Thus, the augmented award is related to, but different from, punitive damages as we know them. The sole purpose of the augmented award is deterrence. Augmented awards would not be designed to punish the defendant for otherwise evil behavior; they would be designed to encourage actors to consider the costs of their action, costs for which our current legal rules do not account. They would be tailored to deal with situations where decision makers cannot easily adjust current legal dogma to directly compensate those injured, most often because of the high administrative costs associated with a "direct" fix. As such, augmented

\footnote{11} This is certainly not to suggest that there may not be instances where compensatory damages may be too high and overdeter people from engaging in what would be efficient conduct. The operation of the classic "thin skull rule," see Bartolone v. Jeckovich, 103 A.D.2d 632, 481 N.Y.S.2d 545 (N.Y. App. Div. 1984), might fit into this category as might the direct but not foreseeable consequences doctrine exemplified most dramatically in In re Arbitration Between Polemis and Furness, Withy & Co., Ltd., [1921] K.B. 560.

\footnote{12} See infra text accompanying notes 169-209.

\footnote{13} See infra text accompanying notes 188-96.
AUGMENTED AWARDS

awards would ideally equal total accident costs less compensatories plus the "value" of other applicable fines or penalties.

I have chosen to call such damages augmented awards rather than punitive damages for several reasons. First, the adjective punitive focuses on punishment, not deterrence. Even the pseudonym "exemplary" damages highlights classic deterrence concerns, not efficiency. Second, a new name hopefully avoids the problem of guilt by association. Finally, I do not mean to imply that the possibility of augmented awards in certain cases signals the total demise of punitive damages. In some cases punishment may still be appropriate apart from efficiency concerns. This paper, however, is about augmented awards, awards in excess of compensation which are intended to encourage efficient investments in safety, awarded in the cases where such awards may be appropriate. I do not mean to imply that law, from a normative standpoint, should only concern itself with efficiency. However, if one accepts the notion that the law might play a role in the deterrence of "inefficient" accident-causing behavior by forcing actors to take into account all the costs of the accidents that they may cause, a place might exist for something similar to what we now call punitive damages. Courts and legislatures all over the country examining the place of punitive damages in twenty-first century tort law ought to consider the possibility that in some areas of the law compensatory damages do not operate as an adequate deterrent. In such cases, some other device, such as augmented awards is needed to efficiently lower the number and severity of accidents.

The following sections further examine the theoretical underpinnings of the case for augmented awards and describe some of the factors that might cause unduly low compensatory damages in relation to total accident costs. Section II generally discusses how America regulates accidents, the theoretical ways in which tort law can deter inefficient accident-causing behavior, and how insurance operates in practice and theory. Section III sets forth the general rules relating to the recoverability of punitive damages and how scholars have analyzed punitives from an efficiency oriented perspective. Section IV analyzes the augmented awards proposal, identifying appropriate cases for recovery of augmented awards and examining a representative case study—the economic harm rule. Section V examines the augmented awards proposal in light of the traditional law of punitive damages. Section VI briefly identifies and discusses some of the practical issues this piece's proposal raises. Section VII discusses augmented awards in light of recent punitive

14. After all, we do still smell. See supra text companying note 1.
15. For a related treatment of punitive damages in contract cases, see Sebert, Punitve and Nonpecuniary Damages in Actions Based Upon Contract: Toward Achieving the Objective of Full Compensation, 33 UCLA L. Rev. 1565 (1986).
damages reform and Section VIII describes several studies of punitive damages in actions which seem to indicate that extra compensatory awards are not the problem tort reformers would have us believe.

II. General Concepts

A. American Accident "Regulation"

The American criminal justice system penalizes those who engage in certain activities which are likely to lead to accidents. Additionally, one's conduct might expose him to a civil fine. Likewise, we have a system of tort law that forces people who cause accidents, under certain circumstances, to pay certain accident victims certain damages. The body of substantive tort rules determines when and who the actor must pay. The law of damages provides what damages the accident causing actor must pay, if liable.

Substantively, American courts have developed batches of rules to limit the liability of defendants in various circumstances. For instance, many courts hold that economic damages, such as lost profits, are not recoverable in tort in the absence of some physical injury. More generally, in order to recover at all in tort, there must be a legally sufficient relationship between the plaintiff and the defendant. If this relationship exists then, more often than not, the court summarily concludes that the defendant owes the plaintiff a duty. Conversely, if the relationship

16. According to Calabresi, the prohibition of an activity would be a specific deterrence approach to accident regulation. G. Calabresi, supra note 3, at 94. Of course, the drawback of specific deterrence is that it is a collectively imposed decision and does not allow actors the freedom to choose for themselves that the market does. The less confident a society is that certain behavior is bad or inefficient, the less likely it would seem that society would opt for a specific deterrence scheme of regulation for that activity.

17. Actually, this statement draws boundaries that are not quite so clear in practice. There are many questions that fit well as either torts or damages issues. One well worn example is the recovery of damages for mental distress. One could, of course, argue that the entitlement to a certain type of damages is a question of substantive tort law, whereas the measure of those damages is a remedies question; but that would be a somewhat artificial way to resolve what is essentially a boundary dispute between torts and remedies teachers.


20. Pitre v. Opelousas General Hosp., 530 So. 2d 1151, 1155 (La. 1988) ("Terms such as 'duty' are merely verbal expressions of policy decisions and do not explain them."); Prosser and Keeton, supra note 19, § 53, at 359 ("No better general statement can be made than that the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists.").
does not exist the court concludes that the defendant does not owe the plaintiff a duty. Most distressingly for the first year law student, the plaintiff must prove that the defendant’s conduct was a proximate cause of the plaintiff’s injuries to recover in tort. All of these limitations on liability are rooted in policy. Some are designed to reduce administrative burdens on courts and to avoid overdetering socially beneficial activities.

As to who may recover if the elements of a tort are established, the physically injured victim is obviously entitled. In addition, in many states certain designated close relatives can recover for the losses they suffer as a result of a victim's death. Wrongful death claimants generally recover for losses that they suffer as a result of the death of a loved one and survival action plaintiffs essentially bring suit to recover the decedent’s damages. Typically included beneficiaries are spouses, children, parents, siblings, and, in a survival action, the decedent’s estate. But often, if there is a spouse or children, parents or siblings are not entitled to recover. If there is no spouse or children, parents will recover to the exclusion of siblings. Additionally, in many states, close relatives can recover for loss of consortium when a family member is hurt but not killed. If plaintiff winds her way through these rules and establishes liability, she will recover compensatory damages.

Based in corrective justice, compensatory damages in personal injury cases return the plaintiff to the position she would have been in

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21. Perhaps the classic example of this relational requirement was the once universal rule that privity of contract was required to sue the seller or manufacturer of a dangerous product in tort.

22. As Dean Leon Green said in particular reference to the duty problem in torts: “Hence, my suggestion is that law, wherever found, is in turn controlled by factors largely common to all sorts of administration, whether of formal government or other forms of group activity.” L. Green, Judge and Jury 76 (1930); see also Malone, Ruminations on Cause-In-Fact, 9 Stan. L. Rev. 60 (1956).

23. L. Green, supra note 22, at 76.


25. Prosser and Keeton, supra note 19, ch. 23.


30. Id.


32. G. Field, A Treatise on the Law of Damages §§ 3, 6 (1876); A. Greenleaf, 2
had the accident not occurred. One immediately notes there is a philosophically pleasant ring to positing the purpose of damages in reparative terms. If a defendant does something “bad” the plaintiff recovers the value of the amount of harm that the defendant caused her. From the defendant’s perspective, he is free to do whatever he wants unless his conduct triggers liability in which case he has an obligation to compensate the plaintiff. Most jurisdictions allow an accident victim to recover, as compensation, the value of any property damaged or destroyed, lost wages, medical expenses, pain and suffering, and damages for mental distress. There are numerous ancillary rules that seem to conflict with this compensation goal, such as the collateral source rule.


33. D. Dobbs, supra note 26, § 1.1, at 1; D. Laycock, supra note 10, at 14-17 (Professor Laycock aptly and succinctly refers to the position that the plaintiff would have been in but for the wrong as the “plaintiff’s rightful position.”).

34. Cf. infra text accompanying note 110.

35. “Bad” in Learned Hand’s terms equates with failing to incur accident avoidance costs where they are lower than the ex ante costs of an expected accident, though a moralist might not call such conduct “bad.” See infra text accompanying notes 155-61. Of course, there is a moral tinge involved in our tort system as well, see generally Prosser and Keeton, supra note 19, § 4. Note that some commentators have questioned whether courts actually do employ the Learned Hand definition of negligence. Priest, The Current Insurance Crisis and Modern Tort Law, 96 Yale L.J. 1521, 1538 n.95 (1987).

36. Most frequently the American tort system calls this basis for liability “fault.” Even where liability is ostensibly not based upon fault as in strict products liability, the plaintiff still must show that a product was defective. Many courts define defective as unreasonably dangerous to normal use. See, e.g., Phillips v. Kimwood Mach. Co., 269 Or. 485, 525 P.2d 1033 (1974); Restatement (Second) of Torts § 402A (1964).

Even where the common law imposes strict, or absolute liability, outside the product liability sphere, the plaintiff must show that the activity involved is ultrahazardous, or, in other jurisdictions, abnormally dangerous, Restatement (Second) of Torts §§ 519, 520 (1976). As every first year torts student knows, courts have narrowly defined those activities that they call ultrahazardous or unreasonably dangerous.

To summarize, fault is the prevalent criteria for determining liability in tort, even in areas where there is supposedly liability without fault, definitions are frequently phrased in terms that borrow from the fault lexicon.

37. See, e.g., D. Dobbs, supra note 26, ch. 8; D. Laycock, supra note 10, at 10-211.

38. The collateral source rule provides that a plaintiff may recover damages representing sums for which it has already been compensated from some other wholly independent source. See, e.g., Helfend v. Southern Cal. Rapid Transit Dist., 2 Cal. App. 3d 1, 465 P.2d 61, 84 Cal. Rptr. 173 (1970). The paradigmatic example is the recovery of medical expenses from a tortfeasor despite the fact that the plaintiff has health insurance that has already paid all his or her medical expenses. Perhaps because of its anomalous appearance in a system supposedly geared toward compensation, the collateral source rule has been attacked by tort reformers and a number of states have eliminated it or limited its effect. See, e.g., Prosser and Keeton, supra note 19, at 27 n.29 (Supp. 1988).
and awards of punitive damages when the actor’s conduct is willful, wanton, intentional, reckless, or otherwise “evil” looking, and restitution in certain tort cases. Likewise, in our world most actors commonly acquire insurance to protect them against liability for personal injuries arising from accidents. Insurance plays an important role in assuring accident victims are compensated and in spreading the cost of compensation across a broader spectrum of people than the victim and the tortfeasor.

B. Efficiency and Accidents

1. Deterrence

Whatever deterrent effect tort law has is based partially on the way it forces actors to take accident costs into account before deciding whether, how, and when to act. Tort law relies heavily upon damages to serve this deterrent function; thus, courts should try to assure that the damages they award accurately measure all the costs that the defendant’s activity imposes upon society. If damages do not adequately take account of all these costs tort law will underdeter. Underdeterrence will lead to an overinvestment in the activity. Concomitantly someone else must either bear, or avoid, accident costs that the actor does not take into account. As such, a careful evaluation of compensatory damages versus actual accident costs is appropriate in any evaluation of the tort system. It is especially appropriate as America continues to address what is popularly called a tort or insurance “crisis.”

2. Efficiency

From an efficiency standpoint, an actor, when deciding upon a course of conduct, should consider accurately all the potential costs of

39. See infra text accompanying notes 118-19 and infra text accompanying notes 263-72.
40. See infra text accompanying notes 87-92.
41. The statement in text is a reference to third party insurance which protects the insured from liability to another. Of course, people also obtain first party insurance to protect them from the economic displacement of accidents (or disease). Examples include: health insurance, life insurance, and disability insurance.
42. Risk spreading is by nature one of the essential purposes of liability insurance. Priest, supra note 35, at 1543.
43. See supra text accompanying notes 7-10.
44. See infra text accompanying notes 47-51. This assumes no relevant criminal or civil fines are applicable.
45. Id.
46. Of course, if that other person or entity is in an economically better position to avoid or bear those accident costs, it would seem that efficiency taken alone would demand that they do so. See generally Calabresi and Hirschoff, Toward a Test for Strict Liability in Torts, 81 Yale L.J. 1055 (1972).
his proposed activity.\textsuperscript{47} Otherwise the actor may either over or under invest in that activity.\textsuperscript{48} One of the cost items the actor must take into account is accident costs.\textsuperscript{49} If accident costs are excluded from the actor's calculations his perceived marginal cost curve for that activity will not accurately reflect the true costs of the activity, and he will engage in the activity more often than he should.\textsuperscript{50} Likewise, the lower cost of the activity will make it attractive to others who will divert resources from pursuits with a higher utility.\textsuperscript{51}

A cost an actor does not otherwise have to take into account in deciding what to do and how to do it is an externality.\textsuperscript{2} Under certain circumstances, the presence of externalities can impede the efficient operation of markets.\textsuperscript{3} In the personal injury context, accident costs

\textsuperscript{47} See, e.g., G. Calabresi, supra note 3, at 70.

\textsuperscript{48} Id. As Calabresi puts it:

Failure to include accident costs in the prices of activities will, according to the theory, cause people to choose more accident-prone activities than they would if the prices of these activities made them pay for these accident costs, resulting in more accident costs than we want. Forbidding accident-prone activities \textit{despite} the fact that they can 'pay' for their costs would, in theory, bring about an equally bad result from a resource allocation point of view. Either way the postulate that individuals know best for themselves would be violated.

\textsuperscript{49} This is in essence the message of much of the work of the law and economics scholars who write on torts. See, e.g., G. Calabresi, supra note 3, at 70.

\textsuperscript{50} See, e.g., Pierce, Encouraging Safety: The Limits of Tort Law and Government Regulation, 33 Vand. L. Rev. 1281, 1289 (1980)

The entity bearing the costs of accidents will have an incentive to keep spending to reduce those costs up to the point at which marginal costs of accident avoidance equals marginal cost of accidents. . . . Failure to internalize all accident costs, then, amounts to a subsidy for high accident cost goods and services, and an indirect subsidy for accidents.

\textsuperscript{51} For instance, if the actual cost, including accident costs, of driving in the wrong lane was $10 per drive, but, because drivers who drove in the wrong lane were not charged for all their accident costs, the apparent cost was $7, people who would not drive in the wrong lane if they had to pay $10 may drive in the wrong lane if the cost to them was only $7. Moreover, if the cost of reading Don Quixote was $8, many people who would otherwise read Don Quixote if the cost for driving in the wrong lane were $10 would decide to drive in the wrong lane rather than read because the cost of driving in the wrong lane is lower than it should be. However, these people would be better off reading Don Quixote if they had to take all the costs of driving in the wrong lane into account.

\textsuperscript{52} R. Posner, supra note 9, at 51-52. J. Hirshleifer, Price Theory and Applications 449-54 (1976).

\textsuperscript{53} J. Hirshleifer, supra note 52, at 449. "Direct externalities, beneficial or harmful, lead the Invisible Hand astray. In the interests of efficiency, the agent generating the externality ought, if the externality is beneficial, to be induced to engage in the process even more than his private self-interest would dictate. If the externality is harmful, of course, the generating agent ought to be induced to diminish the scale of [the activity] in comparison with what his self-interest would dictate." In the case of an efficiency justification for augmented awards the concern is with harmful externalities.
the actor need not count as a cost of his injury causing activity are externalities which may unduly impede the efficient reduction and avoidance of certain accidents.  

a. Accident Costs

As a logical prerequisite to determining if actors are taking account of all accident costs, it is necessary to define accident costs. One very real component of accident costs is the amount people expend on accident avoidance. This would include the cost of any safety features involved with the activity, such as guards on products, as well as investments in safety, training, and education. The other broad item of accident costs actors must consider before engaging in "risky" behavior is the cost the activity imposes upon society. Damages others suffer are as much a cost of the activity as any prevention techniques in which the actor engages.

When deciding what to do and how to do it, actors will often accurately take into account such costs as safety features because they represent costs that actors must actually pay, in the layman's sense of the word. Contrariwise, people might not accurately perceive the costs their accidents impose upon others precisely because they do not always "pay" these costs.

54. See Pierce, supra note 50, at 1296.
55. See generally G. Calabresi, supra note 3, at 92.
56. Pierce, supra note 50, at 1290-95. Actually another component of the calculus involves any impairment of the value of the activity which safety considerations impose; if an activity has a lower utility after safety devices are factored in, society is paying a price for that safety. This might be viewed most aptly as a "credit" for the manufacturer in deciding what to spend on accident avoidance.
57. One commonly used measure of the accident costs that an activity imposes upon others is the sum of damage awards or settlements in personal injury suits arising out of the activity.
58. Of course, it is possible an actor might not be aware that certain costs it must pay are attributable to the accident-causing activity and in that way may not properly consider those as costs in relation to that activity. On a relatively simplistic level, a parent may buy a safe to house her rare collection of cameos and may keep a handgun in the safe that would otherwise be hidden in a closet where a child would be 50% more likely to find it, play with it, and be injured. In actuality, part of the price of the safe is an investment in protecting the child from handgun injuries, whereas the parent may attribute all of the cost to protecting the cameos. Put a little differently, one might view the reduced rate of handgun injuries to children as a beneficial externality of investing in the safe to protect the cameos.
59. Likewise, actors may not accurately calculate the impairment on utility that additional safety devices cause. See supra note 56. Inaccurate calculation of the second component of accident costs would lead to an underinvestment in the activity rather than an overinvestment. If the actor does not realize that the activity is more valuable without the expensive safety precautions, he will perceive the cost of the activity with safety
In order to understand how this might occur, consider how the economist would have the actor take account of accident costs in deciding how to act and what to do. To determine potential damages others may suffer, the economist would start with the probability, or likelihood, that an accident would arise if the actor engages in the activity, expressed as a percentage. Then she would multiply that figure by the severity of the accident if it occurs, expressed in monetary terms. This second part of the formula, the severity of the accident, constitutes the costs that an accident arising out of the activity would impose upon society. Essentially, the economist would reduce the dollar damages that others would suffer if an accident occurred by the likelihood of occurrence. This, then, is the ex ante cost of an accident, expressed in dollar terms. It cannot be overemphasized that the actor is concerned, when deciding what to do and how to do it, with the ex ante costs of accidents, not the actual, after the fact, total costs of accidents. In deciding what to do and how to do it, the actor should compare this ex ante accident cost with the amount it would cost to prevent the accident. If the accident can be prevented for less than its ex ante cost, then efficiency dictates the actor incur the costs of avoidance. Alternatively, if the cost of avoidance is greater than the ex ante cost of potential accidents, the actor should not incur the accident avoidance expense. He should engage in the activity as is.

b. The "Learned Hand Negligence Formula"

The Learned Hand formula for negligence is based on this very economic analysis. If the burden of accident avoidance is less than the probability of an accident occurring times the expected loss if the accident does occur, an actor is negligent if he does not incur the costs of avoidance. For the formula to work effectively, the actor must accurately perceive the costs his accidents will impose upon society. Errors may arise in two primary ways. First, the actor may err in estimating the precautions as higher than it actually is, in which case he will do the activity with less than optimal frequency. To this extent the failure to properly calculate the monetary impact of the additional safety devices on the activity constitutes a positive externality.

60 For an accessible and lucid explanation of the importance of ex ante costs, see R. Posner, supra note 9, § 4.5. One will note that the ex ante costs of accidents is the "risk" side of Judge Learned Hand's negligence formula from United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947). See also Conway v. O'Brien, 111 F.2d 611 (2d Cir. 1940), rev'd, 312 U.S. 492, 61 S. Ct. 634 (1941).

61 See cases cited note 60. See also, R. Posner, supra note 9, § 6.2; Calabresi and Hirschoff, supra note 46, at 1055.
probability of an accident's occurrence. He may over-\textsuperscript{62} or underestimate the chance his conduct will cause an accident.\textsuperscript{63} Equally important, he may inaccurately perceive the costs the activity imposes upon others.\textsuperscript{64} Ironically, one of the potential causes of this misperception is not the actor's "fault." It arises from the fact that one commonly noted measure of the costs accidents impose upon society is damage awards and settlements (which of course are influenced by damage awards). Should those awards and settlements inaccurately reflect the costs accidents impose upon society, an actor who utilizes such awards in his cost calculations will not, by definition, act efficiently to avoid and prevent

\textsuperscript{62} The more risk averse the actor, the more likely he will overestimate the chance an accident will occur. Insurance may be an effective way to deal with this risk aversion, but then the moral hazard problem may arise. See generally Epstein, Products Liability as an Insurance Market, 14 J. Legal Stud. 645, 653 (1985). See supra text accompanying notes 47-54 and infra text accompanying notes 247-53.

\textsuperscript{63} See generally G. Calabresi, supra note 3, at 148-49. Calabresi's focus is on the likelihood that a pedestrian will inaccurately perceive the possibility that he will be injured when walking by a car; but, intuitively the same may be said of some actors.

Returning to the hypothetical posed earlier, see supra note 51. If the possibility of having an accident when driving on the wrong side of the road in the hypothetical community involved is 1/100, or 1\%, and the damages suffered by third persons if an accident occurs are $300, the ex ante cost of these accidents is $3. In order to assure that the actor and others engage in this activity at an efficient level and in an efficient manner, this $3 must be added to the actor's other "activity" costs such as gasoline, time, driving clothes, etc. . . . If an accident costing $3 could be avoided by a $2 expenditure, the driver would act efficiently if he spent the $2 to avoid the accident. Alternatively, if the $3 in accident costs could not be avoided for less than $3, it would be inefficient to incur the expense of avoidance.

\textsuperscript{64} An important subset of this inadequate calculation category are people who do not perceive that there are any accident costs at all attached to an activity and those who may be aware of accident costs but who do not know that there is a chance that they will have to pay those costs. That is accident costs, as to these actors, are externalized. As Dean Calabresi noted, there is no point in imposing accident costs on someone, or some group, who will not be influenced by those costs. In essence, deterrence fails as a justification for these groups of people because allocating costs to them will have little or no impact on their future behavior. G. Calabresi, supra note 3, at 144-50. For a real world example of a judge forced to wrestle with this problem, see Turner v. New Orleans Public Services, Inc., 476 So. 2d 800 (La. 1985) where Justice Dennis wrote:

The degree of accident cost reduction which could be achieved by reducing the recovery of careless pedestrians injured by negligent motorists is apt to be small. Because pedestrians are an unorganized group, reduction of individual plaintiffs' awards may not be communicated readily to other pedestrians or immediately influence their conduct. On the other hand, pedestrians generally appear to be in a substantially better position to avoid collisions with negligent drivers than, for example, are laborers to escape injury by defective machinery with which they are forced to work by economic circumstances. If the message that fault reduces recovery is communicated to the pedestrian, he at least has greater power and opportunity to heed it.

(Dennis, J., assigning additional reasons). Id. at 807.
This truism will be reexamined below in the context of punitive damages. A related point deals with the payment of costs, as opposed to the awareness of ex ante accident costs. Arguably there is no reason that the actor should ever have to pay these costs to anyone as long as he takes them into account when deciding what to do and how to do it. But, there is the risk that one who never has to pay a “cost” will not take that cost into account. Therefore, forcing actual payment of costs is one way to force actors to take them into account. What may be less controversial, but is perhaps of greater significance in the augmented damages arena, is that efficiency and the accompanying notion of deterrence do not demand that the actor, even if he must pay accident costs, must pay them to his victims.

65. Depending upon whether damages awards and the settlements that they influence are too high or too low, there will either be too few or too many accidents. In the context of augmented damage awards, the concern is with damages awards that are too low.

66. See infra text accompanying notes 109-52.

67. This is in essence the heart of the theory of Kaldor-Hicks efficiency. See, e.g., A. Schwartz and R. Scott, Sales Law and the Contracting Process 26 (1982).

68. Quoting Judge Posner:

The association of negligence with purely compensatory damages has prompted the erroneous impression that liability for negligence is intended solely as a device for compensation. Its economic function is different; it is to deter uneconomical accidents. As it happens, the right amount of deterrence is produced by compelling negligent injurers to make good the victim’s losses. Were they forced to pay more (punitive damages), some economical accidents might also be deterred; were they permitted to pay less than compensation, some uneconomical accidents would not be deterred. It is thus essential that the defendant be made to pay damages and that they be equal to the plaintiff’s loss. But that the damages are paid to the plaintiff is, from an economic standpoint, a detail. But an important one. First: it is necessary to the private enforcement of tort law... Second: if victims of negligent accidents are not compensated, they will take some precautions for they know that the law of negligence will not be administered so perfectly that all negligent accidents are in fact deterred.

R. Posner, supra note 9, § 6.12. Professor Morris noted a similar point in a “non-economic” vein. Morris, supra note 7, at 1173-76.

One way, and perhaps the best, to handle the problem would be to require the actor to seek out all those who he or she might injure and purchase the right to hurt them. In the hypothetical discussed in supra notes 51 and 63, drivers who wanted to drive on the wrong side would seek out their (potential) victims, negotiate over the value of possibly injuring them by driving on the wrong side of the road, and then pay the victims an agreed upon sum for the right to injure them—if an accident with them occurs. The community would then have created a market in being injured by driving on the wrong side of the road. The problem is that it is, in the real world, impossible for an actor to seek out all those whom he or she might injure and negotiate with them beforehand. There are other problems as well. Efficient negotiations require that both sides have perfect information. In our hypothetical, it is unlikely that either side would have perfect
In any event, if we can force the actor to take into account all relevant accident costs and to act with them in mind (whether paid, not paid, or actually paid to victims) the actor will behave efficiently in avoiding, preventing, and causing accidents. Society might take various measures to encourage actors to take accident costs into account. One option is to shape tort rules to encourage actors to take all the costs of their activities into account, thereby encouraging efficient behavior. Other options include criminal sanctions, administrative controls, and various combinations of all of the above.

3. Efficiency and Insurance

In addition to compensating and spreading risk, one may postulate that insurance also has an efficiency-related function. One would expect insurance rates to reflect the likely damages caused by an insured's activities plus the administrative expenses necessary to provide insurance and to fund the tort system itself. Insofar as the insured's premiums reflect the likelihood of damage multiplied by the severity of damage if an accident occurs, the premium is akin to the ex ante accident costs that society would have the actor consider. In this way, then, insurance ideally forces the actor to pay the ex ante costs of any accidents he

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information. Moreover, even with perfect information concerning the identity of injurers and victims, it is very possible that potential victims would underestimate the chances that they would be injured thereby demanding less from the would be wrong side driver than $3, which in turn would mean that the driver would not be paying enough and would overengage in the activity. See, e.g., Calabresi, Torts—The Law of the Mixed Society, 56 Tex. L. Rev. 519, 521-23 (1978).

By way of disclaimer, let me categorically state that I do not mean to imply that the compensation providing function of tort law is somehow unimportant or even of secondary importance. My point is only that it is possible to theoretically separate compensation from deterrence. Perhaps Aristotle was right in believing that the “moral claim for a remedy is strongest when there is both a loss to plaintiff and a benefit to defendant.” D. Laycock, supra note 10, at 526. But deterrence can operate absent compensation. The system might be less acceptable, if acceptable at all, but that real world possibility requires discussion beyond the scope of this article.

69. In a sentence, this seems to be one of the important messages implicit in much of the work of Dean Calabresi. See, e.g., G. Calabresi, supra note 3, at 20; G. Calabresi and P. Bobbitt, Tragic Choices (1978); Calabresi and Klevorick, Four Tests for Liability in Torts, 14 J. Legal Stud. 585 (1985).


71. At least those activities covered by the policy.

72. Including, of course, a profit for the insurer.

73. This assumes that insurance is loss rated, an assumption that may not be justified in all cases. In fact, one commentator has concluded that “insurance costs reflect only crudely, if at all, variations in risks of accidents among firms and activities.” Pierce, supra note 50, at 1298.
may cause. To the extent that insurance premiums accurately reflect the ex ante accident costs of an activity, insurance performs a deterrence/efficiency function.

C. Comparing Theory and the Real World—Does the American System Efficiently Deter?

1. Compensation

How does the American system stack up in relation to accident costs, deterrence, and efficiency? Efficiency requires the actor to accurately take into account all accident costs before he engages in an activity.\(^\text{74}\) How does compensation or "making a victim whole" further that end? There is no obvious way in which compensation furthers efficiency.\(^\text{75}\) However, there is a relationship between the two concepts that provides some efficiency justifications for compensating tort victims.

First, note that absent some device requiring the actor to take accident costs into account the actor may not do so. Thus, compensation at least operates as some threat to the actor that if he or she does not take potential accident costs into account beforehand, bad things may happen afterwards—liability for damages suffered by another.\(^\text{76}\) In this vein, compensatory damages operate as a deterrent.\(^\text{77}\) As a corollary, one might expect that if, ex ante, the actor properly takes account of potential accident costs, then liability would not attach, absent some policy reason unrelated to efficiency.\(^\text{78}\) As Dean Calabresi has pointed out, we often shape legal rules for distributional rather than efficiency reasons.\(^\text{79}\) Risk spreading and compensation, two frequently articulated goals of tort law,\(^\text{80}\) are distributional rather than efficiency considerations.\(^\text{81}\)

Although the notion that the threat of paying compensation may encourage people to consider accident costs before acting is at the heart of the American law of torts, one is left with some lingering doubts.

\(^{74}\) See supra text accompanying notes 43-70.

\(^{75}\) See supra text accompanying notes 67 & 68.

\(^{76}\) See, e.g., D. Laycock, supra note 10, at 14-17; R. Posner, supra note 9, § 6.12, at 143 n.2.


\(^{78}\) This is the conclusion one necessarily draws from Judge Hand's negligence formula. See supra text accompanying notes 61-70.

\(^{79}\) G. Calabresi, supra note 3, at 18-20.

\(^{80}\) Prosser and Keeton, supra note 19, § 4; W. Prosser, J. Wade and V. Schwartz, supra note 27, at 1-2.

How are we so sure that compensatory damages adequately represent all the accident costs that we want people to consider ex ante? Are there people who are injured but either do not or cannot sue under our current laws? Are there damages the current system does not allow the injured victim to recover that society might still want the actor to take into account ex ante when determining his or her course of conduct? From the actor's perspective, are we sure that we are not overdetererring? Do those who recover and the damages they recover represent an adequate proxy for the ex ante amounts that we want actors to "pay?" Or, by making actors pay the full damages that some people suffer, are we asking them to pay too much?\textsuperscript{82}

In addition to forcing actors to pay some accident costs, compensation performs a second efficiency related function. The tort system operates as a data bank providing actors access to information on the number of accidents that do occur, the damages that accident victims suffer, and the dollar value of those damages.\textsuperscript{83} In this regard the "fault" system facilitates actors' ex ante calculations by providing them with the data they need to calculate the value of the damages that their activities impose on others. Given a large number of similarly situated

\textsuperscript{82} If an actor's conduct has a 1% chance of causing $300 in accidents, the relevant ex ante accident cost of the activity is $3 (excluding any safety precautions that the actor already takes). If the law requires the actor to pay $300 to the victim if the actor acts inefficiently, the law assures adequate deterrence only if the risk only occurs one in one hundred times. But the one in one hundred chance that the accident has of occurring each time that an actor engages in the activity is mutually independent. That is, the unlucky actor may cause an accident three times in the 100 times that he drives on the wrong side of the road, whereas the lucky actor may go 200 without causing any accident at all. Under this scenario the unlucky actor will be overcharged for engaging in the activity, whereas the lucky one will be undercharged. Consequently, there will not be optimal deterrence. The unlucky driver may stop driving or overinvest in safety. The lucky driver may drive on the wrong side of the road too often. Of course to the extent that the lucky actor's good fortune is attributable to his or her development of a safer way to engage in the activity, efficiency may well be served. To the extent that it is due only to Lady Luck, we will have encouraged the unlucky actor to underinvest in safety and to overinvest in the activity. Put differently, the likelihood that an accident occurs is probabilistic. Accidents are random events. Only as we increase the number of persons engaging in the activity do we begin to get any real feel that our ex ante predictions are accurate. Moreover, despite large numbers, the occurrence of accidents is random. The 1% chance of an accident arising is an average for all actors who are sufficiently similarly situated. This random nature of accidents is one of the linchpins of the operation of liability insurance markets. See, e.g., Priest, supra note 35, at 1521.

\textsuperscript{83} In essence then, if the severity of accidents is measured by the damage that they do to others and that damage is gauged by the compensatory damages that a court will award, an assumption that this piece questions, compensatory awards serve as the severity portion of the Learned Hand algebraic definition of negligence.
actors, over time damages paid might be expected to somewhat equal
the actual value ex ante of an activity's accident costs.84

2. Non-Compensatory Awards

As noted, certain American tort rules are not grounded in com-
pensation. The collateral source rule provides that a plaintiff can recover
from the defendant items of damages for which it has already received
compensation from some collateral source, such as an insurer.85 The
collateral source rule can lead to double compensation. Traditionally,86
however, courts were willing to tolerate that windfall to the plaintiff,
arguably because allowing recovery required defendants to take into
account the costs their conduct imposed upon others.

The entire doctrine of restitution is another example of an instance
where the law awards damages for reasons other than compensation.
Damages in restitution are measured not by the loss that the plaintiff
has suffered (the proper measure of compensatory damages), but by
the gain the defendant has enjoyed.87 Scholars and judges have postulated
that this is because measuring damages by the amount of the loss that
the plaintiff has suffered would not adequately deter the defendant from
acting similarly in the future.88 Restitution is employed in certain types
of torts cases as the proper measure of damages. These cases include

84. This is the conclusion one would also reach by looking at an insurance pool
over time. Premiums would, of course, exceed accident payouts inasmuch as the premium
would include a fee for the insurer's aggregation and monitoring services.
85. D. Dobbs, supra note 26, at §§ 3.6 and 8.10; Restatement of Torts § 920,
comment e (1939).
86. See sources cited supra note 85; recently some states have enacted legislation
limiting or overruling the collateral source rule either entirely or in limited contexts, such
1988) (modification of the collateral source rule by Cal. Civ. Code § 3333.1); State Farm
limits the collateral source rule. . ."); Thomas v. Clark, 373 S.E.2d 668 (Ga. App. 1988)
("[T]he effect of the collateral source rule was radically modified by . . . OCGA § 51-
12-1 . . . (eff. July 1, 1987).")); English v. New England Medical Center, 541 N.E.2d 329
source rule pursuant to G.L. c. 231, §§ 60F, 60G, and 60H (1988 ed.");); Gjovik v.
were eliminated under the collateral source rule. Minn. Stat. § 548.36 (1988) . . .");
R.C. 2744.05(B) was enacted . . . to limit . . . by eliminating the collateral source rule. . .").
88. D. Dobbs, supra note 26, at § 4.1; Parks v. Pavkovic, 753 F.2d 1397, 1408-09
3529 (1985).
conversion cases\(^9\) and trademark infringement and copyright cases,\(^9\) which, although governed primarily by statutes,\(^9\) are based in common law tort actions.\(^9\) Punitive damages are another area where plaintiffs recover an amount not grounded in compensation.

3. *The Reality of Insurance*

Likewise, there are differences between the theoretical and real world where insurance is concerned. Insurers, in setting rates, are obviously concerned with more than efficiency.\(^9\) They set rates and define actuarial groups based not only on maximizing efficient accident avoidance and occurrence but also on administrative convenience, insurance regulation, and profitability.\(^9\) For instance, an ideal insurer may group various actors together for purposes of efficiency when, in fact, an actual insurer would group them with some larger contingent because of administrative convenience.\(^9\) Another potential problem with the deterrence function of insurance is that many actors purchase broad all-risk policies not

89. D. Dobbs, supra note 26, § 5.15, at 415-17; Felder v. Reeth, 34 F.2d 744 (9th Cir. 1929).


92. D. Dobbs, supra note 26, § 5.16 (conversion and action in assumpsit); id. § 6.5 (trademark and copyright).

93. G. Calabresi, supra note 3, at 47-50.

94. See, e.g., id. at 50.

95. Insurance companies, in setting insurance premiums, are concerned with the riskiness of the insured activity. But they are also concerned with their administrative ability to classify and subclassify activities. For instance, returning to the wrong side of the road driver, statistics might indicate that driving on the wrong side of the road at night in a yellow car with The Rolling Stones playing on the radio was more likely to result in an accident with severe injuries than driving on the wrong side of the road in a red car while reciting nursery rhymes on the car phone to one's paramour. However, from an administrative standpoint, an insurance company is unlikely to want to subclassify risks to such an extent. It is more likely that the underwriter will create one category for driving on the wrong side of the road and will charge the same premium to all drivers within that category even though, as we have seen, some wrong side drivers are riskier than others. In the real world, of course, it is impossible for an insurance company to even categorize drivers to the extent that we have postulated. Drivers are unlikely to admit that they drive on the wrong side of the road beforehand and it will be difficult for an insurer to discover such tendencies at manageable costs. On the problem of imperfect information in the insurance acquisition process, see generally Epstein, supra note 62, at 653-54. Instead drivers are grouped based upon easier to administer (and detect) characteristics such as prior accidents, prior traffic violations, sex, marital status, age, and performance in school.
tied to particular risks. Fortunately, there is a limit on an insurer's ability to broadly group actors and risks together.

Adverse selection limits an insurer's ability to pool high risk activities and actors with lower risk activities and actors. In such a loosely formed pool, lower risk people are paying more for insurance than if they were not grouped with the higher risks. Consequently, lower risks will leave the pool when they discover this situation, assuming there is a cheaper alternative. Thus, the insurer is pressured to group risks as narrowly as profitably possible, and in fact insurance works most effectively when this is the case.

4. A Theoretical/Reality Recap

Despite the obvious lack of perfect correlation between the present system and an optimally deterrent one, the current scheme does have some positive efficiency-related incentives. Tort damages operate as a proxy for accident costs imposed upon others. Actors use these judgments to calculate the severity of threatened injuries in monetary terms—a necessary element in Learned Hand's negligence formula. Likewise, insurance premiums, to the extent that they are based upon the potential losses that insureds may cause, operate as a charge roughly equalling the ex ante accident costs of the insured's covered activities.

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96. See, e.g., Pierce, supra note 50, at 1299. Actually, the standard general liability policy provides an apt example.

97. See generally Epstein, supra note 62, at 650-52; Priest, supra note 35, at 1539-50.

98. Priest, supra note 35, at 1540-41.

99. This cheaper alternative may include another carrier who can more efficiently pool risks and offer insurance at a lower premium, self-insurance, or even going bare. See id. See also Pierce, supra note 50, at 1298. In actuality, lower risks are probably always grouped with higher risks and the whole issue of adverse selection, in this context, becomes one of degree. Various lower risks will drop out at various points depending on the variance between the risks they perceive they pose and the premiums that they are forced to pay. In actuality, one may reasonably ask if part of the current insurance crisis and what Professor Priest calls the unravelling of risk pools, Priest, supra note 35, at 1553, is not attributable, in part not to the actual grouping of high risks and low risks but to the perception of insureds that they are low risks grouped with high risks when, in fact, they may be high risks themselves.

100. Priest, supra note 35, at 1540. At this point another disclaimer is in order. This piece is not designed nor intended to be a defense of the current fault system supplemented as it is by private and social insurance. No doubt if we started over we could design a system that was more efficient and cheaper to operate. Likewise, we could certainly design a system that did a better job of compensating injured victims and spreading the costs of risks. But the point made here is, given the system we have, insurance may have some efficiency-oriented function.

101. See supra text accompanying notes 61-70.

102. See supra text accompanying notes 41, 42, 71-73, and 93-100.
But in order for our current system to operate most effectively, some real relationship must exist between the accident costs society wants the actor to consider beforehand and the damages we force the actor to pay after the fact. The damages we award to compensate plaintiffs in personal injury cases and the categories of accident costs we want actors to consider ex ante should highly correlate. If actual damages awarded in tort suits do not reflect the costs we want actors to consider ex ante, but the system relies upon those actual awards as a “definition” of accident costs, then the system will not optimally deter. If the damages awarded in tort suits are less than the total costs we want actors to discount ex ante, we are encouraging people to consider less than all of the costs of that activity and to overengage in it. Likewise, if we overcompensate accident victims we are encouraging actors to underengage in the activity.

One point concerning the relationship between tort compensation and optimal deterrence bears reemphasis. Deterrence does not require the actor (tortfeasor) to actually pay the people that he injures—it merely requires that he consider those costs. Although this section has indicated that the notion of tort recovery by victims intended as compensation, augmented by insurance, may work towards the goal of optimal deterrence, nothing in the notion of efficiency requires its implementation via some system assuring compensation. Compensation is just one way to help achieve the goal. To the extent that damages undercompensate those victims we allow recovery, the system is inefficient. Likewise, by not allowing certain victims to recover compensation the system underdeters. Moreover, if compensatory damages do not adequately provide for all the costs accidents impose upon society, the

103. See generally supra text accompanying notes 43-70.
104. See supra text accompanying notes 47-54.
105. Id.
106. See supra text accompanying notes 43-70.
107. Once again, assume driving on the wrong side of the road created a one in one hundred chance of causing $300 damages and there are 100 potential victims. If the would-be wrong side driver found each of those 100 people and paid each of them $3, efficiency demands would be met. Then if one of them were hurt, demanding additional compensation would overdeter the actor. Alternatively, if the state required the actor beforehand to pay $300 into a state fund for accident costs, optimal deterrence would demand no more. Or, if one of the 100 were injured and the actor paid that one $300, efficiency goals would be satisfied. As stated earlier, arguably, there is no reason for the actor to pay $300 to anybody or anything as long as he or she takes those accident costs into account in plotting his or her marginal cost curve for the activity. See supra text accompanying notes 75, 76, and 78-84. But, as Judge Posner has pointed out, R. Posner, supra note 9, § 6.12, at 143 n.2, the tort system provides victims with an incentive to sue the actor who misbehaves, thereby providing an arguably more effective incentive to potential misbehavers to actually take accident costs into account. But once again, note that deterrence arguably does not require compensation.
tort system frustrates optimal deterrence, absent some device to encourage an actor to take all those costs into account. Before turning to a device which might serve that function, the augmented award, it is appropriate to examine one that, to date, has not—the punitive damages award.

III. PUNITIVE DAMAGES

Punitive damages exist to punish and allegedly deter the defendant, and others like him, from engaging in socially reprehensible behavior. I say allegedly deter because in the punitive damages context, deterrence has taken a back seat to punishment. Indeed, as noted in the introduction, critics of the doctrine have focused on punitive damages as an inappropriate use of civil procedure. The punitive damages debate has raged for at least 150 years—focusing on their penal nature. Today's


109. D. Dobbs, supra note 26, § 3.9, at 204.

110. The earliest treatise writers discussing the law of damages indicated that damages primarily exist to compensate the injured victim, to place her in the position that she would have been in had the defendant not committed the tort. See, e.g., G. Field, supra note 32, § 32, at 28 (“The general principle, recognized in the measure of damages, is that of compensation.”); A. Greenleaf, supra note 32, §§ 253 and 273 (“Damages are given as compensation, recompense, or satisfaction to the plaintiff, for an injury actually received by him from the defendant. They should be precisely commensurate with the injury, neither more nor less; and this whether it be to his person or estate.”); J. Sayer, The Law of Damages B (1792) (“DAMAGES are a pecuniary Recompense for an Injury.”); T. Sedgwick, supra note 32 (Professor Horwitz has called Sedgwick’s treatise on damages “the most brilliant and boldly innovative American antebellum legal treatise.”); M. Horwitz, The Transformation of American Law 1780-1860, 83 (1977). When these men wrote, punitive damages were already recognized in both England and the United States, see, e.g., Wilkes v. Wood, 1763 Lofft. 1, 98 Eng. Rep. 489 (1763); Huckle v. Money, 2 Wils. K.B. 206, 95 Eng. Rep. 768 (1763); Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851) (whether a court can award punitive damages “will not admit of argument.”). Field discusses them in chapter 6 of his treatise on damages. Earlier he points out in relationship to the maxim that the primary purpose of damages in tort was to compensate that “[i]n a great majority of cases, especially in actions for torts, the maxim, in its literal sense, is much too restricted.” G. Field, supra, § 45. Greenleaf admitted no such doubt and his failure to recognize the validity of punitive damages in any sense served as the basis for the debate on, the issue between he and Sedgwick. Modern commentators continue to emphasize the reparative function of damages. D. Dobbs, supra note 26, at 135-38; F. Harper, F. James, O. Gray, The Law of Torts § 25.1 at 490 (2d ed. 1986) (“The cardinal principle of damages in Anglo-American law is that of compensation for the injury caused to plaintiff by defendant’s breach of duty.”) (emphasis in original); see also sources cited supra note 33; Prosser and Keeton, supra note 19, at 5-6 (“There
critics continue to call for the abolition or modification of punitive

remains a body of law which [sic] is directed toward the compensation of individuals, rather than the public, for losses which they have suffered within the scope of their legally recognized interests generally, rather than one interest only, where the law considers that compensation is required. This is the law of torts."

Against this backdrop the question of punitive damages has loomed as an inescapable contradiction. In one of the major articles written in recent years on the subject of punitive damages, Professor Ellis noted that "[t]he concept of punitive damages lies in the borderline that both bridges and separates criminal law and torts." Ellis, Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1, 2 (1982).

One commonly accepted theory of the evolution of punitive damages suggests that punitive damages developed as the relationship between judge and jury matured. The earliest references to punitive damages date back at least to The Code of Hammurabi, see Belli, Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society, 49 UMKC L. Rev. 1, 2 (1980). In Exodus 21:37, the authors of the Bible state: "When a man steals an ox or a sheep and slaughters or sells it, he shall restore five oxen for the one ox, and four sheep for the one sheep." As Belli points out, the doctrine of punitive damages took its place in the English common law relatively late, around the thirteenth century. Belli, supra, at 3; Ingram, supra note 5, at 206-07; J. Ghiardi and J. Kircher, Punitive Damages: Law and Practice (1986 and Supp. 1988). Ghiardi and Kircher note that one of the theories for the development of punitive damages is that even as courts began to develop tools to set aside or modify jury verdicts judges still were reluctant to do so and the doctrine of punitive damages served to insulate the judiciary from the criticism that might accompany the reduction of the jury's award. Id. § 1.02, at 4-5. The authors quote from Huckle v. Money, 2 Wils. K.B. 205-07, 95 Eng. Rep. 768-69 (1763) to illustrate their point:

"Upon the whole, I am of the opinion the damages are not excessive; and that it is very dangerous for the Judges to intermeddle in damages for torts; it must be a glaring case instead of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a Court to grant a new trial for excessive damages."

Id. § 1.02, at 4. Others trace the development of the doctrine of punitive damages in England to the existence of amercements prior to the time of the Magna Carta. An amercement was an amount that a litigant paid to the Crown as what Justice Blackmun in Browning-Ferris Indus. of Vermont, Inc. v. Kelco, 109 S. Ct. 2909, 2917 (1989), called an "all purpose royalty penalty." Amercements were employed for a broad variety of purposes including "fining" the tortfeasor. See generally Massey, The Excessive Fines Clause and Punitive Damages: Some Lessons from History, 40 Vand. L. Rev. 1233 (1987) and other sources cited in Justice O'Connor's partial concurrence/partial dissent. Browning-Ferris, 109 S. Ct. at 2927. Whatever the relationship between amercements and punitive damages, the Court still held that the eighth amendment's excessive fines clause was not triggered by an award of punitive damages in a suit between private litigants. See supra text accompanying note 36.

Almost from the outset of the Republic, most American courts recognized the doctrine of punitive damages. Belli cites a case from 1791 involving breach of a promise to marry. Belli, supra, citing Coryell v. Colbaugh, 1 N.J.L. 90 (1791). At first, judges had no power to modify jury verdicts. Professor Ellis provides a complete but manageable history of the early development of punitive damages in England in Ellis, supra, at 12-20. Later, as this power was recognized, judges still were hesitant to use it. Id. Thus, when judges needed some justification for allowing an otherwise clearly excessive verdict to stand,
damages in personal injury cases. Many do so on the same grounds cited in the mid 1800's—the civil law did not ever and does not now exist to punish.

A. The Punitive Hornbook of Punitive Damages

Just as many of the philosophical questions surrounding punitive damages have not changed, the law has similarly been relatively static

punishment was one justification. Id. One might argue, however, that by Greenleaf's time the evolution of the judge/jury relationship had advanced to a point where punitive damages were unnecessary and undesirable and that was precisely his contention.

Sedgwick, the seminal American scholar on damages, countered Greenleaf arguing that punitive damages served a positive function in a limited number of cases where the defendant's behavior was beyond the bounds of tolerable human conduct and that it was desirable to send a strong signal to the defendant and others that society would not tolerate such conduct. Interestingly, Professor Horwitz notes that outside the area of punitive damages, Sedgwick applauded efforts to make the law of damages more predictable and certain. He fostered the notion that the question of the amount of compensatory damages was an issue of law for the court and that a judge had the power to set aside excessive jury verdicts. M. Horwitz, supra, at 83-84. In the 150 years or so since those gentlemen wrote, the debate over punitive damages has continued to rage.

Professor Clarence Morris, in a 1931 article that is still cited as an important piece in the history of punitive damages analysis, postulated that one continuing justification for the existence of punitive damages was the inefficiency of the criminal law where many criminals are not apprehended and penalties are not specifically tailored to the individual but fixed in advance by the legislature. Morris, supra note 7, at 1194-98. A recent bibliography of punitive damages literature cites over-four hundred books and articles dealing with the subject. R. Schloerb, R. Blatt, R. Hammesfahr and L. Nugent, Punitive Damages: A Guide to the Insurability of Punitive Damages in the United States and its Territories 319-41 (1988).

The focus of the debate in both the law reviews and the courts has centered on the proper role of the courts and the allocation of functions between the civil and criminal law.

Representatively, Prosser and Keeton have titled their section dealing with punitive damages: "Tort, Crime, and Punitive Damages." Prosser and Keeton, supra note 19, § 2, at 7. This section appears in the first chapter of the book which deals, in part, with such broad issues as what is a tort and what policies drive tort law. The authors apparently view the issue of punitive damages and their relationship to criminal law as important in defining the scope and/or purposes of tort law, rather than as a subpart of tort law or tort damages.

111. See, e.g., Punitive Damages: A Constructive Examination, 1986 A.B.A. Sec. Litigation, Special Committee on Punitive Damages (1986); Ellis, supra note 110; Ghiardi, The Case Against Punitive Damages, 8 Forum 411 (1972); Ingram, supra note 5; Owen, Civil Punishment, supra note 4; Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1 (1982) [hereinafter Owen, Problems]; Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1257 (1976) [hereinafter Owen, Products Liability Litigation]; Sales and Cole, supra note 5; American College of Trial Lawyers, Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice (1989) [hereinafter ACTL Report] (The ACTL Report contains a short but well-selected bibliography of pieces arguing for the abolition of punitive damages, the modification thereof, and those who would preserve the status quo. Id. at 4 n.19).

112. See supra text accompanying note 110.
until very recently. Thus, in the abstract, the issues of whether a plaintiff is entitled to punitive damages and what factors the judge or jury should consider in deciding how much to award are the same today as they were in 1850. Certainly mass tort cases and the recent efforts of tort reformers have led to some new problems and peculiar twists. For the most part, however, the substantive law relating to the entitlement and the amount of punitive damages is the same as it was 150 years ago. The law, like the philosophical debate, has been grounded in punitive or penal concerns.

For instance, in most states, the plaintiff in order to recover punitive damages must show the defendant engaged in worse activity than mere negligence. The defendant must have committed an intentional tort or otherwise acted wilfully, wantonly, maliciously, recklessly, or outrageously.

In order to be liable for punitive damages, a defendant must have engaged in some morally blameworthy conduct deserving of punishment. In instructing juries on the proper amount to award as punitive damages, courts typically advise them to award an amount sufficient to punish the defendant and to deter the defendant and others like him from engaging in similar conduct in the future. This deterrence is not efficiency related; it is punishment oriented. Courts also tell juries to consider the wealth of the defendant, the severity of harm with which the plaintiff was threatened, the relationship between the harm that the plaintiff suffered or with which he was threatened, the amount of

113. In this vein, Ghiardi and Kircher state the following in their treatise:

Possibly it is time for a thorough re-examination of all of the rules and procedures applicable to punitive damages. In the preparation of this work we gained the impression that some courts tend to repeat, as if by rote, old rules on the subject as one would intone an ancient ritual. Little consideration appears to be given to their substance. The rules of stare decisis should never be a commitment to intellectual stagnation.

J. Ghiardi and J. Kircher, supra note 110, § 2.13.


117. See, e.g., Linthicum v. Nationwide Life-Ins. Co., 150 Ariz. 326, 723 P.2d 675 (1986); Tuttle v. Raymond, 494 A.2d 1353 (Me. 1985); D. Dobbs, supra note 26, § 3.9, at 205-08; Ellis, supra note 110, at 20-21; Mallor and Roberts, supra note 114, at 651; Prosser and Keeton, supra note 19, § 2, at 9-10; Restatement (Second) of Torts § 908 (1965).

compensatory damages awarded, the egregiousness of the defendant’s conduct, the amount of any other punitive damages awards the defendant had to pay or is threatened with paying, and any criminal punishment the defendant suffered or may suffer as a result of the same conduct forming the basis of the plaintiff’s tort suit.\textsuperscript{119} Most of these factors are designed and discussed in reference to how much punishment is needed, not in reference to efficiency and accident avoidance.

Appellate courts have traditionally reversed punitive damage assessments only if they “shocked the conscience.”\textsuperscript{120} Recently courts have grown more willing to review and reverse, or revise downward, punitive damage awards. Still, there are cries for greater reform.\textsuperscript{121} Aside from the shock the conscience standard, appellate courts have traditionally relied upon the oft-cited rule that punitive damages must bear a reasonable relationship to compensatory damages or else they will be reduced.\textsuperscript{122} There is an aspect of the “punishment must fit the crime” to this reasonable relationship rule.

Interestingly, the United States Supreme Court in \textit{Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.}\textsuperscript{123} held that the eighth amendment’s excessive fines clause does not apply in a case between private parties.\textsuperscript{124} The Court’s holding, however, did not undermine the traditional wisdom that the focus in a punitive damages case is on punishment.

\textbf{B. Recent Statutory Changes}

These general rules, as well as the underlying purposes allegedly served by punitive damages awards, remain controversial today. In many states, and also at the federal level, punitive damages are the target of tort reformers.\textsuperscript{125} Recent legislation has made certain changes in rules

\begin{itemize}
  \item 119. See the sources cited supra note 118. See also Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981); Mallor and Roberts, supra note 114, at 666-69. See also infra text accompanying notes 273-87.
  \item 120. Owen, Products Liability Litigation, supra note 111, at 1321-22.
  \item 121. See Owen, Civil Punishment, supra note 4, at 108-12; see also Sales and Cole, supra note 5; Mallor and Roberts, supra note 114.
  \item 122. D. Dobbs, supra note 26, § 3.9, at 210-11; Prosser and Keeton, supra note 19, § 2, at 14-15.
  \item 123. 109 S. Ct. 2909 (1989).
  \item 124. See supra note 6.
  \item 125. Prosser and Keeton, supra note 19, at 2 (Supp. 1988). Rep. Thomas A. Luken recently introduced a product liability reform bill in the House, Product Liability Reform Act of 1989, H.R. 2700, 101st Cong., 1st Sess. (1989), which, although it does not establish a culpable state at which a plaintiff is entitled to recover punitive damages, does expressly provide that punitive damages cannot be awarded against a defendant who is merely negligent. Under the bill, a plaintiff would have to establish his or her entitlement
\end{itemize}
governing the recoverability of punitive damages. Some states now require that the plaintiff establish his or her right to recover punitives by clear and convincing evidence. Other states achieved the same result judicially. Colorado has gone so far as to require that the plaintiff prove his or her right to punitive damages beyond a reasonable doubt, an obvious analogue to the punishment aspects of the doctrine. Other states have placed caps on the amount of recoverable punitive damages. Some states have passed legislation authorizing the bifurcation of punitive damages cases separating the liability/compensatory damages aspects of the case from the punitive damages aspect.


129. In some states the amount of punitive damages is capped by an absolute dollar limit. Kansas Stat. Ann. § 60-3402 (Supp. 1989) (punitive damages in medical malpractice cases limited to lesser of $3,000,000 or 25% of the defendant's highest gross income for the five years preceding the tort. In others the cap is based on the amount of compensatory damages awarded). N.H. Rev. Stat. Ann. § 508:4-d (1983 & Supp. 1989); Oklahoma Stat. App. Tit. 23, § 9 (1987) (punitive damages limited to an amount equal to actual damages absent clear and convincing evidence of wrongful conduct); Tex. Civ. Proc. & Rem. Code Ann. §§ 41.001-.008 (Vernon Supp. 1988) (punitive damages limited to four times actual damages or $200,000, whichever is greater; the limit is inapplicable to cases involving malice or intentional torts). Some of these caps are only presumptive and a plaintiff can recover a greater amount of punitive damages if he, in essence, rebuts the presumption by showing that the defendant's conduct was particularly egregious. See statutes cited supra notes 126-28. See also Ala. Code § 6-11-21 (Supp. 1989) (punitive damages limited to $250,000 unless the defendant engaged in a practice or pattern of intentional wrongful conduct, actual malice, or defamation); Colo. Rev. Stat. § 13-21-102 (1987) (punitive damages can be no more than actual damages unless the defendant's wrongful conduct continued during the pendency of the case in which event the court may increase the punitive award to three times the actual damages awarded); Ga. Code Ann. § 51-12-5.1(g) (Supp. 1989) ($250,000 cap unless the defendant had the specific intent to harm or the case is a products liability case).

C. Punitive Damages and Efficiency

1. Classic Deterrence

All of these recent changes seem aimed at the doctrine as we know it. None are geared towards making punitive damages a more efficient deterrent. But one of the articulated purposes of punitive damages is deterrence. Indeed, defenders of punitive damages in tort cases point to the alleged deterrence rationale as justification. But interestingly, as criminal law scholars have long pointed out, deterrence is also one of the goals of punishment. Jailing a man may well have some effect

the rare cases where the defendant faces mass tort liability and the multiple punitive damages awards; Mallor and Roberts, supra note 114, at 664-66 (the jury, after proper instruction, should decide whether the plaintiff is entitled to recover punitive damages and then the judge should award the amount of those damages); Owen, Products Liability Litigation, supra note 111, at 1319-21 (Judge should set amount of punitive damages after the jury has decided that the plaintiff is entitled to them); ACTL Report, supra note 111, at 18-19 (calling for bifurcation, and possibly trifurcation, in order to protect defendants from the prejudice associated with litigating the issue of liability for compensatory damages and liability for punitive damages together).

Many of the bifurcation proposals are driven by the notion that if the jury hears about the wealth of the defendant before it has decided the basic liability question, the jury may well return a decision against the defendant on the issue of compensatory damages merely because the defendant is wealthy. Sales and Cole, supra note 5, at 1147-48 ("Permitting the fact finder to consider evidence of a wrongdoer's wealth is really nothing more than a camouflaged mechanism designed to encourage large punitive assessments. In essence, it is a procedural device that promotes the redistribution of wealth in society."). Likewise, if the jury hears that the defendant has been subjected to criminal penalties and/or paid (or simply'been assessed) other punitive damages awards, those facts may influence the jury's decision on liability even though they are generally irrelevant for that purpose and inadmissible. See generally Owen, Problems, supra note 111, at 52-53.

131. The great Clarence Morris pointed out nearly sixty years ago that tort necessarily has a reparative as well as an admonitory function. See, e.g., Morris, supra note 7, at 1173. As he so eloquently stated:

The value of the liability with fault rules is found in the coupling of the admonitory and the reparative functions [of tort law]; and in the absence of a need for discouraging undesirable behavior, there is often no justification for compensating plaintiffs at defendants' expense. The large portion of our tort law in which liability is dependent on fault can only be used to compensate plaintiffs when there are defendants deserving of punishment. As long as the liability with fault rules are retained, the law of torts will have an admonitory function even though the doctrine of punitive damages is abandoned. So punishment in tort actions is not anomalous (if anomalous means unusual); and punitive damage practice is only one of many means of varying the size of money judgments in view of the admonitory function.

Id. at 1177.

upon his future behavior, as well as upon the future behavior of others who receive notice of the first man's jailing and are in a position to choose whether to do what he did. Fear of punishment, whether it be loss of life or liberty, a criminal fine, or even a punitive damages judgment, may shape future behavior. We might call this classical deterrence. However, this notion of deterrence is not as subtle as the Calabresi notion of deterrence. As noted, he used the word to mean deterring inefficient investments in accident causing behavior (or safety) by forcing actors to take account of all of the costs of their behavior.

2. Punitive Damages and Efficiency

Some scholars have undertaken an economic, efficiency-oriented analysis of punitive damages. They have carved out relatively narrow areas where they believe punitive damages may be efficient. For instance, Professor Ellis has postulated that punitive damages are appropriate in only three types of cases: (1) where the probability of liability is greater than the probability of loss; (2) where the compensatory

133. Several writers have doubted the role punitives can play in efficiency oriented deterrence. See, e.g., Ellis, supra note 110; Ingram, supra note 5; Owen, Problems, supra note 111; Priest, Punitive Damages and Enterprise Liability, 56 S. Cal. L. Rev. 123 (1982); Schwartz, supra note 4, at 143-44 (after noting the anomalous nature of many current punitive damages rules when viewed from a deterrence perspective, he states: "The deterrence theory thus badly fails the descriptive test: there is almost nothing in the common law of punitive damages that it clarifies, and there are central features in that law that it contradicts.").

134. See infra text accompanying notes 247-62. See also Cooter, Economic Analysis of Punitive Damages, 56 S. Cal. L. Rev. 79, 89, 98 (1982):

The model . . . highlights three broad characteristics of an economic view of punitive damages: (1) punitive damages should be restricted to intentional faults; (2) these faults will usually violate the legal standard of care by a wide margin; and (3) the awards for punitive damages should be large. . . . [P]unitive damages should be regarded as an unusual measure, appropriate only for gross, intentional fault. Punitive damages should not be used to correct small imperfections in computing damages or in bringing suits. . . . [P]unitive damages should be computed at a level that offsets the illicit pleasure of noncompliance or the exceptional costs of compliance that motivated the injurer. Fortunately, this computation does not have to be exact to achieve deterrence. Finally, punitive damages should be awarded in strict liability cases only if the plaintiff can prove intentional fault.

135. Ellis, supra note 110, at 25-26. In this category of cases Ellis includes torts such as fraud which is often difficult to detect and always difficult to prove. He also includes oppression by public officials and other intentional torts involving actual malice or recklessness such as: "robbery, conversion, and rape" where he postulates there are difficulties of "identifying and apprehending the perpetrator."
damages a court will award are less than the loss,\textsuperscript{136} and (3) where the defendant's subjective gain from certain behavior is greater than the cost the law recognizes as compensatory damages.\textsuperscript{137}

The last category includes cases where the defendant gets some illicit benefit from his tortious activity that the law does not recognize.\textsuperscript{138} That is, the defendant may receive great pleasure in injuring someone, pleasure which may be greater than the compensatory damages the law awards.\textsuperscript{139} The law, however, may not recognize the gains the defendant enjoys,\textsuperscript{140} even though to him the gains, \textit{ex ante}, exceed the loss.\textsuperscript{141} A punitive damages award forces the defendant to pay more than mere compensation in the hopes that he and others like him will not repeat the conduct. Ellis' first category includes cases where the defendant may expect to escape detection, or identification.\textsuperscript{142} Ellis concludes that there are not many cases in his second category\textsuperscript{143}—where compensatory damages are less than loss.\textsuperscript{144}

\begin{enumerate}
\item Id. at 26-31. Ellis includes three types of cases in this category: those where there is no legal remedy (he essentially relegates this subcategory to a historical footnote given the expansion of compensatory damages for such items as emotional distress); those where losses fall on persons other than the victim (again he notes the supposedly declining significance of this category given the growth of loss of consortium claims, although he does point out that all of these losses are not compensated and even under the expanding concepts of who is a proper plaintiff in a personal injury suit there may be real uncompensated societal losses in the form of a loss of security or in the costs that self-help imposes upon all of us); and those cases where the loss cannot be readily translated into monetary terms (he also relegates this category to minor importance by pointing out that frequently in tort cases losses cannot be easily translated into monetary units, that justifying punitives because compensatory damages are hard to value assumes that hard to value damages are undervalued which is not necessarily the case and that if there is no market to gauge the proper amount of compensatory damages the lack of that same market makes it impossible to value punitive damages).
\item Id. at 31-33.
\item Id. See also Professor Laycock's summary of Ellis' position in D. Laycock, supra note 10, at 592-93.
\item Ellis, supra note 110, at 31-33.
\item Id.
\item Id. at 26-33.
\item Accord R. Posner, supra note 9, § 6.12.
\item Ellis, supra note 110, at 27-28.
\item In an accompanying article to Professor Ellis', Professor Owen, fast becoming (if not already) the American guru of punitive damages, questions Ellis' three categories. He states:

\begin{quote}
Each of Professor Ellis' categories seems to be all-inclusive or almost so: none of the categories appears to exclude many, if any, cases. As for the first category, the real-world probability that an actor will be caught and held liable for any loss should always be somewhat less than one. . . .

The all inclusiveness of the second category is even simpler to see. For
\end{quote}
\end{enumerate}
Another often cited justification for punitives applies to cases where the defendant threatens slight harm to many. The threatened harm may be so small in these cases that plaintiffs would not sue unless punitives were available. Without punitives no one would sue and the defendant would continue to engage in the socially undesirable activity because from a general deterrence perspective the defendant would not have to take all its costs into account. Awarding punitives forces the defendant to consider injuries to people who would normally not sue.

Others contend punitives actually serve to compensate plaintiffs for otherwise unrecoverable damages and to pay the plaintiff's attorney's fees. These and other rationalizations for the doctrine explain or justify punitives in narrow categories of cases or give a surreptitious purpose for such awards, such as paying attorney's fees through the back door when a plaintiff cannot recover those fees directly. As can be seen, critics have not articulated a large role for punitive damages in the efficiency-oriented regulation of accidents. They have identified certain narrow areas where punitives may be efficient, but they have found no such place for punitives in the larger universe of accident cases. One recent break from tradition is Professor Dobbs' excellent article, Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies. He argues that it is time to take a look at punitive damages from the perspective of remedies. Doing so, he focuses on deterrence-measured remedies, contending that in torts committed as part of a profit-motivated activity, extra compensatory damages should be either the defendant's gain (or profit) or the plaintiff's litigation costs, including attorney's fees.

One thing, plaintiffs in this nation are only rarely awarded their litigation costs (including their attorneys' fees). Moreover, rarely, if ever, does a defendant pay in damages for truly all the losses caused by his wrongful act. In addition, the public generally may suffer a sense of fear or demoralization from wrongdoing that is not vindicated beyond requiring payment for the loss. Finally, the third category appears far broader, if not all-inclusive, than Professor Ellis' description would indicate. A "thief" must almost always perceive a greater benefit from his conduct than would the law.

Owen, Civil Punishment, supra note 4, at 113 (footnotes omitted).
145. Peterson, Sarma and Shanlet, supra note 14, at 64, indicated that a ratio rule would not be appropriate in this type of case.
146. Id. As Professor Ellis, Ellis, supra note 110, and other critics point out, this was indeed one of the historical justifications for such awards. See, e.g., Ingram, supra note 5, at 210; Sales and Cole, supra note 5, at 1121-23.
147. See, e.g., J. Ghiardi and J. Kircher, supra note 110, § 2.11.
149. Id. at 834.
150. Id. at 915.
Like Dobbs, I believe increased damages may operate as efficient deterrents. Augmented awards would more efficiently deter wherever compensatory damages understate the societal costs of an activity. Where compensatory damages are an inadequately low measure of accident costs, augmented awards could fill that gap.

IV. AUGMENTED AWARDS: BEGINNING TO IDENTIFY APPROPRIATE CASES

In appropriate cases, augmented awards may operate to encourage efficient investment in accident avoidance by forcing a defendant to take into account all the costs of its activities. The basic question then becomes in what types of cases might an augmented award encourage efficiency? The short answer is any case or category of cases where compensatory damages are an inadequately low proxy for the accident costs that an activity imposes upon society.

One might fruitfully start the analysis with those rules that deny plaintiffs the right to recovery because compensation would entail undue administrative costs. Administrative concerns have often hidden behind the mask of proximate cause.

151. Most commentators merely state that justification is largely inappropriate in a world where compensatory damages are more compensatory than they used to be. See, e.g., Ellis, supra note 110, at 27-28; Ingram, supra note 5, at 213-14 ("In most cases, compensatory damages are quite sufficient to deter undesirable future conduct."); Sales and Cole, supra note 5, at 1158-64. Cf. Owen, Civil Punishment, supra note 4, at 111, 113. Or they state that if compensatory damages are broken the proper treatment is to fix them. In response to what he called the imperfect damages justification for punitive damages, Professor Schwartz stated: "If it is true that existing damage rules fail to comprehend significant elements of harm that torts are likely to produce, the proper strategy entails reforming or revising damage rules directly, rather than straining for a surrogate result through reliance on punitive damages." Schwartz, supra note 4, at 139. The response is that there may well be case types where even fully compensatory damages fail to force the defendant to take account of all the accident costs that its activity imposes upon society. Moreover, there may be cases where there are sound reasons not to adjust compensatory damage rules; that is refusing to allow certain plaintiffs to recover may be an efficient rule, but it would still be preferable to encourage the defendant to take account of accident costs that are not included in compensatory damages and not otherwise factored into the defendant's pricing calculus. See supra text accompanying notes 43-70.

152. See infra text accompanying notes 153-246. Recognition of this potential prompts a reevaluation of the factors and standards that courts now employ in awarding punitive damages.

153. See supra text accompanying notes 43-70.

154. See infra text accompanying notes 155-246. See also Priest, supra note 35, at 1589.
A. Augmented Awards and Proximate Cause

American law has long dispensed with the illusion that there is anything scientific, measurable, or even causal about the doctrine of proximate cause.\textsuperscript{155} The lesson learned from such scholars as Dean Leon Green\textsuperscript{156} and Professor Wex Malone\textsuperscript{157} is that proximate cause is purely a question of policy.\textsuperscript{158} How far should liability go? Where should a court and society limit a defendant's liability?\textsuperscript{159} In drawing that line, courts must consider all of the policies at stake in accident cases: deterrence, risk spreading, compensation, fairness, and administrative concerns.\textsuperscript{160}

Most basically, proximate cause cuts off liability.\textsuperscript{161} One rationale for cutting off liability is the fear that full recovery by all those injured by certain torts would deter the defendant and others like him from engaging in socially useful conduct, that is, full recovery would

\textsuperscript{155} See, e.g., L. Green, supra note 22, chs. 1-7; Malone, Ruminations on Dixie Drive It Yourself Versus American Beverage Company, 30 La. L. Rev. 363 (1970).

\textsuperscript{156} For a useful compilation of some of Green's works, see L. Green, The Litigation Process in Tort Law: No Place to Stop in the Development of Tort Law (2d ed. 1977).

\textsuperscript{157} For a bibliography of the late Professor Malone's work, see Bibliography of the Writings of Wex S. Malone, 48 La. L. Rev. 1069 (1988). For a personally edited collection of some of his most influential and frequently quoted works, see W. Malone, Essays on Torts (1986).

\textsuperscript{158} I admit that some of my colleagues laugh at me when I say this or that is a question of policy. "That's what all tort lawyers say," one of my friends notes. Then quite aptly she asks: "Isn't everything?" I agree, although I am still amazed at the reverence with which some judges continue to treat those two words "proximate cause." See, e.g., Stoneburner v. Greyhound Corp., 232 Or. 567, 375 P.2d 812 (1962).

\textsuperscript{159} As almost always, Professor Malone's classic statement regarding the scope of rules seems appropriate of quotation:

All rules of conduct, irrespective of whether they are the product of a legislature or are part of the fabric of the court-made law of negligence, exist for purposes. They are designed to protect some persons under some circumstances against some risks. Seldom does a rule protect every victim against every risk that may befall him, merely because it is shown that the violation of the rule played a part in producing the injury. The task of defining the proper reach or thrust of a rule in its policy aspects is one that must be undertaken in each case as it arises.

Malone, Ruminations on Cause-In-Fact, 9 Stan. L. Rev. 60, 73 (1956).

\textsuperscript{160} See, e.g., L. Green, supra note 22, at 76-77; Prosser and Keeton, supra note 19, § 4.

\textsuperscript{161} See, e.g., Prosser and Keeton, supra note 19, § 41, at 264; D. Dobbs, supra note 26, § 8.9; Weyerhaeuser Co. v. Atroops Island, 777 F.2d 1344 (9th Cir. 1985); Pitre v. Opelousas General Hosp., 530 So. 2d 1151 (La. 1988); Cates v. Eddy, 669 P.2d 912 (Wyo. 1983).
"overdeter." 162 As such, proximate cause serves an efficiency-related function. 163 One might even argue that the entire purpose of the doctrine is to assure that people do not pay for causing accidents (or losses) that would cost too much to prevent. In cases where courts decide defendant’s actions were not the proximate cause of the plaintiff’s injuries because liability would inefficiently overdeter, there would be no reason to implement a scheme of augmented awards. In such cases the court has decided to cut off compensatory awards because imposing liability, even for those sums, would overdeter. 164 It would not be efficient.

In other classes of cases courts employ proximate cause 165 to limit a defendant’s liability not because of a primary concern with overdeterrence, but because the court is concerned that allowing recovery would lead to an unmanageable proliferation of claims. 166 That is, the courts are concerned with their ability to deal with cases that a rule of liability would create. The costs of administration would be too great. The general deterrence gains from forcing a defendant to internalize actual accident costs might be real, but when one factors in the social costs of administration the liability rule becomes too costly. In essence, the gains derived from encouraging defendants to institute more effective

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162. See, e.g., Prosser and Keeton, supra note 19, § 41, at 265; Berryhill v. Nichols, 171 Miss. 769, 158 So. 470 (1935) (best possible medical treatment would not have averted the injury). Of course, using the Learned Hand formula, the conduct at issue would not be negligent as, by definition, its utility outweighed its cost.


164. Theoretically put, in terms of the Learned Hand test, the courts seem to be concluding that the burden of prevention of the damages that are presented in the case before the court outweigh the ex ante cost of those accidents. One of the possible reasons why the courts might so conclude is that the cost of discovering the probability of the injury at issue (the P in the Learned Hand formula) and the cost of determining the severity of an accident if it does occur (the L in the Learned Hand formula) are part of the cost of avoidance (the B in the Learned Hand formula). As such, the traditional role that foreseeability has played in proximate cause discussions, see Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co., Ltd. [1961] A.C. 388, is rational in light of the economist’s concerns for efficiency as well. Relatedly, foreseeability is relevant to the actor’s ability to act in reference to knowledge. That is, it is relevant to whether he or she is capable of being deterred.

165. Frequently, courts accomplish this result under the rubric of no duty being owed to the plaintiff. See generally Prosser and Keeton, supra note 19, § 42; Palsgraf v. Long Island Railroad Co., 248 N.Y. 339, 162 N.E. 99 (1928). One classic, but dwindling example, was the former rule that a defendant owed no duty to protect a plaintiff from negligently inflicted emotional distress. Prosser and Keeton, supra note 19, § 54; see also infra text accompanying notes 216-28.

166. See infra text accompanying notes 212-46. It cannot be denied that in many of these cases as well there is also a judicial concern with overdeterrence. The two often travel hand-in-hand.
accident avoidance means are more than offset by the judicial costs of policing the rule. Put differently, the cost of deciding the claims, even though some or all of them are bona fide, is not worth the effort. Were there some way to force the defendant to take account of unrecoverable damages, without forcing the system to incur the costs of deciding particular cases in the traditional manner, there would be an efficiency gain with no accompanying administrative drain. One possible way to provide a safety incentive without the large administrative costs associated with case-by-case adjudication would be to permit the plaintiffs we allow to recover to seek an augmented award. This award would represent the accident costs that society should “charge” the defendant under the Hand formula but does not because of some other reason such as administrative costs.

B. The Economic Harm Rule: A No Duty Rule

As noted, judges often express their determination that the administrative costs of liability exceed deterrence gains by finding that defen-

167. The old rule against the recovery of negligently inflicted emotional distress arguably fits within this category of cases. See Prosser and Keeton, supra note 19, § 54. There was no question that people were suffering emotional distress from negligent conduct, but courts classically refused recovery out of a concern for fraudulent claims, an inability to value damages, the difficulty of defining the scope of any duty owed, and a concern that liability would open the floodgates to litigation. See Daley v. LaCroix, 384 Mich. 4, 179 N.W.2d 390 (1970). One simple way that courts stemmed the tide while ostensibly preserving the rule was to require some physical impact as a prerequisite to liability. The impact allegedly eased the judiciary's burden of separating the bona fide cases from the fraudulent claims. See id. Now, most states allow the recovery for negligently inflicted emotional distress. W. Prosser, J. Wade and V. Schwartz, supra note 27, at 396 n.4.

Another example of a similar development in a related context was the development of liability for intentionally caused mental distress. Initially there was no tort of intentional infliction of emotional distress, although damages for emotional distress were recoverable if some other intentional tort was established. Thus, if the defendant assaulted the plaintiff, the plaintiff could recover for the resulting emotional distress. Absent the assault, there would be no recovery. The other tort apparently provided the indicia of misconduct that made the court feel that the claim was not fraudulent. Thus the court did not have to deal with the administratively burdensome task of separating sound from unsound claims for emotional distress. Later the law began to allow recovery where, even though there was no other underlying tort, the actor's intentional misconduct caused such distress that a physical injury ensued. The recovery was not based upon the intentional infliction of mental distress, however, but rather negligence. The defendant's actions were unreasonable in light of the foreseeable risk of physical injury and he would be liable therefore. See, e.g., Restatement of Torts §§ 306, 312 (1965). Apparently, once again the physical harm provided some indicia of harm that would not otherwise be present and allowed the court to avoid the causal questions that it would otherwise have to answer—the administrative drain. As in the area of negligent infliction of emotional distress, most courts recognize the independent tort of intentional infliction of emotional distress. See, e.g., State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952).

168. See supra note 164.
dant's acts were not the proximate cause of plaintiff's injuries. Another way that the court may express this conclusion is to hold that certain plaintiffs cannot recover or that certain damages are not recoverable. This is in essence a "no duty" formulation. One such rule, that many jurisdictions still follow, provides that in the absence of physical injury or property damage a plaintiff cannot recover economic loss in tort. A 1980 shipping disaster in the Mississippi Gulf Outlet Channel provides an apt example for discussing what Professor Laycock calls the "economic harm rule." A real case study may better demonstrate how an augmented award might have furthered deterrence goals, without imposing an undue administrative burden upon the courts.

1. A Case Study in Augmented Awards: M/V Testbank

a. The Facts

On July 22, 1980, an inbound bulk carrier, the M/V Daniel collided with an outbound container vessel, the M/V Testbank in the Mississippi River Gulf Outlet Channel. A cloud of hydrocarbonic acid surrounded the two vessels and then drifted off towards Shell Beach, Louisiana. In the collision several of the Testbank's containers were damaged and lost overboard; they contained about twelve tons of pentachlorophenol (PCP), which is toxic to animal and marine life in even moderate quantities. The PCP spill was apparently the largest such spill in United States history. As a result of the collision and spill, all residents within ten miles were evacuated and the channel was closed to all traffic until mid-August. State and federal authorities suspended all fishing and shell fishing in the outlet and within a surrounding 400 mile area. Authorities also placed an embargo on all of the area's fish and shellfish. Many local businesses, especially in the fishing and seafood industry, suffered financial losses. Shippers who could neither get out of nor into New

169. The erstwhile rules against recovery of intentionally or negligently inflicted emotional distress are two examples.

170. See supra note 165.

171. See, e.g., State of La. ex rel. Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985) (en banc), cert. denied, 477 U.S. 903, 106 S. Ct. 3271 (1986). The majority and dissenting opinions are excellent discussions of the development of the rule, the cases which have followed it, the cases that have rejected it, and the implications of adhering to and of rejecting it. Cf. People Express Airlines, Inc. v. Consolidated Rail Corp., 100 N.J. 246, 495 A.2d 107 (1985) (rejecting the rule in favor of a case-by-case approach to the problem).


173. This factual statement is substantially taken from Judge Wisdom's statement of the facts in his dissent from the Fifth Circuit's en banc decision of the case. M/V Testbank, 752 F.2d at 1036 (Wisdom, J., dissenting).
Orleans were also adversely affected. Predictably, law suits followed; injured persons filed forty-one such suits which were consolidated before a federal district court judge in Louisiana. The plaintiffs in that consolidated suit included:

1. commercial fishermen, crabbers, oystermen, and shrimpers who routinely operated in and around the closed area;
2. fishermen, crabbers, oystermen, and shrimpers who engaged in these practices only for recreation;
3. operators of marinas and boat rentals, and marine suppliers;
4. tackle and bait shops;
5. wholesale and retail seafood enterprises not wholly engaged in fishing, shrimping, crabbing, or oystering in the closed area;
6. seafood restaurants;
7. cargo terminal operators;
8. an operator of railroad freight cars seeking demurrage;
9. vessel operators seeking expenses (demurrage, crew costs, tug hire) and losses of revenues caused by the closure of the outlet.

b. The Legal Proceedings

On defendants' motions for summary judgment, the district court dismissed all claims except those of the commercial fishermen and shell fishermen. A three judge panel of the Fifth Circuit affirmed; Judge Wisdom specially concurred, arguing that, although precedent demanded denying the claims, it was time to reexamine that precedent. The Fifth Circuit en banc accepted Judge Wisdom's call to reexamine prior decisions and affirmed their continued viability over two spirited dissents, one by Judge Wisdom and the other by Judge Rubin. In his majority opinion, Judge Higginbotham defended and applied the economic harm rule to the case before him. According to his statement of the rule, a plaintiff who suffers neither property damage nor physical injury cannot recover in negligence. Writing in dissent,

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174. Id. at 1020.
175. Id. at 1036 (Wisdom, J., dissenting).
176. The commercial fishing interests' claims were not dismissed because the trial court felt that they merited special protection, analogizing them to seamen, a favorite of maritime law. State of La. ex rel. Guste v. M/V Testbank, 524 F. Supp. 1170, 1173-74 (E.D. La. 1981).
177. 728 F.2d 748 (5th Cir. 1984).
178. Id. at 750 (Wisdom, J., concurring).
179. 752 F.2d at 1035 (Wisdom, J., dissenting). Judges Rubin, Tate, Politz, and Johnson joined Judge Wisdom's dissent.
180. Id. at 1053 (Rubin, J., dissenting).
181. The source of the rule, at least as to the case before the court, was the seminal case of Robins Dry Dock and Repair Co. v. Flint, 275 U.S. 303, 48 S. Ct. 134 (1927), in which a charterer of a steamship was denied recovery for losses that it suffered as a
Judge Wisdom argued that the economic harm rule was unfair and contrary to modern tort principles. He would have replaced the majority's rule with what would in essence have been a case-by-case approach asking whether the plaintiff suffered particular, foreseeable, economic loss proximately caused by the defendant's negligence. 182

Interestingly, Judge Higginbotham expressly noted that the claims of the commercial fishermen were not before the court and nothing he said would preclude another panel of the court from considering the merits of their claims. 183 He posited that commercial fishermen might make a "substantial argument" that they "possess a proprietary interest in fish in waters they normally harvest..." 184 Apparently a proprietary interest would supply the commercial fishermen with a meaningful claim that they had suffered property damage and thus were outside the scope of the economic harm rule. The distinction between the commercial fishermen and others whom the court would not allow to recover would be logically consistent although it might do some damage to traditional American conceptions of property law. 185

In a concurrence, Judge Williams openly questioned whether the commercial fishermen had a proprietary interest in the fish. But he did not question that they should be allowed to recover. He stated: "I would prefer that the rule be stated with enough additional breadth to allow recovery for those who are damaged because they make their living out of a 'resource' of the water." 186 Likewise, Judge Garwood concurred. Although he generally applauded the economic harm rule, result of a dry dock's negligence. The dry dock's negligence delayed the charterer's access to the vessel and the charterer sued for that loss of use. In denying recovery, Justice Holmes stated:

[No authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with that other unknown to the doer of the wrong.

Id. at 309, 48 S. Ct. at 135. Higginbotham read this language to mean that in the absence of a physical injury to the person or property of the plaintiff there can be no recovery. The dissenters contended that Robins should only bar a plaintiff's recovery where the plaintiff's only attachment to the incident out of which the damage arose was a contract with some third party. 752 F.2d at 1037-39. If the plaintiff was foreseeable and suffered particular economic loss proximately caused by the defendant, then the plaintiff should at least have its day in court.

182. 752 F.2d at 1035 (Wisdom, J., dissenting).
183. Id. at 1027 n.10 ("That is, today's decision does not foreclose free consideration by a court panel of the claims of commercial fishermen.").
184. Id.
186. M/V Testbank, 752 F.2d at 1034 (Williams, J., concurring).
he patted the majority on the back for leaving the claims of the commercial fishermen to one side and expressed his understanding that there would be "possible rare exceptions" to the economic harm rule. Thus, the reader is left with the impression that although the Fifth Circuit followed the economic harm rule, it did so with a built-in exception for the commercial fishermen.

c. Analysis in Light of the Augmented Awards Proposal

i. The Basis of the Decision

Returning to Judge Higginbotham's opinion, it is imperative for purposes of analyzing the potential for augmented awards, to understand the court's articulated rationale for following the economic harm rule. Essentially, Judge Higginbotham pointed to institutional or administrative concerns. The appeal of the economic harm rule is that it provides a "bright line" rule. Such a rule is easy to apply and gives the appearance, at least, of a reasoned decision on the court's part. Moreover, it arguably provides potential tortfeasors with some pre-event guidance as to the kinds of harm for which they will be liable. To Judge Higginbotham, decisions made in the absence of the "preexisting normative guidance" that the economic harm rule provides are "less judicial and more the product of a managerial, legislative or negotiated function." In expressly rejecting the dissent's foreseeability limitation on recovery, the court noted the great number of foreseeable economic injuries that might, and did in fact, occur as a result of the disaster in the channel. The court lamented its inability to draw lines between those who should and should not recover based upon "a determinable rule of law." Expanding and perhaps extrapolating upon Higginboth-

187. Id. at 1035 (Garwood, J., concurring).
188. Id. at 1028.
189. Id.
190. Id.
191. Id. On the general subject of line drawing and floods of litigation, what Professor Stone said in another context is relevant here. He wrote:

This cry has been raised against every innovation in tort litigation. It is an insult to the whole judicial process dedicated as it is to the winnowing of true claims from false ones. To refuse to entertain valid claims because others might be fraudulently brought is an argument of expediency rather than of justice.


This theme is echoed in Judge Rubin's dissent where he noted that the constitutional (and legislative) grant of authority to the federal courts to hear cases and controversies also requires federal courts to hear cases within its jurisdiction even though a legislative problem to the particular dispute before the court might be preferable. 752 F.2d at 1053 (Rubin, J., dissenting).
am's argument, one might conclude it was not that people were not injured that prevented the court from acting. Rather, it was a concern for the court's ability to decide, in the traditional fashion, all the potential cases that a contrary decision would engender. Judge Gee repeated these same concerns in his concurrence arguing that adjudication is geared to decide who owned Blackacre or who ran a stop sign, it is not tailored to decide mass tort cases.

Although not expressly articulated, it seems reasonable to conclude that a correlative basis of the court's decision might be the high administrative costs a contrary decision would have engendered. These costs would include all the private and social litigation costs of the trials resulting if the court had not dismissed most of the plaintiffs' claims. Writing about an analogous Ninth Circuit case, Professor Rizzo has postulated that the reason the court only allowed commercial fishermen to recover, as opposed to "people who suffered inconvenience in not being able to sail out in their boats," is that "[t]he litigation costs would be too high" in the latter case.

iii. The Deterrence Implications of the Decision and the Augmented Award

Turning again to the M/V Testbank case, the majority decision runs the risk of forcing such defendants and others similarly situated to take into account only potential physical injury, property damage, and economic loss suffered by commercial fishermen and those who suffer

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192. At the bottom of the court's decision is apparently a real concern for the role of the courts in our society and their ability to keep the respect of the citizenry if they engage in what scholars might refer to as non-judicial decision making. This concern manifests itself in Judge Higginbotham's citation, in a footnote, of Professor Fuller's classic article, Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353 (1978). 752 F.2d at 1029 n.12.

193. M/V Testbank, 752 F.2d at 1032-33 (Gee, J., concurring). In light of the subject of this paper he was the only judge writing to bring up the subject of punitive damages. In the context of mass tort cases, he lamented that early plaintiffs, recovering compensatory and punitive damages, might exhaust the defendant's coffers before later plaintiffs ever recover compensatory damages. Id. at 1033.

194. Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974).


196. Id. at 299. The general rule that Professor Rizzo draws is that courts do not allow economic losses to be recovered in tort where it can be expected that the plaintiff could have reallocated the loss contractually. That is where the plaintiff could have entered into an indemnity contract to protect its rights the court will not allow the plaintiff to recover economic losses. In cases where there has been damage to some common property right that no one owns in the traditional sense of the word, an indemnity contract is impossible and the courts allow recovery "so long as the expected litigation costs are not too high." Id. at 298.
physical injury and property damage when deciding what cargoes to carry, what prices to charge for carriage,\textsuperscript{197} how to secure their dangerous cargoes, and how much to spend on avoiding spills like the one that occurred. Thus, even though many not protected by the economic harm rule will be affected by an accident, it is likely that carriers will not efficiently invest in safety.\textsuperscript{198} One way to alleviate the problem would be to allow the commercial fishermen (or anyone suffering personal injury or property damage) to bring a claim for an augmented award. The augmented award would serve as a rough approximation of the estimated value of those claims that the court has determined are too expensive to litigate on a case-by-case basis. In this way the tort system would continue to serve a deterrence function in cases of this sort, but would not incur the allegedly excessive costs inherent in the case-by-case adjudication of compensation claims.

\section*{iii. Overdeterrence Versus Expensive Deterrence}

It bears emphasizing that at the heart of the decision in \textit{M/V Testbank} may also be the concern that allowing recovery by everyone who was injured in the slightest by the collision would lead to overdeterrence.\textsuperscript{199} The word—overdeterrence—must be carefully scrutinized. If overdeterrence means that the cost of prevention is greater than the \textit{ex ante} cost of accidents, so that liability would cause an overinvestment in safety, then a decision finding defendants liable is incorrect by definition under the Learned Hand negligence formula.\textsuperscript{200} Pursuant to that formula, the actor must invest in safety only up to the point at which the marginal cost of the additional investment equals the marginal benefits derived therefrom. Certainly if liability for compensatory damages would cause an inefficient over-investment in safety, an augmented award would serve no purpose at all. Arguably, it would make matters worse. Augmented awards would be available only where needed to force the defendant to take into account those costs that we would want a profit-maximizing actor to consider as costs of its activity when deciding how much to invest in safety.\textsuperscript{201} Such a case would arise where the burden

\begin{footnotesize}
\begin{enumerate}
\item To the extent that regulatory bodies do not set the acceptable rate.
\item See supra text accompanying notes 43-70.
\item For a discussion of proximate cause doctrine's classic concern with avoiding overdeterrence, see L. Green, Rationale of Proximate Cause (1927); Prosser and Keeton, supra note 19, § 42.
\item See supra text accompanying notes 61-70.
\item In this vein, there are several points made in Judge Higginbotham's opinion and Judge Gee's concurrence in \textit{M/V Testbank} that merit attention. Judge Gee expressly noted that one of the problems with mass tort cases, as well apparently, although not expressly, with all institutional defendants, is that the cumulative effect of repeated damages awards may
\end{enumerate}
\end{footnotesize}
of avoidance at the margin was less than the safety gained, but for some, where other reasons, such as high administrative costs, liability would be too expensive (inefficient). Given the incredibly high cost of tort litigation in America, one may intuitively conclude that such cases are not uncommon.

**iv. First Party Insurance: A Lesson in Not Confusing Compensation and Deterrence**

In the same vein, a point made by Judge Higginbotham stands out. In discussing the reasons why courts should adhere to the economic harm rule, he stated that first party insurance is a more efficient way to compensate those who cannot recover under the economic harm rule. He points out that the injured parties are in a better position to insure against potential losses they may suffer. This is no doubt because victims are in a better position to value their potential losses and thus will not overinsure. Moreover, as Judge Higginbotham noted, first party insurance is cheaper to administer than third party insurance. Accepting the judge's statements, they merely reflect a preference for first party

be irrational. 752 F.2d at 1033 (Gee, J., concurring). Apparently, irrationality contemplates that the defendant might be forced out of business. The most basic response is that if the actor's business is one that is so unsafe that it cannot profitably exist and bear its accident costs it ought to be out of business unless it provides some benefit that cannot adequately be recaptured in its price, in which case a nonmarket response may be appropriate.

Judge Higginbotham's points are a tad more substantial. In addition to the role of the court, to which the text refers, he also posited that although damage awards might have some deterrent effect, there comes a time where imposing greater accident costs can lose its meaning as "the incentive curve flattens." M/V Testbank, 752 F.2d at 1029. While it seems arguable at least that once the accident costs that society forces a defendant to bear exceed the costs of prevention further liability may not have a further deterrent effect, it is not so clear to me at which point that occurs. For instance, how do we know the point at which further liability will not efficiently induce further care? Likewise, how can we be so sure in every economic loss case that, if we do not take account of at least some of the losses that the rule would not make the defendant pay, B would not be greater than P times L? Thus, efficient behavior under the economic harm rule may actually be inefficient behavior in light of all the costs involved. As Judge Wisdom noted in his dissent: "Absent hard data, I would rather err on the side of receiving little additional benefit from imposing additional quanta of liability than err by adhering to Robins' inequitable rule and bar victims' recovery on the mistaken belief that a 'marginal incentive curve' was flat, or nearly so." M/V Testbank, 752 F.2d at 1052 (Wisdom, J., dissenting).

202. M/V Testbank, 752 F.2d at 1029.

203. Cf. id. at 1052 (Wisdom, J., dissenting) (questioning whether the unsuccessful plaintiffs are all in a better position than the defendants to insure against the losses that they suffered).

204. M/V Testbank, 752 F.2d at 1029; see also Priest, supra note 35, at 1548.

205. In the interests of disclosure, I am personally drawn to Judge Wisdom's and Judge Rubin's views of the case. Refusing to decide because it would be better if the legislature acted seems to me to be an abdication of decision making responsibility. It is one thing if
insurance as a compensatory mechanism in accidents of this sort. They do not seem to have any relevance to the deterrence objectives of tort law. Just because first party insurance is a better device for compensating certain plaintiffs does not mean that society wants to license actors to ignore the damages their conduct causes in deciding how much to invest in safety. Thus, augmented awards might be an apt way to force persons similarly situated to the defendants to take those costs into account before acting.206

Here, though, a potential problem arises. As noted, one of the reasons first party insurance is cheaper, hence more efficient as a compensation vehicle, is that the insured and insurer can more accurately predict the loss in the first party context than in the third party context, where the identity and characteristics of the ultimate beneficiary (the tort victim) may well be unknown at the time the named insured purchases the policy. If this is the case, how does the court determine the amount of the augmented award, without incurring all the costs of litigating the claims of all those injured persons who are not before the court? Actually, if that calculus must take place, the augmented award would arguably be more expensive to litigate, as the actual injured party would not be before the court. It is argued later207 that this problem, as well as others with the administration of augmented awards litigation, is significant, but not unsolvable.208

the legislature has taken a body of cases away from the courts, but it is another if the courts take those cases away themselves. In fact, decision may be the best way to get the legislature to act given the likelihood that defendants are better organized and more likely to petition for redress of a decision contrary to their interests than disappointed victims.

206. The same may be said of their insurers.

207. See infra text accompanying notes 299-320.

208. The Kinsman cases provide another example of the analysis employed herein with reference to M/V Testbank and augmented awards. In Petition of Kinsman Transit Co., 338 F.2d 708 (2d Cir. 1964), cert. denied, 380 U.S. 944, 85 S. Ct. 1026 (1965) [hereinafter Kinsman I], the employees of the owner of a ship negligently moored it to a dock about three miles above a draw bridge operated by the City of Buffalo. The ship was improperly attached to an improperly anchored deadman maintained by the dock owner. During the course of the night, ice and debris built up between the ship and the dock ultimately causing the deadman to pull out and the ship to float down river. On its uncharted course, the ship collided with another ship, the Tewksbury, which had been properly moored, but the force of the collision knocked the Tewksbury loose. The two ships then commenced an unchoreographed dance down the river. Despite efforts to get the City to raise the bridge, it negligently failed to do so because one crew was late getting to work. The two ships crashed into the bridge; the bridge collapsed; the ships grounded to a halt and ice began to build up behind the wreckage. Ultimately, the river flooded and damaged adjoining property as far upstream as the place where the first ship had originally been moored. In Kinsman I, about twenty such landowners sued the first ship owner, the owner of the dock with the faulty deadman, and the City of Buffalo. Various defendants claimed that they were not liable for damages to the landowners because, in proximate cause lingo, the damages were too remote. The Second Circuit Court
d. Summary

To recap, one could resolve the problems the M/V Testbank decision presents in regards to efficiency and deterrence by allowing the commercial fishermen whose claims the court did not dismiss to file claims for augmented awards. The claims would not be for compensation but of Appeals affirmed the trial court’s decision allowing the plaintiffs to recover. The court noted that the damage was of the same type that might be expected to arise from the defendants' negligence, albeit somewhat greater in degree, and that the plaintiffs were all foreseeable. For years, Judge Henry Friendly's opinion for the court in Kinsman I was a standard in certain first year torts books. See W. Prosser, J. Wade and V. Schwartz, Cases and Materials on Torts 326 (7th ed. 1982); C. Gregory and H. Kalven, Cases and Materials on Torts 347 (1969); J. Henderson, Jr. and R. Pearson, The Torts Process 461 (1975). In a second suit the owners of some wheat stored in Buffalo brought suit against the same defendants for extra transportation costs that they incurred in moving their wheat and for the price of replacement wheat that they had to buy as a result of the accident. Petition of Kinsman Transit Co., 388 F.2d 821 (2d Cir. 1968) [hereinafter Kinsman II]. This time the Second Circuit, Judge Kauffman writing, denied recovery; the damages that the wheat owners suffered were just too remote. There is no doubt that the wheat owners suffered the damages and there is little reason not to believe that there were others in substantially the same position who were also injured but never brought suit. Interestingly, the court expressly refused to rely on the Robins rule and decided the case under traditional proximate cause analysis.

For present purposes, there are two possible explanations for the Second Circuit’s decision to deny recovery. First, the court might simply have decided that, for reasons not apparent in its opinion, allowing the plaintiff to recover damages would have been unfair somehow. If this is the case, we can certainly not fault the court; however, if this was the basis for decision, it was based on grounds other than efficiency for efficiency would counsel that we desire the defendant and its insurance rate setter to take all the damages that its accidents cause into account. Fairness per se is more of a moral factor, a distributional rather than an efficiency consideration.

A second possible explanation of the court’s decision in Kinsman II is that although efficiency considerations alone might have favored the plaintiff's recovering its damages, the administrative costs of having the plaintiff and others like it bring suit would have been so phenomenal that they would have offset any efficiency gain arising from allowing the plaintiff to recover. These administrative costs are not merely those involved in litigating meritorious claims, although these alone would be exorbitant. In addition, one must calculate the costs of litigating spurious claims, that is those brought by the overly sensitive and those brought by the less than forthright plaintiff hoping to profit from the hardship of another. It is precisely this latter concern that kept the doors of the courthouse locked for so many years to plaintiffs alleging that they suffered from negligently inflicted emotional distress.

To the extent that the Kinsman II court was influenced by the administrative costs inherent in litigating claims like the Kinsman II plaintiff's, an award of augmented damages to the Kinsman I plaintiffs and no recovery to the Kinsman II plaintiffs would have meant a net efficiency gain because the administrative costs of litigating claims like those at issue in Kinsman II would have been eliminated as a cost factor. Thus, an augmented damages award to the Kinsman I plaintiffs could have resulted in increased efficiency at less cost. Obviously, the cost of litigating or otherwise deciding the entitlement to and the amount of the augmented damages claim in Kinsman I would have to be taken account of, but, that cost would probably be less than the administrative costs of all the trials that would have followed a different result in Kinsman II and certainly would have been less with proper judicial (or some other) supervision of the process.
would serve a purely deterrent function. The augmented awards claims would be designed to force the defendants to take account of injuries that their conduct caused, but for which compensatory damages are not recoverable under the economic harm rule. Such an augmented award system would result in a net efficiency gain as the award would have a positive deterrent effect without the accompanying administrative costs of individual litigation. 209

C. Beyond Proximate Cause and the Economic Harm Rule

Barring realistic and anticipated damages by a blanket rule against recovery of "mere" economic loss in tort does not force damage-causing actors to take all their activity costs into account. Augmented damages in such cases would do so. Of course if the rule-barring economic loss is unjustified, as Judge Wisdom contends, courts should change it and directly compensate the injured. To the extent that administrative costs or other concerns justify denying direct compensation, however, augmented damages can serve a positive deterrence function without imposing an undue administrative cost. Note that for present purposes the undercompensatory nature 210 of tort damages is irrelevant from a moral perspective. It is important only to the extent that undercompensatory damages cause underdeterrence. 211 For instance, studies have indicated that damage awards in cases involving very serious injuries are too low. Likewise, in personal injury cases there may well be ripple effects beyond the person physically injured.

1. Wrongful Death and Loss of Consortium Cases

The right of certain named beneficiaries to bring wrongful death actions or actions for loss of consortium where the victim survives are

209. The arguments articulated herein in reference to the economic harm rule are equally applicable in jurisdictions that do not follow the economic harm rule. See, e.g., People Express Airlines Inc. v. Consolidated Rail Corp., 100 N.J. 246, 495 A.2d 107 (1985). In such a jurisdiction, all injured plaintiffs will still not recover as some of their claims will no doubt still be too remote in a proximate cause sense. This was the express holding of Kinsman II. See supra note 208. Where the remoteness is based upon the expense of litigating claims and separating real from fraudulent claims, augmented awards may once again result in an overall efficiency gain. To the extent that decisions denying recovery of economic losses on grounds that they are too remote are influenced by a concern with litigation costs and fraudulent claims, augmented damages to personal injury plaintiffs and to economic loss plaintiffs whose claims are not too remote would result in a net efficiency gain. Plaintiffs who are currently allowed to recover would, in essence, have a proxy for those who cannot.


211. See supra text accompanying notes 43-70.
responses to these ripple effects. They provide for damage awards to people who are injured as a result of another’s actual personal injury. But these rights to sue are limited responses. A common limitation is that only certain classes of persons are allowed to sue. Wrongful death and consortium statutes may allow spouses and children to sue but not the victim’s parents, unless there is no spouse or children. Nevertheless parents with married children and grandchildren suffer real losses when a child dies. If rules limiting the class of persons who can sue for wrongful death and loss of consortium are based on a concern for avoiding overdeterrence they are arguably justified. But if overdeterrence is not their primary justification, then augmented awards may serve a positive deterrent function. For example, if decision makers are motivated to limit the class of potential plaintiffs in such cases by a concern for the administrative expenses associated with litigating certain relative’s claims, then an augmented award which forces the defendant to consider the costs of injuries for which it might not otherwise be liable might improve the deterrent effect of tort law.

2. Employment and Other Relational Contracts

Similarly, extrafamilial relationships are displaced when a member of the community is killed or injured. Friends and neighbors are hurt, albeit in an intangible manner. Whether their interests merit protection is one question; it is another to ask whether we want actors to at least consider those injuries as costs when deciding how much to invest in safety.

At the same time, employers are adversely affected when an employee suffers an injury that prevents her return to work or that limits the range of functions she can perform. The employer must find someone to replace the injured worker or at least to perform the tasks she is no longer able to undertake. Learning curves may mean that overall production will decline. This of course depends on the nature and size

212. S. Speiser, supra note 128, at Appendix A.
213. In most cases the loss will be an emotional one; but, in many cases there may be a loss of support and services as well.
214. Moreover, there is real concern that awards in wrongful death cases are drastically undercompensatory. See, e.g., Pierce, supra note 50, at 1293. But to the extent that such awards are merely too low, the answer is to deal with this problem directly rather than through the augmented damages vehicle.
215. See supra text accompanying notes 155-68.
of the business, but the more frequent debilitating accidents are, the more likely they will cause losses in overall production.

These examples of injuries that accidents cause to the relatives, friends, and employers of accident victims represent damage to what Professor Macneil has called relational contracts, long-term complex contractual or quasi-contractual relationships. Tort law does little to protect these relationships. If overt protection is undesirable for some reason, such as the administrative expense involved in direct compensation, then augmented damages may force actors to consider such costs.

3. Property Damage Cases

Similar issues arise in property damage cases. Generally courts measure damages in such cases by either the cost to repair, or the cost to replace the thing damaged or destroyed whichever is less. The replacement cost is usually equal to the fair market value of the damaged thing. In some ways, the property damage tort plaintiff is in a position analogous to a disappointed, non-breaching buyer who seeks specific performance but must settle for damages because specific performance is not an available remedy under current rules. Commentators writing about specific performance have questioned whether contract damage awards are ever really adequate compensation, postulating that, where possible, specific performance should be the preferred remedy in contract cases because damages do not adequately take account of all the costs.


218. Many may balk at the notion of ostensibly "extending" liability in death cases for injuries suffered by friends, neighbors, and employers. But, as noted, the sole purpose of the augmented award would be to deter the defendant and others like him. Not coincidentally, courts and legislatures have long used accidental death as an occasion to serve systematic ends other than compensation. Most basically, the survival action is not compensatory by definition. It awards damages that the decedent can no longer be compensated; he cannot be made whole. Such awards, then, must serve some function other than compensation-punishment, vindication, or deterrence.


220. Where the property is "used" and there is no reliable market in which to measure fair market value, the court will use the value of a "new" similar piece of property and depreciate it. See D. Dobbs, supra note 26, at 379.

221. See, e.g., id. at 796.

that a breach causes. Professor Schwartz has argued that finding cover often requires an investment of time and energy that damages do not protect. He notes that the frustration and anger that the breach and the search for cover entail are not recoverable. Similarly, in any case where a defendant tortiously destroys the plaintiff's property, tort damages do not adequately deal with the incidental damages the plaintiff will incur covering or trying to cover. Likewise, if repair is functionally and economically feasible, the victim must find a repair person. The more complex the damaged property, the more likely it is that repairing will be time consuming, inefficient and costly. Ironically, the greater the disturbance of plaintiff's normal routine the more likely it is that 100% compensatory damages will be unavailable either because they are "speculative" or "remote." An award, albeit perhaps an estimate, of these costs as augmented damages would force actors to consider more frequently such costs when deciding what and how much to produce and how much to invest in safety.

4. Augmented Awards as a Response to the "Does Torts Deter" Question

Yet another reason to award augmented damages in certain cases is found in the ongoing debate concerning the degree to which tort law operates as a deterrent at all. Many scholars contend that actors do not respond to the threat of damage awards. They react, if at all, to threats to their own safety, administrative regulation, and social pressure. These anti-deterrence arguments seem most persuasive in reference to the sporadic tortfeasor, the speeding driver, or the homeowner who

223. Dawson, Specific Performance in France and Germany, 57 Mich. L. Rev. 495 (1959); "[A]n obligee has a right to specific performance, rather than a mere right to appeal to the discretion of the court for this remedy." Comment (a) to La. Civ. Code art. 1986 (Rev. 1984); Right of the Obligee (to Specific Performance); 2 S. Litvinoff, Obligations 301-02 in 7 Louisiana Civil Law Treatise (1975).
224. The word is used here in the same way as in U.C.C. § 2-715(1) (1989).
226. Id. at 151.
227. Id. at 139.
228. See supra text accompanying notes 43-70. Interestingly, the U.C.C. contains a provision that, in the absence of a liquidated damages clause, awards a frustrated seller 20% of the value of the buyer's anticipated total performance or $500, whichever is less. This is so regardless of whether seller proves any entitlement to damages or not. It is by its nature and its placement a sort of legislative liquidated damages clause. U.C.C. § 2-718(2)(b) (1989). It is an apparent recognition of the fact that sellers in such positions incur expenses that because of their imprecision and difficulty of proof would probably not be recoverable otherwise.
negligently fails to shovel his walk. But even some of the harshest critics of personal injury law admit that tort judgments may serve some deterrent function when the defendant or potential defendant is a regular actor in the tort arena such as the manufacturer of a potentially dangerous product.231 A large enterprise is more likely to be aware of tort judgments and is more likely to engage in safety planning based upon all its knowledge, including its knowledge about potential judgments.232 If tort judgments are most likely to deter large enterprises engaged in dangerous activities, efficiency would seem to dictate that tort law concentrate its deterrent effect on such actors.233 But, it may not always be in the interests of plaintiffs' attorneys to pursue claims against these defendants.234 These claims may take longer to litigate and require a great investment in time and money. Consequently, the plaintiffs' lawyer's actual hourly recovery may be less in such suits than in a traditional garden variety tort suit.235 Augmented awards here might serve not so much as a proxy for otherwise unrecoverable damages but as an inducement to plaintiffs' attorneys to take such cases.236 In that way, the tort system would encourage lawyers to bring cases that are likely to have a greater deterrent effect and possibly make civil deterrence more efficient.

5. What About Defendants Paying Too Much?

Of course defendants might object that they are paying more than the damage they caused to the plaintiff, if in fact they are held liable, but the same is true of punitive awards now. Defendants are also paying more than the damages they cause in cases where the plaintiff is allowed to recover his or her attorneys' fees under antitrust,237 civil rights,238 environmental,239 and other statutes, such as RICO.240 These are areas where some public policy dictates relaxing the American rule providing

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231. Id. at 13.
232. See the discussion of the Grimshaw case, infra text accompanying notes 300-08.
234. Id. at 903-05.
235. Id. at 904.
236. See generally id. at 905.
for the non-recoverability of attorneys' fees to promote private law enforcement. Augmented awards against defendants who are likely to be deterred by tort judgments might have a similar salutary effect on private "regulation" of dangerous behavior. They would force the defendant to take into account more of the costs its activities impose upon society. Augmented awards would have a net positive efficiency effect in any case in which concerns unrelated to optimal deterrence now preclude no recovery. Perhaps the most clearly appropriate type cases are those in which we now refuse recovery, not because no one has been injured, but because of administrative considerations. By awarding augmented damages to those currently allowed to sue for various types of damages arising out of the same conduct that injures others not allowed to sue, the law could avoid the administrative cost problems of direct compensation while increasing efficiency. In that sense, augmented damages would realistically serve to deter inefficient behavior.

6. An Efficient Windfall is Still Efficient

Stepping back for a moment, one should note a criticism about punitive damages that might be levelled at augmented awards as well. It is sometimes said that punitives are offensive because they constitute a windfall to the plaintiff. Punitives are a windfall because they exceed the plaintiff's compensatory damages. Likewise, to the extent augmented awards exceeded compensatory damages, they would also be a windfall to the successful plaintiff, assuming plaintiff ended up recovering all of them. However, from the pure perspective of deterrence, the windfall concept is irrelevant. For an award of damages to operate as a deterrent compensation need not be involved. This is part of the lesson learned from the long life and continued vitality despite attack of the collateral source rule, as well as the existence and application of restitution as the measure of damages in certain tort suits. The mere fact that an award is not compensatory does not mean it cannot serve other ends. That an award that efficiently deters is a "windfall" does not make it inefficient.

V. AUGMENTED DAMAGES AND THE SUBSTANTIVE LAW OF PUNITIVE DAMAGES

Turning from the theoretical to the real world of tort suits, how does the above articulated justification for augmented damages fit into

241. See supra text accompanying notes 43-70.
242. The economic harm rule seems to provide an apt example of such a rule. See supra text accompanying notes 169-209.
244. This need not be so. See Section VI infra.
245. See supra-text accompanying notes 67-70.
246. See supra text accompanying notes 87-91.
the American tort system? That question will be addressed in the context of the current substantive law of punitive damages. This section will analyze the appropriateness of current punitive damages rules to augmented damages awards. Despite the fact that augmented awards focus on deterrence, not punishment, comparisons to punitive damages rules are inevitable.

A. The Insurability of Augmented Awards

To the extent that augmented awards force defendants to take account of costs that the law, for one reason or another, has not historically forced actors to take into account, augmented awards may lead to more efficient deterrence through tort. Just as importantly, as defendants and their insurers are forced to pay augmented damages awards, the insurance rates of those potential defendants exposed to augmented damage awards will increase. Insurers who know that their insureds are exposed to greater than compensatory damage awards will increase rates to reflect these increased damages. Thus, the insurance premium will become a more accurate proxy for ex ante accident costs.

But would augmented awards be insurable? There is already an ongoing debate concerning the insurability of punitives.

Most courts that have considered the question of whether punitive damages are insurable have decided they are, but a substantial body of authority holds they are not. In 1962, Judge Wisdom wrote an opinion in a diversity case, Northwestern National Casualty Co. v.

247. Here I have assumed that insurers will in fact have to pay augmented damages awards. This issue is discussed in further detail infra. See infra text accompanying notes 249-62.

248. This assumes that insurance rates are risk rated and that the greater the risk that the insured presents the higher his or her rate would be. To the extent that slight differences in risk may not currently justify the administrative expense of different premiums for different insureds, augmented awards may make underwriter fine tuning more important, and easier, as the insurer’s exposure may vary dramatically depending upon whether or not the insured might be exposed to an augmented award.


250. See sources cited in Prosser and Keeton, supra note 19, § 2, at 13 n.63.
McNulty,\textsuperscript{251} in which the court decided it would be against the public policies of Florida and Virginia to allow insurance against punitive damages. Judge Wisdom reasoned that letting a defendant "pass on" punishment to a third person would be anomalous; it would render the punishment meaningless.\textsuperscript{252} The same argument applies to the deterrence rationale of augmented awards. If punitives are meant to deter the defendant, then the defendant should arguably have to pay them.\textsuperscript{253} However, in the context of augmented awards—given the relationship between insurance and the deterrence rationale for tort law—insuring against augmented awards is logical.

Augmented awards are not punishment; thus, vicarious punishment is not an issue. As for deterrence, if insurance rates are to operate as proxies for ex ante accident costs, then it is crucial insurers base those rates on the actual accident costs that the defendant's actions impose on society. To the extent that augmented awards make total damage awards a more accurate measure of such accident costs, insurers should include them in their premium calculus.

1. Insurability of Augmented Awards and the Breakdown of Insurance Pools

There is yet another reason for allowing insurance against punitive damages in the augmented award context: insurance operates most effectively when classes of insureds are similarly situated.\textsuperscript{254} Insurance works best when insureds are pooled with other persons who present substantially similar risks both in terms of frequency and severity. The more similar the insureds are, the more accurately the premiums charged will represent the ex ante value of the risks that each member of the group presents. Naturally, if rates accurately represent individual riskiness, it is less likely that large numbers of the insured group will opt out of coverage based upon their belief that the premium is too high.\textsuperscript{255}

\textsuperscript{251} 307 F.2d 432 (5th Cir. 1962).
\textsuperscript{252} "Considering the theory of punitive damages as punitory . . . it appears . . . that there are . . . strong public policy reasons for not allowing socially irresponsible automobile drivers to escape . . . ." 307 F.2d at 441. "[T]he delinquent driver must not be allowed to receive a windfall at the expense of the purchasers of insurance, transferring his responsibility for punitive damages to the very people—the driving public—to whom he is a menace." Id. at 442.
\textsuperscript{253} Ellis, supra note 110, at 73-75.
\textsuperscript{254} See Priest, supra note 35, at 1539.
\textsuperscript{255} Priest, supra note 35, at 1541. Of course, there will always be people who leave insurance pools because they inaccurately believe that they are being charged too much. That is, there will always be people who feel that they are safer than they actually are. If identification of such people, or groups of people, were possible, mandatory insurance coverage would be one solution. In fact, one might view financial responsibility laws requiring automobile liability insurance, or sufficient assets to satisfy judgments up to a certain amount as a response to this same problem.
Professor Priest has contended that one of the primary reasons for the alleged insurance crisis of the late '80's was the breakdown of insurance pools. He postulated that a substantial number of insureds withdrew from insurance pools because they believed their premiums were too high in light of the risks they presented. Augmented awards might prevent some of this unraveling. Augmented damages against certain defined groups of defendants engaging in certain defined activities might allow insurance companies to more finely tune insurance pools. People exposed to augmented awards will be actuarially grouped with others who are potentially subject to such augmented awards. This may have a positive effect on the insurer’s ability to deal with pool breakdown and to charge various insureds accurate premiums.

2. Different Rules for Different People?

Alternatively, if it is true that most insurance rates are not based upon the actual risks that the insured presents but on broader categorical characteristics, such as age, because administrative concerns predominate in the rate setting determination, then perhaps insurance premiums play only a small role in deterring unreasonable conduct and encouraging efficient investments in safety. In that case, the argument that insurance against augmented awards is against public policy is more persuasive. Intuitively one might opine that some types of insurance premiums play little or no deterrent role; automobile liability insurance seems an apt example. Alternatively, one might justifiably wonder whether insureds whose premiums are based on the actual risks they present are not in fact influenced by the premiums they pay. If certain groups or cat-
egories of insureds' behavior is influenced by their insurance premiums, then it would make sense from the perspective of optimal deterrence to allow them to obtain coverage against augmented awards.

As an aside, if people make decisions based on clusters of factors, including insurance premiums, tort law may actually have a greater deterrent effect than we commonly believe. Thus, even an increased automobile insurance premium may have a real deterrent effect and the argument for insurability is thereby strengthened.

B. The Recoverability of Augmented Awards Under the Hornbook Rules of Punitive Damages

Augmented damage awards have implications for many of the other "hornbook" punitive damages rules. Specifically, as noted above, many of the rules governing the recovery of punitive damages are tailored to the punishment rationale and have little or no relevance to the deterrence rationale underlying the theory of augmented awards set forth herein. These rules have no place in cases where courts might award augmented damages not to punish a defendant but to improve the efficient operation of the tort system as a deterrent. Focusing on the deterrence justification for augmented awards requires analysis of the applicability of many of these hoary "rules" to augmented awards.

1. Defendant's Mental State

Universally, in order to recover punitive damages, the plaintiff must establish that the defendant's conduct was particularly egregious-intentional, willful, wanton, malicious, reckless, outrageous or at least grossly negligent. Synthesizing these factors, one might conclude that the merely careless defendant is not subject to punitive damages, but that the defendant whose actions are "evil," or appear to the outsider to be evil (or at least extremely stupid), will be subject to punitive liability. This focus on the evil defendant is consistent with the punishment rationale for punitive damages; however, it is not consistent with the deterrence justification for augmented awards. Augmented awards are not intended to punish but to deter, to encourage actors to consider

262. This is certainly not to suggest that such coverage should be mandatory. It should, it seems, be a simple question of contract.
263. J. Ghiardi and J. Kircher, supra note 110, §§ 5.01-5.04; D. Dobbs, supra note 26, § 3.9, at 205; Prosser and Keeton, supra note 19, § 34, at 213-14.
264. See sources cited supra note 263.
265. Id.
266. Id.
267. Id.
268. Id.
269. Id.
all the costs of their activities. They are designed to deal with cases where current legal rules cannot be easily accommodated to directly compensate those who are injured, most often because of the high administrative costs associated with a "direct" fix. Moreover, to the extent that the current standards defining one's entitlement to punitives deter only the very stupid, they ignore the fact that suboptimal damage awards may underdeter both the careless and careful. In short, in augmented damages cases the court should not focus on the reprehensibility of the defendant's conduct, but on whether compensatory damages are too low. Are the compensatories awarded an insufficient deterrent to the defendant and others like him so that these actors will be encouraged to engage in efficient activities, at efficient levels, and in an efficiently safe manner? Courts, or whatever other decision making body society chooses, should be more concerned with the risk of underdeterrence than with blameworthiness in the augmented damages sphere. The decision maker should seek to identify those areas where compensatory damages are undercompensatory: where all injured persons do not sue, and where legal rules such as proximate cause and duty operate to underdeter. As far as efficiency is concerned, the defendant's state of mind or culpability is irrelevant.

2. Augmented Awards and the Factors Governing the Proper Amount of Punitive Damages

The factors judges and juries are instructed to analyze when determining the proper amount of punitive damages also tend to overem-
phasize the punishment function. Among other things, courts instruct juries to consider the proper amount needed to punish and deter the defendant, the relationship between punitive damages and the compensatory damages awarded, the character of the defendant’s acts, the harm with which the plaintiff was threatened, the wealth of the defendant, any other punitive damage awards or awards with which the defendant is threatened, and any criminal punishment for the same conduct which the defendant has suffered or may suffer. Some of these factors are relevant to augmented awards, others clearly are not. Thus, the amount needed to punish has no bearing on the proper amount needed to deter. The amount needed to deter is precisely what the augmented damage award would be geared to measure, although one may reasonably wonder about a jury’s ability to make that determination on a case-by-case basis. That issue will be discussed in more detail below.

a. The Reasonable Relationship Rule

Of the factors mentioned, the relationship between compensatory damages and punitive damages, or augmented awards, is clearly relevant. Augmented awards should ideally measure only the amount by which compensatory awards are less than the actual damages that the defendant’s conduct imposes upon society. Concomitantly, there is no deterrence justification for a rule requiring augmented awards not to exceed a certain percentage of compensatories, or, put differently, that requires augmented awards bear a reasonable relationship to compensatories. The relationship between compensatories and augmented awards would probably not be proportional across the board. What is relevant is the relationship between compensatories and the accident costs that an activity imposes. Augmented damages awards should equal accident cost minus compensatories.

Courts often say punitives must bear a reasonable relationship to the amount of compensatory damages awarded. Although this rule of reasonableness may give courts a rule of thumb to set aside awards

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274. Id.
275. Id.
276. Id.
277. Id.; Ellis, supra note 110, at 61.
278. See sources cited supra note 263.
279. Id.
280. See infra text accompanying note 309.
281. Ellis, supra note 110, at 58-60; D. Dobbs, supra note 26, § 3.9, at 210-11.
282. D. Dobbs, supra note 26, § 3.9, at 219-21. See also sources cited supra note 281.
they consider too high, it is theoretically suspect. The greater the divergence between the compensatory damages awarded and the actual costs the conduct imposes upon society, the greater the need for an award greatly exceeding the compensatory damages. The reasonable relationship rule frustrates the very purpose of the augmented award. Actually the same can and has been said about punitive damages. 

b. The Threatened Harm

The harm with which the plaintiff was threatened is only relevant in so far as it may reflect the actual total accident costs that flowed or might have flowed from the defendant’s behavior. To the extent that society decides to deter conduct that may impose accident costs, the potential costs of those accidents become relevant, and the harm with which plaintiff was threatened is an apt consideration.

c. Defendant’s Wealth

It is hornbook law that the jury or judge should consider the defendant’s wealth in deciding how much to award as punitive damages. The justification for this criteria is that the punisher has to know how much the punishment will hurt before it knows what is enough. The wealthy man, it is reasoned, will be hurt less by a $1 fine than a poor man. This is based on the diminishing value of the dollar: the more you have, the less one dollar is worth. Considering the defendant’s wealth has simply no articulable efficiency justification. Nevertheless, distributional concerns may demand that the decision-maker consider the wealth of the defendant. For instance, the court might decide that an augmented award would put the defendant out of business, resulting in too many jobs being lost. Or a court might decide such an award would be unjust where those directly responsible are no longer involved in defendant’s operation because the injury causing activity occurred a long time ago. Of course, one may justifiably wonder whether these are decisions better left to a more democratically constituted body, such

283. Id.
284. J. Ghiardi and J. Kircher, supra note 110, § 5.36; Ellis, supra note 110, at 61.
285. See Ellis, supra note 110, at 61.
as a legislature. A direct, collectively determined subsidy may be a better way of addressing certain problems than allowing a court to make a more insulated decision.

d. Other Awards or Punishment

The amount of any other punitive damages or augmented awards the defendant has to pay is still a relevant concern in the augmented damages context. Other awards are obviously relevant to the deterrence goal. The extent to which all damage awards adequately represent actual accident costs is a critical inquiry. Awards totaling more than total accident costs would tend to overdeter.

The amount of any criminal fines or punishment that authorities may impose is susceptible to a similar analysis. If criminal sanctions are viewed solely as punishment, then they have no bearing upon the efficiency rationale for augmented awards. But if society decides to employ the criminal law as an efficiency-oriented tool to foster optimal deterrence, criminal sanctions become as relevant to the accident cost/augmented award calculation as other punitive/augmented damages awards. Naturally, accurate optimal deterrence will require that the relevant decision makers accurately gauge the deterrent effect of the criminal sanctions imposed upon the defendant regardless of their purpose.

e. Recovery From an Estate

Another generally accepted “punitive damages” rule is that punitive damages are not recoverable from an estate. The reason typically given for this rule is that if the tortfeasor is dead it is impossible to punish or deter him. This justification for the general rule ignores the fact that punitive damages may have an effect on others like the decedent. Recent cases have recognized this fact and have held estates liable for punitive damages. Where appropriate to deter others, augmented awards ought to be recoverable from an estate. To the extent that augmented awards against estates will cause the insurance rates of those in insurance pools with those decedents to rise, they may be efficient. This increase would have a deterrent effect by forcing those in the pool to take account of more of the accident costs they impose upon society.

287. The articulated justification for the augmented award in this piece is its ability to force the defendant in a tort suit to more fully and accurately consider all of its accident costs when deciding what to do and how much to invest in safety.

288. Schwartz, supra note 4, at 143, questioning this rule. J. Ghiardi and J. Kircher, supra note 110, § 9.10.

289. See sources cited supra note 288. See also Demarest and Jones, supra note 130.

290. See supra text accompanying notes 247-62.
f. Vicarious Liability

Another frequently litigated and oft-written about topic is the vicarious liability of an employer for punitive damages. There are two generally available rules regarding when an employer is liable for punitive damages levied as a result of an employee's conduct. One provides that an employer is vicariously liable for punitive damages whenever it is vicariously liable for the tort of the employee. This has been called the respondeat superior rule. The other rule, which both the Restatement (Second) of Torts and the Restatement of Agency have adopted, is known as the complicity rule. It provides that a principal is vicariously liable for punitive damages only if it recklessly hired an incompetent employee, authorized reckless behavior, ratified the conduct at issue, or if the underlying tortious act was committed by a managerial agent. The complicity rule is based on the notion that it is unfair to punish one person for another's wrong. In the corporate context the complicity rule is grounded in the perceived inequity of punishing helpless shareholders for a subordinate employee's wrongful act. The complicity rule loses much of its persuasive appeal, however, when the focus is switched from punishment to deterrence and from punitives to augmented awards. If the justification for imposing augmented awards is to force an actor to take all its accident costs into account, then, an enterprise ought to be liable for augmented awards wherever the act that caused an accident is attributable to that enterprise. Thus, in an augmented

291. J. Ghiardi and J. Kircher, supra note 110, ch. 24; L. Schlueter and K. Redden, supra note 110, § 4.4(B)(2); D. Dobbs, supra note 26, § 3.9, at 214; Prosser and Keeton, supra note 19, § 2, at 13.
292. D. Dobbs, supra note 26, § 3.9, at 214. See also sources cited supra note 291.
293. Id.
294. Id.
295. Id.
297. D. Dobbs, supra note 26, § 3.9.
298. Id.
damages case respondeat superior is the only sensible rule to determine the vicarious liability for augmented awards.

3. Summary

The focus on augmented awards as a possible tool in deterring inefficiently unsafe conduct forces a reexamination of some of the routinely accepted general rules associated with punitive damages. Many of these rules are geared towards the punishment function of punitive damages and are anomalous if the law is trying to deter, without necessarily punishing. Instead, legal rules associated with augmented damages should attempt to isolate the types of cases where compensatory damages and substantive tort rules do not adequately deter. That is, the law should attempt to identify case-types where actors are not forced to take all their accident costs into account. This analysis should first seek to determine if rules and damages that are now undercompensatory can be made an adequate deterrent by being made adequately compensatory. If for some reason they cannot, unduly high administrative costs for instance, augmented damages may provide a workable answer.

VI. AUGMENTED AWARDS: SOME PRACTICAL CONCERNS

Given the theoretical basis for augmented awards, some practical impediments may surface in their implementation. Many questions arise: Who decides whether augmented awards are appropriate in a given type of case? What type of tribunal should impose augmented awards? Should personal injury victims prosecute and recover augmented awards? How much should augmented awards be? These are difficult questions that must be addressed. Many of them are as troublesome in current punitive damages practice as they would be in the proposed augmented damages arena. Unfortunately, a complete response is beyond the scope of this article.

A. The Proper Amount

The proper amount of an augmented award should be enough to deter the defendant and others like him from acting in a socially unacceptable manner, but no more. Ideally it would equal the amount by which the accident costs that an activity imposes upon society exceeds the sum of compensatory damage awards, administrative fines, criminal fines, and any other amount paid out as a partial proxy for accident costs. It should be enough to cause the insurance premiums that classes of actors pay to accurately reflect the total probability of a loss occurring multiplied by the dollar value of the loss if it does occur.

299. See supra text accompanying notes 43-108.
In short, augmented awards should be set to make the actor’s ex ante cost-benefit analysis of safety investments more accurate.

1. An Aside: Grimshaw v. Ford Motor Co.\(^{300}\)

An illustration of this point is the celebrated California case involving the Ford Pinto, *Grimshaw v. Ford Motor Co.* In *Grimshaw* the jury awarded the injured plaintiff\(^{301}\) $125 million in punitive damages, ostensibly because Ford *had* engaged in a cost-benefit analysis and concluded that protecting the Pinto’s gas tank from collision and fire would cost more than the amount of total judgments the company would have to pay tort claimants in “gas tank” claims.\(^{302}\) The trial court reduced the punitive damages award to $3.5 million, the appeals court affirmed.\(^{303}\)

Some scholars have pointed out that if Ford was liable for punitive damages because it engaged in the type cost-benefit analysis on which the Learned Hand definition of negligence is based, the case represents a repudiation of the economic analysis of tort law in the extreme.\(^{304}\)

Certainly there is that air about the appellate court’s opinion, but it need not be read so broadly. One can reasonably conclude that what got Ford into trouble was not the fact that it engaged in a cost-benefit analysis, but that it improperly engaged in that analysis. Ford's analysis was arguably improper for two reasons. First, Ford underestimated the damages that courts would order it to pay. That is, actual compensatory damages, under current legal rules, would have been higher than Ford estimated. But, even if Ford’s estimate of what courts would order it to pay was right, one could argue this figure was still incorrect because it was still too low because the amounts that courts would award, or that Ford would pay out in settlements, did not take into account all the potential accident costs the Pinto would impose on society. The purpose of a punitive damages award, then, was arguably not simply to punish Ford for engaging in a cost-benefit analysis involving life and limb, but to encourage Ford\(^{305}\) to conduct that cost-benefit analysis properly in the future. This is essentially this piece’s definition of the

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301. Actually, in the wreck in which the plaintiff was injured, the driver was killed. The driver’s survivors also filed suit. The plaintiff was awarded $659,680 in compensatory damages.
302. 119 Cal. App. 3d at 771, 174 Cal. Rptr. at 358.
303. Id. at 777, 174 Cal. Rptr. at 361.
304. D. Laycock, supra note 10, at 607.
305. One might persuasively argue that Ford also needed to be punished to satisfy society’s moral appetite for just desserts.
The augmented award, an award which should accurately measure those additional accident costs.  

The Grimshaw appellate court’s lack of meaningful analysis leaves something to be desired. As is, the award looks unpredictable and unprincipled. Perhaps even as an ad hoc unprincipled imposition of a “superdeterrent” it would be justified as a reminder to Ford to get it right next time. Under this view, the amount is not really important as long as it catches Ford’s attention and forces Ford to modify its behavior. But several problems arise with this justification of the role of increased awards. First, it renders the amount, as well as the exposure to the award, so uncertain that overdeterrence is a real fear. Moreover, the case does not say that Ford better be sure to take account of all accident costs next time: its message is ambiguous. Finally, one wonders why we should delegate to Ford the responsibility for determining all of the accident costs its products will cause society. Certainly Ford might be in the best position to gauge how many people will be in accidents, what their ages might be, what factors caused accidents, and what historic judgments against Ford have been. But Ford may not be in the best position to determine who (other than drivers and passengers of Pintos and other cars) will be injured; what their injuries will be; what value to place upon damaged relationships the law does not currently protect; or what the administrative costs of varying proximate cause, duty, and compensatory damages rules would be in certain areas.

Not only is Ford unlikely to be in the best position to make these determinations, but judges and juries sitting in particular cases also may not be the most desirable check on the tortfeasor’s cost-benefit analysis.

B. Who Decides?

As the system currently operates, judges and juries make decisions regarding punitive damages. Unless new processes are developed, judges and juries also would make those decisions regarding liability for and amount of augmented damages.

I. Case-by-Case Decisions by Judges and Juries

Of course there is some desirability in having a decentralized, case-by-case determination of whether augmented damages are appropriate. Case-by-case decision-making allows flexibility and precise tailoring of

306. One might also argue that punitives are appropriate because Ford insisted on looking at what was only in terms of a present dollar value. That, however, is a moral concern that is beyond the scope of this paper.
308. Ellis, supra note 110, at 46-63; D. Dobbs, supra note 26, § 3.9, at 219-21.
award to injury (of both the plaintiff and others). It also injects the common sense of the community into the process. Unfortunately, the down side may be too steep. The factors that justify the development and application of augmented awards require an understanding of how the entire system is functioning. Are compensatory damages in particular cases operating to adequately assure that defendants are taking into account all their accident costs? The answer to this question requires a study of what legal realists might call the law in action. Juries and judges lack both the time and ability to make such studies, given the statistical and economic factors involved.

2. Increased Criminal or Civil Fines Rather Than Augmented Awards

One potential solution would be to forget augmented awards and increase the number and severity of criminal fines in tort cases. This would of course require legislative effort. Moreover, once such statutes were enacted one might anticipate that change would still occur slowly. Common experience counsels that criminal fines for conduct that is also tortious are traditionally quite small although this may now be changing. Another alternative would be to supplement the tort process with a detailed scheme of civil fines. This is subject, however, to some of the same problems that would plague criminal fines.

3. Administrative Regulation and the Activity Tax

Yet another approach would be to have augmented awards administratively set and periodically reviewed. This would allow an interdisciplinary team to review the current tort system, identify trouble spots, and determine what would be needed to fix them. The augmented awards system would then function like a tax on engaging in certain activities which could be levied several ways. One way to levy the tax would be to have anyone engaging in an activity file an augmented awards return with their income tax. Under such a scenario, there is really no “award” involved.

One could also use the current tort system as a collection system. That is, whenever a defendant was liable for conduct subjecting it to an augmented award, some sum in addition to the compensatory damages levied could be added to the final judgement. This additional sum could go to the plaintiff or to the state for special purposes, or it could be split between the two.

4. A New Role for the Judge—Not the Jury

A modified approach would be to employ the tort system, as we now know it, only in part. Borrowing from a recent and related
proposal by Professor Ghiardi, the judge could decide the augmented damages question after the jury decided the liability and compensatory damages issues. This proposal would have the benefit of case-by-case determination, but the determination would be made by someone with a more systemwide orientation to the problem, and with more experience in the field, than a recently empaneled jury of lay persons. Nevertheless, one might still worry about the expertise of individual judges to handle the necessary social engineering involved.

5. Administrative Agencies and Insurers

Another way to handle the administration of an augmented awards program would be to have an administrative agency set augmented awards guidelines working hand-in-hand with insurers and insurance rate commissions. Once these commissions determined that certain tortfeasors might be subjected to augmented awards, then the “awards” insurers would add some amount to the relevant actor’s insurance rates for accident insurance thus assuring that the actors would have to take those costs into account. This system would have the desirable effect of using the existing insurance market as a device to increase the efficiency of investments in accident avoidance. Problems would arise with those actors who decided to “go bare” and risk liability without insurance. Mandatory insurance for certain activities might be a partial solution.

6. Enforcement and Collection of Augmented Awards and the Rent Seeking Plaintiff

Hand-in-hand with these concerns goes the question of who should be charged with the enforcement and collection of augmented awards. There are several alternatives. One option would be to appoint administrative officers to prosecute the state’s case for augmented damages as the plaintiff pursued her compensatory damages claim. This looks and sounds a lot like a quasi-criminal proceeding. Another option would be for the plaintiff to pursue its claim, then have the judge impose the administratively determined augmented award. This award could then go to the state in full, or partially to the state and partially to the plaintiff, to encourage enforcement.

An obvious problem with private plaintiffs recovering augmented awards is a concern with overenforcement. That is, would the waste

associated with rent seeking\textsuperscript{310} behavior by plaintiffs and their counsel offset any gains attributable to augmented awards? Would the costs associated with the rush to and arrival at the courthouse impose costs on the system that would undermine the positive effects sought to be effected by the proposal?\textsuperscript{311} There are several responses. First, rent seeking is already a problem in torts litigation. Would more hurt? Second, and less evasively, one response would be to identify "owners" of the augmented awards claims and not allow others to sue. One such option would authorize state attorneys general to bring all such suits on behalf of their citizens. Another option would be the authorization of multi-district or nationwide class actions for augmented awards. To date, class actions for punitive damages only have not fared well,\textsuperscript{312} Or one could, as noted, contract management of the scheme to an administrative agency. Undoubtedly, there are other solutions; however, the rent-seeking issue is significant. And, awards to particular plaintiffs, if they are entrusted with the role of private attorneys general, must be great enough to encourage the filing and prosecution of an action for augmented awards.

7. Augmented Awards and the Problem of Uncertainty

One of the benefits of having some type of administratively determined augmented award system, aside from the avoidance of rent seeking, is that it would reduce the uncertainty associated with a case-by-case determination of the scope and amount of punitive damages. Some say current punitive damages law and procedures are unfair because they expose defendants to radically different levels of liability depending on who is the judge and perhaps more importantly on who is on the jury.\textsuperscript{313} As Professors Ellis and Johnson\textsuperscript{314} have pointed out, uncertain punitive damage awards can have an undesirable chilling effect on defendants who decide not to engage in socially desirable behavior or who engage in the behavior less often than one would desire. Administrative determination would lend a desirable air of certainty to the proceeding. In fact, Professor Johnson's response to the problem is to heighten the standard required for liability in a tort


\textsuperscript{311} The development of rules relating to the recovery of mental distress in tort cases comes to mind again.

\textsuperscript{312} See J. Ghiardi and J. Kircher, supra note 110, § 5.41.

\textsuperscript{313} Owen, Products Liability Litigation, supra note 111, at 10; Ellis, supra note 110, at 37; J. Ghiardi and J. Kircher, supra note 110, §§ 5.38-5.39.

case with increased damages. He calls his proposal one for punitive liability. Fewer plaintiffs would recover; but they would recover more. One problem with his proposal, however, is that it tends to abandon the compensation function of tort law which the augmented award proposal does not.

8. The Double Compensation Problem

Another quasi-practical issue arises in conjunction with the issue of whether to award augmented awards. The entire reason for awarding augmented damages is to force actors to adjust their cost calculations to take account of accident costs beyond what they spend on safety and compensation. Augmented awards would be inappropriate whenever actors have already built such costs into their pricing mechanism, even though they may not actually pay such costs as compensatory damages. Returning to the M/V Testbank case, for example, if seafood processors know they will not be able to recover economic losses during a channel shutdown perhaps they will pay less for fish during open periods. If so, they in fact have been "compensated" for the losses tort law denies them. In such a case, an augmented award to the fishermen for losses suffered by processors would be inappropriate. The same logic applies to wholesalers who pay less to processors and on up the line. Laycock refers to this phenomenon as "'channelling liability and allocat[ing] ... risks into a series of contracts. ...'" Whether particular markets ultimately function in this manner is an empirical matter. Intuitively, I feel that upstream risk allocation is not universal. Professor Rizzo has indicated that it is least likely to occur where ownership of the thing physically injured is in doubt. The possibility of some efficient allocation of risk by contract merely counsels that augmented awards would not be necessary in such cases. It does not undermine their justification in other appropriate cases.

9. Reality: Obstinacy to Change

Many of the proposals discussed above share a common problem. They require extensive change. One lesson we seem to have learned from the tort crisis is that comprehensive change in the tort system is unlikely given the powerful political forces battling. What is more likely is what has occurred to date, slow interstitial change. It seems highly unlikely that legislatures will set up administrative agencies to oversee the entire tort process or adopt schedules of augmented awards.

315. Johnson, supra note 314, at 1395-98.
Judges probably still will end up mediating policy disputes between pro- and anti-reform groups in the context of deciding concrete cases. Actually, herein lies one of the appeals of the augmented awards proposal. It is a proposal courts could adopt as part of the common law development of tort law without radically altering the nature of tort litigation. It requires fine tuning and redeveloping a device we already have, punitive damages, to serve one of its current alleged justifications—deterrence. Nevertheless, I share the concerns of those who feel the jury is not the best decision-maker in the augmented awards context and would welcome Professor Ghiardi’s proposal that the judge, rather than the jury, decide whether to make an augmented award and how much to award. Should the task overwhelm the judge, she could employ Federal Rule of Evidence 706 (and state counterparts) to appoint an expert to study whether compensatory damages in that particular case are too “low.”

C. Augmented Awards and the Mass Tort Case

How to handle mass tort cases is as much an issue with augmented awards as it is with punitives. The award of punitive damages in mass tort suits is a subject of current debate. Concomitantly, given the fact that mass tort cases represent an ideal opportunity for the court to study the deterrent effect of damage awards on certain types of conduct and the fact that the defendants in those cases are those most likely to be deterred by tort law, mass torts hold some promise as a testing and proving ground for augmented awards. In many ways, the most logical way to handle the augmented awards question is to decide it after the parties have litigated or settled compensatory damages claims. At that point there would be a basis for determining if tort damages are undercompensatory and whether an augmented award is desirable. This determination could be handled judicially or administratively. Ideally, there seems to be no reason not to use a single case to determine the entitlement to and amount of any augmented awards although, as noted, this notion has not succeeded to date in the punitive damages field.

318. Fed. R. Evid. 706 states in part:

(a) Appointment. The court may on its own motion ... enter an order to show cause why expert witnesses should not be appointed ... . The court may appoint any expert witnesses ... of its own selection.


320. Trent, The Use of Representative Actions to Adjudicate Policy-Holder Bad Faith Claims: Not a Class Act, 23 Tort & Ins. L.J. 589 (1988); In re Northern Dist. of Cal. Dalkon Shield IUD Products Liability Litigation, 693 F.2d 847 (9th Cir. 1982),
D. Summary

In short, the practical questions raised by augmented damages are complicated and would require resolution over time as society gained more experience with the concept. Our experience to date has been with punitive damages, and the emphasis has been on the punitive. Emphasizing the deterrence objectives of punitive damages may require different procedures and reevaluation of current procedural devices in this arena. This realization raises the question of whether recent punitive damages reforms are consistent with the augmented awards concept.

VII. Recent Punitive Damages Reform and the Augmented Award

In part, recent punitive damages reform has suffered from the historical drawbacks associated with punitive damages in general. Many reforms unduly focus on the punitive aspect of punitive damages ignoring any potential deterrence rationale. Others are not inconsistent with the idea of augmented damages discussed herein.

A. Caps

Several states have capped potential punitive damages judgments.1 These caps, as noted, are either an absolute dollar amount2 or are set in reference to the amount of compensatory damages awarded.3 The caps may well give some certainty to actors and insurers because they cap the defendant's ultimate liability for punitives. In reference to augmented awards, however, there is no obvious relationship between the potentially undercompensatory nature of tort damages in certain cases and the dollar limits set in those statutes that employ an absolute dollar cap. An absolute limit ignores the differences among cases. Moreover, in statutes where caps are related to the amount of com-

Compensatory damages awarded, there is no intuitive reason to believe that current damages are undercompensatory in some consistent mathematical relationship to the compensatories awarded. This is the same point made above in reference to the reasonable relationship rule. Interestingly, in several states that have opted for caps, the cap is essentially a rebuttable presumption of the appropriate amount of punitive damages. Typically in these states the plaintiff can recover greater punitive damages than the cap, if he or she establishes that the defendant's conduct was particularly outrageous or malicious.

Thus, if the plaintiff shows that the defendant was particularly evil, the plaintiff can recover a greater amount of punitive damages. It is apparent that the focus is once again upon the punishment aspect of punitive damages. If the defendant deserves greater punishment, then the jury can dole it out. It almost goes without saying that this focus underemphasizes, if not ignores, the deterrence rationale for an augmented award because, as noted, augmented awards are not keyed to the defendant's conduct.

B. Heightened Burdens of Proof

Some states have chosen to increase the plaintiff's burden in punitive damages cases to clear and convincing evidence. Again, this reflects the quasi-criminal nature of the award. The augmented awards proposal described herein is essentially ambivalent on burden of proof, although two points merit consideration. First a higher burden of proof might deter some rent-seeking. Second, to the extent that the burden of proof has any impact on the number of cases plaintiffs win, and how much defendants pay, the question becomes purely empirical. How often must plaintiffs win and defendants pay to increase allocative efficiency?

C. Bifurcation

Some reformers have argued that bifurcation of the liability and punitive damages aspects of the trial might be desirable. The applicability of bifurcation to augmented damages cases obviously depends upon the procedure employed in augmented damages cases and would seem desirable should traditional tort/civil procedures be employed.

324. See statutes cited supra note 321 for Colorado, Florida, Kansas, Oklahoma, and Alabama.
325. See statutes cited supra note 324.
327. J. Ghiardi and J. Kircher, supra note 110, generally in ch. 12.
The focus on the augmented damages portion of the trial would be shifted from the fault of the defendant and the need to compensate the plaintiff to the amount of additional deterrence needed.

D. Split Recoveries

Some states have reformed punitive damages so that the punitives recovered are split between the plaintiff and the state.\(^{328}\) These proposals are not inconsistent with the augmented damages proposal outlined herein. As long as the plaintiff, and her attorney, recover enough to encourage efficient enforcement, it does not matter who recovers the excess. Funds could be created to compensate those who do not recover or who do not recover enough under current tort law. However, such funds might raise constitutional issues. In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,\(^{329}\) the United States Supreme Court held that the eighth amendment was not implicated in actions between private individuals. Potentially, awarding a portion of the recovery to the state might trigger eighth amendment concerns as Justice O’Connor noted in her dissent.\(^{330}\) Query if augmented awards would constitute punishment or a fine.

E. Summary

In short, some of the recent punitive damages reforms unduly overemphasize the punishment aspects of the law. Others are consistent with the augmented awards idea, depending upon the procedure chosen to implement them.

VIII. ARE NON-COMPENSATORY DAMAGES A SERIOUS ENOUGH PROBLEM NOW TO LIMIT IMPLEMENTATION OF AUGMENTED AWARDS?

Some may wonder whether it is desirable to expand the role of non-compensatory damages at a time when we are allegedly in a torts crisis and many current proposals limit even compensatory damages.\(^{331}\) Despite the attention that punitive damages have attracted, the collected data on punitive damages in accident cases belies the notion that they


\(^{330}\) Id. at 2932-33 (O’Connor, J., dissenting).

are, in fact, an overwhelming concern. From the data presented in some studies, one wonders why there has been such recent furor over punitives. Studies by Landes and Posner and by the RAND Corporation’s Institute for Civil Justice indicate that punitive damage awards in personal injury suits are uncommonly rare, contrary to popular perception.

A. The RAND Study

The RAND study examined jury awards in San Francisco, California, and Cook County, Illinois, from 1960-84, as well as in all California counties from 1980-84. The study analyzed the frequency and amount of punitive damage in various types of cases including business/contract, intentional tort, and personal injury. The personal injury category included negligence and strict liability cases. The authors also considered post trial adjustments of punitive awards, recent experience with punitive awards, the types of defendants liable for punitive awards, and the relationship of punitive awards to compensatory awards. Interestingly, between 1960 and 1984 there were only ten punitive damage awards in personal injury trials in San Francisco and fifty in Cook County where there were more trials. Likewise, between 1960 and 1979 less than one percent of all personal injury trials in both jurisdictions resulted in an award of punitive damages. From 1980-84 the figures increased modestly to two percent in San Francisco and one percent in Cook County. Given the small percentage of cases involved, one wonders whether even these seemingly insignificant increases are meaningful.

As to the size of punitive awards, the RAND study noted that the infrequency of such awards in San Francisco made analysis difficult. From 1980-84, when six of the ten personal injury cases awarding punitive damages were decided, the median punitive award was $150,000, and the average punitive award was $372,000. In Cook

334. Id. at 4.
335. Id. at 9.
336. Id. Table 1.1, at 5.
337. Id. Table 2.2, at 10.
338. Id. Table 1.1, at 5.
339. Id. Table 2.4, at 11.
340. Id.
341. Id. at 22.
342. Id. Table 2.9, at 21.
343. Id.
344. Id.
County, the Study's authors noted an increase in the amount of punitives awarded in personal injury cases. From 1980-84 the median award was $82,000, up from $59,000 in the period from 1975-79 and $5,000 from 1970-74. The average award from 1980-84 was $1,934,000, up from $109,000. In Cook County from 1980-84, juries awarded $27 million in punitives, up from $1 million in 1975-79. The comparable figure for San Francisco from 1980-84 was $2 million. Although the Cook County increases are dramatic, the authors note that the increase occurred in large part because of very large awards in several cases.

The study not only considered jury verdicts in the two jurisdictions but also analyzed post trial adjustments in cases where punitive damages were awarded. In a little over half of the cases studied, defendants paid the original award. In thirty-three out of the remaining thirty-four cases, the defendant ultimately paid less than the jury awarded either because of a post trial decision, new trial, settlement, or because of reduction on appeal. The reduced amounts involved ninety percent of the total money (punitive) involved in all the surveyed cases. Defendants ended up paying fifty percent of the total punitive awards. Significantly, thirty of the sixty-eight cases surveyed involved personal injury cases. The average jury award in those cases was $793,000; the average amount actually paid in those cases was $303,000 or

345. Id. at 22.
346. Id. Table 2.9, at 21.
347. Id.
348. Id.
349. Id.
350. Id.
351. Id.
352. Id.
353. Id. at 22 ($9.3 million in one medical malpractice case against a hospital, $13 million in another involving medical malpractice and products liability; $3.7 million in one personal injury case and three other punitive awards over $100,000). Although the 1980-84 medians were higher "[m]ost punitive awards in personal injury cases were more modest" than those listed in the preceding parenthetical.
354. The authors sent questionnaires to all lawyers of record in cases where punitive damages were awarded from 1979 to 1983. They received 68 usable responses (53% of the trials). They received more usable responses from Cook County than from San Francisco. Id. at 26-27.
355. 35 out of 68. Id. at 27.
356. Id. at 28.
357. Id. at 28. The one increase was from $7,000 to $16,000.
358. Id.
359. Id. See also id. Table 2.14, at 29.
360. Id.
361. Id.
362. Id.
thirty-eight percent of the amount awarded. Of the three types of cases studied (business/contract, intentional tort, and personal injury), this represented the lowest percentage paid. Extending their study to all California jurisdictions for the years 1980 and 1984, the authors found only forty-eight cases where juries awarded punitive damages in personal injury cases.

In examining the relationship between compensatory damages and punitive damages, the authors noted first that in Cook County punitive damages to compensatory damages ratios were generally smaller than in California. This was true in personal injury cases as well as the other types of cases. But, as the authors pointed out, "disproportionately large punitive awards rarely occurred in personal injury cases." In California personal injury cases, there were twenty-one cases where the punitive/compensatory ratio exceeded 2:1, fifteen cases where it exceeded 3:1, and fifteen cases where it exceeded 4:1. In Cook County, there were only thirteen personal injury cases where the ratio exceeded 2:1, and none where the ratio exceeded 3:1 or 4:1.

In reference to statutes limiting punitives to some ratio of compensatory damages, the authors noted that "[r]atio standards would have the least impact on punitive damages in personal injury cases, perhaps because punitive damages are less often extreme in such cases or because the same outrage that leads jurors to award large punitive damages might also lead them to award large compensatory damages."

In conclusion, although the RAND study does not deal with the possible effect of punitives in most tort cases, and the authors do note that the potential for an extraordinary award "adds volatility to personal injury litigation," the numbers indicate that punitives are a less significant problem than anecdotal recitations would have us believe. The authors themselves state in their introductory summary of the study that: "[i]n sum, punitive damages were rarely awarded

363. Id.
364. Id. In business contract cases, 89% was paid, in intentional tort cases, 56% was paid.
365. Id. See also id. Table 3.5, at 38. The average award in those cases was $600,000; the median was $76,000. Id. Table, at 39. Revealingly, there were only 3 such awards in rural counties. Id. Table 3.5, at 38.
366. Id. at 58-59.
367. Id. at 59.
368. Id.
369. Id. Table 5.2, at 63.
370. Id.
371. Id. at 64.
372. Id. at 12-13.
373. Id. at vi.
in personal injury litigation and when awarded were usually small.\textsuperscript{374}

\textbf{B. The Landes and Posner Study}

While the RAND study considered jury awards, and post trial reductions to some extent, the Landes/Posner study focused on appellate decisions.\textsuperscript{375} Initially, they analyzed all of the punitive damages cases in the then most recent (mostly January, 1986) edition of each of the West case reporters.\textsuperscript{376} There were seventy-two such cases;\textsuperscript{377} only thirteen were what the authors call accident cases.\textsuperscript{378} They define accident cases as those involving negligence or strict liability\textsuperscript{379} paralleling the RAND definition of personal injury cases.\textsuperscript{380} The thirteen cases represented only two percent of all the reported accident cases in those volumes.\textsuperscript{381} The authors also point out that two percent may be an overrepresentation of punitive damage cases in the accident case sample because such cases are more likely than ordinary accident lawsuits to generate an appeal.\textsuperscript{382}

Turning their attention from accident cases to products liability cases, Landes and Posner first examined federal appellate decisions in products cases from the start of 1982 to November 1984. There were 172 appealed products liability suits.\textsuperscript{383} Ten of these involved punitive damages awards.\textsuperscript{384} Six of those were reversed and another was substantially reduced.\textsuperscript{385} Thus, only four of the 172 products cases studied involved affirmed awards of punitive damages—less than three percent.\textsuperscript{386} Running the same study out through mid-1984, Landes and Posner found forty-eight more appealed products cases with only one punitive damages award affirmed on appeal—just over two percent.\textsuperscript{387}

\begin{itemize}
  \item \textsuperscript{374} Id.
  \item \textsuperscript{375} Id. See also Landes and Posner, supra note 332, at 34.
  \item \textsuperscript{376} Landes and Posner, supra note 332, at 34.
  \item \textsuperscript{377} Id.
  \item \textsuperscript{378} Id.
  \item \textsuperscript{379} Id. at 33.
  \item \textsuperscript{380} Peterson, Sarma and Shanlet, supra note 14, at 9.
  \item \textsuperscript{381} Landes and Posner, supra note 332, at 34.
  \item \textsuperscript{382} Id.
  \item \textsuperscript{383} Id. In San Francisco, there were four products liability trials that resulted in punitive damages awards from 1960-84. There were two such cases in the same period in Cook County. Peterson, Sarma and Shanlet, supra note 14, Table 2.5, at 13. From 1960-79, 3\% of all products trials resulted in a punitive damages verdict in San Francisco. The figure doubled to 6\% for 1980-81. In Cook County, less than 1\% of the products trials between 1960-79 resulted in a punitive damages award. For 1980-84, the Cook County figure was 1\%. Id. Table 2.6, at 14.
  \item \textsuperscript{384} Landes and Posner, supra note 332, at 35.
  \item \textsuperscript{385} Id.
  \item \textsuperscript{386} Id.
  \item \textsuperscript{387} Id.
\end{itemize}
Turning to state cases, the authors found 119 appellate products cases in the ten most recent volumes of the West regional reporters, excluding California and New York. The authors excluded these two states to see if punitives were more frequently awarded in the more “liberal” states. In the 119 “conservative states” case sample, punitives were affirmed on appeal in less than two percent of the cases. Turning to California and New York, Landes and Posner found twenty products cases; in none were punitive damages even awarded. In all, the scholar and the scholar/jurist surveyed 359 products cases. Punitive damage awards were affirmed in less than two percent of those cases—seven. In those seven cases, the average punitive award was $500,000, “only slightly more than the average actual damages awarded in these cases.”

This data is summarized here to emphasize the point that instituting augmented awards would not be like throwing gasoline on a raging fire or importing rats during the plague. In short, although neither study can nor does establish that punitive damages are not problematic in accident cases, they do not establish that they are. Realistically, the numbers are shockingly small. Naturally, the numbers on punitive damages awards bear no relation to what the numbers might be under a system instituting augmented awards not to “punish and deter,” but to deter efficiently. The numbers may rise if augmented awards were made available and grouped with punitive damages in future studies like the RAND and Landes/Posner reports. The point of the studies in relation to the augmented awards proposal discussed herein is that extra compensatory awards in accident cases do not seem to be an incredibly serious problem. Consequently, development of such extra compensatory awards would arguably not be an undue burden on a category of cases presently creaking under the weight of such awards.

XI. CONCLUSION

Classically courts and commentators have stated that the purpose of punitive damages is to punish and to deter; however, the doctrinal emphasis has been on punishment rather than deterrence. Although several commentators have analyzed the efficiency considerations as-

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388. Id. at 36.
389. Id.
390. Id.
391. Id.
392. Id.
393. Id.
394. Assuming punitive damage awards do not go down, which they might, if augmented awards became available.
395. Realistically, greater stress on the system seems to come from the incredible administrative costs of the tort system not from the burden of punitive damages awards.
associated with punitive damages, their conclusions have generally been that punitive damages are an efficient deterrent only in a limited number of cases where there is underenforcement because of the difficulty of discovering the defendant’s wrongful conduct, where the damages inflicted upon individual plaintiffs are too small to be worth litigating, or where the defendant receives what society regards as illicit gains from his or her actions. The message of this article is that wherever compensatory damages coupled with substantive tort rules inadequately measure the total accident costs an actor imposes upon society, damages in the form of augmented awards may operate as an efficient deterrent. The total measure of such awards should optimally equal the amount by which the sum of current tort recoveries, settlements, fines, and any other costs we now make defendants pay, is less than the total accident costs the activity imposes.

One area where augmented awards would serve to more efficiently deter would be in cases where the law does not now award certain types of compensatory damages or allow certain types of plaintiffs to recover, not because real losses have not been suffered as a result of the defendant’s conduct, but rather because the gain in deterrence is offset by the administrative burden allowing recovery would entail. The augmented award proposal would authorize plaintiffs now allowed to recover compensatory damages to also seek an augmented award. The plaintiff would in essence have a proxy to sue on behalf of those who it is too expensive to allow to sue directly. The fact that the award would not be compensatory in any fashion is irrelevant to its deterrence function.

Authorizing augmented awards and their insurability would also have the beneficial effect of forcing insurance rates to more accurately reflect all the costs of an activity. In this regard, the ex ante accident costs actors face in the form of an insurance premium would more realistically reflect the price they were willing to pay for engaging in the relevant activity.

Instituting a proposal for alternative awards would require society to make some choices regarding collective versus ad hoc decision-making. These choices, however, are no different than the choices society faces regarding any modification of the fault system in general. Just how far reaching a change is desired and the costs of that change would define its scope. Although this article has made some initial observations concerning the possible ways of implementing an augmented awards proposal, it was by no means exhaustive.

In closing, the purpose of this article has been to highlight the fact that there may well be a place for something similar to what we now call punitive damages in a rational scheme dealing with the efficient reduction of total accident costs. Such a system could operate in conjunction with our current tort system’s primary remedial focus on
compensating injured victims of accidents. Of course, emphasizing the
deterrence justification of augmented awards as the next step in the
evolution of punitive damages requires a reexamination of many of
the standard rules relating to the recovery of punitives. Many of the
rules we have applied to punitive damages unduly focus on the pun-
ishment rationale. In conclusion, reanalysis requires rethinking our
approach to accident law, but in the end the entire exercise is performed
in order to construct a better system of handling accident claims.