Punitive Damages: Legal Hot Zones

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I. INTRODUCTION

For some, of a dramatic nature, to conjure up the image of hot zones, now associated with the deadly ebola virus, will be apt indeed. Punitive damages flowing forth from the unprincipled, uncontrolled jury may be likened to an infection in the law that introduces a systemic disease in the American society and economy. This essay is for the more phlegmatic.

By means of a more dispassionate analysis of the law and its purposes I want to suggest the appropriateness of the rules relating to punitive damages. I
refer first to the deep common law roots of punitive damages in tort law. They were and are designed to regulate and support a civil society. These deep roots have not always been recognized, because of the modern law’s drive to divorce tort from criminal law. In Section III I show how our thinking about tort law has been tailored to unitary theories. In that process, the goals of tort law have been separated from criminal law. Section IV demonstrates that the substantive rules relating to punitive damages are remarkably consistent throughout time and common law jurisdiction. The formula is exceedingly open-textured inviting a broad discretion in applying the sanction of punitive damages to particular circumstances. The predominant formula requires a high degree of culpability; the harmful act must have exhibited arrogance in disregarding the rights of the injured party. With the development of the substantive law and the struggles of the courts to fit punitives in with the formulations of tort law, courts and scholars have been heavily engaged in exploring the rationale of punitive damages. Are they to compensate, to deter, or to wreak retribution? I argue that each rationale has strengths but ultimately fails as a basis to justify the imposition of punitive damages. In Section VI I suggest a theory that supplies a more satisfactory basis for punitives. It has historical strength, deriving from punitive damages’ role in meeting the necessities of running and solidifying social institutions. It further has theoretical veracity in its consistency with a republic model of liberty that pervades American jurisprudence.

Section VII refers to evidence about the incidence and severity of punitive damages. From the empirical data, we can discern that problem punitives are localized. They are not a uniform national disease. The existence, however, of problem punitives prompts questions about why these “hot zones” well up in our legal midst. Only close empirical work will answer this question. The remainder of this article sets forth an agenda for such work. The hypothesis to be tested in future work is that “hot zones” occur not because of loose or unstable substantive and procedural rules, but rather stem from social failure. The law assigns the awarding of punitive damages to the jury with a broad, only loosely reviewed, discretion. There is good reason for this. Punitive damages do not represent an aberration in the legal fabric, let alone a threat to our economic system. But the rules presuppose, and themselves construct, a responsible, informed, deliberative, traditional, and self-governing community. Once these conditions are forfeited, problem punitives are likely to be awarded. The suggestion, then, is that problem punitives will be found in communities where the conditions of institutional responsibility have been eroded. The implications of reform are profound, and as I urge in Section VIII, any change should take place in full appreciation of those implications.

Careful, dispassionate empirical work is crucial for without it, the endeavors of courts and legislatures may badly miss their mark. Present law reform may, at best, be futile, or, at worst, be destructive of an essential element in our jurisprudence scheme. The former may be exemplified by the Supreme Court’s assiduous attempts to introduce due process procedures. These are unlikely to be efficacious. The latter are exemplified by reforms that propose abolition,
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caps, or proportionality, which diminish the retributive goals of the law, and do great violence to the liberal-republican fabric of our society.

II. THE COMMON LAW ROOTS

With the common law rules of punitive damages, as with the common law as a whole, it is surprising how alike the doctrines appear over its many jurisdictions.\(^1\) The principles relating to an award of damages in Melbourne, Victoria, take much the same form to those prevailing in a court awarding punitives in Melbourne, Florida.\(^2\) Yet the experience with frequency and severity of punitive damages is vastly different. Experience is a product of forces other than the rules of substantive law. It is reflective of the strong remedial stance of American courts.\(^3\) Where the criminal law is inadequate in mapping the wrongs which should be prescribed, American courts have employed tort law with the potent remedy of punitive damages to cover the field. But more fundamentally, the broader use of punitive damages draws from a faith in the institutions of a liberal-republican form of government. One would expect punitive damages to have withered in Commonwealth countries where Parliament is overwhelmingly the source of law.\(^4\) Yet the courts will not let it go. It is unsurprising to find that punitive damages flourish in the rich American soil that asserts a faith in the democratizing institution of the jury and the rights of the individual. Punitive damages in Commonwealth tort law are then a remarkable vestige of Common law dominance found in the pre-Nineteenth Century.\(^5\) The assault on them has lasted long, yet they stand. It is instructive to review briefly this assault since it may cast light on the present-day attack throughout the United States.

Punitive damages law is conventionally traced to the Eighteenth Century English decisions that upheld jury verdicts that exceeded the plaintiff's actual

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2. Johns-Manville Sales Corp. v. Janssens, 463 So. 2d 242 (Fla. App. 1984) (stressing in punitive damages award the defendant’s knowledge of the dangerousness of asbestos). Compare Coloca v. B.P. Australia [1992] 2 V.R. 441 (punitive damages available for defendant’s exposing plaintiff to asbestos dust and fibers, if in “contumelious disregard of plaintiff’s rights”). Note that Florida Statutes, 1991 § 768.72(2), provides for 60% of the punitive damages award to be paid either to the Public Medical Assistance Trust Fund (personal injuries) or to the General Revenue Fund (any other claims).
physical harm.\textsuperscript{6} It was in 1763 that an English court employed the term “exemplary damages.”\textsuperscript{7} Lord Devlin, in the seminal case \textit{Rookes v. Barnard},\textsuperscript{8} found that the courts began to award punitive damages mainly in cases involving abuse of public office. This, however, represents a cramped view of the courts’ powers. Throughout the history of the common law juries, where they were able to award damages, juries had the authority to grant damages in excess of the level necessary for compensation.\textsuperscript{9} The jury was a powerful institution in the common law process; the judges had no capacity or interest in checking or reviewing the quantum of any award. The judges, when they began to develop a more rule-based body of law, explicitly confirmed an already well-established practice of the jury in setting damages at a super-compensatory level where the circumstances demanded such awards. Thus, the United States Supreme Court in \textit{Molzof v. United States}\textsuperscript{10} was able to confidently conclude that “‘punitive’ damages has a long pedigree in the law.”\textsuperscript{11}

The imminence of punitive damages in the law predates verbal identification. Early tort law was mixed with the criminal law. Prior to trespass, an aggrieved person, when pleading, would utter “words of felony,” which would enable recovery of the bōt, a tariff set according to the crime to be extracted from the goods of the malefactor.\textsuperscript{12} The writ of trespass was introduced to spread the power of the King throughout the realm quietening it to the rule of law. When Edward I introduced the action into Wales, it was set forth in strong words “its punitive and exemplary character.”\textsuperscript{13} The law assuaged loss as a byproduct of bringing effective law to the land. The modern separation of punishment and compensation had no place. The plaintiff was unable to plead his actual loss.\textsuperscript{14} The harm to the plaintiff itself was irrelevant as many law students learn from

\begin{itemize}
\item 8. 1964 App. Cas. 1129, 1222.
\item 9. Uren v. John Fairfax & Sons Pty. Ltd., 117 C.L.R. 118, 152 (1966). See also Ellis, supra note 6, at 12-13 (discussing the power of the jury and the gradual willingness of judges to review awards). Juries had wide discretion which was in early law checked only by the writ of attainder, George T. Washington, \textit{Damages in Contract at Common Law}, 47 L.Q. Rev. 345, 349 (1931); the writ declined in the 15th and early 16th Centuries, \textit{id}. at 362. Indicating the wide power of the jury, the word “damages” was defined as “that which jurors are to inquire of” or as Lord Coke said: “recompense that is given by the jury.” George T. Washington, \textit{Damages in Contract at Common Law}, 48 L.Q. Rev. 90 (1932).
\item 10. 112 S. Ct. 711 (1992).
\item 11. \textit{id}. at 715 (the Court cited \textit{Day v. Woodworth}, 13 How. 363, 14 L.Ed. 181 (1852)).
\item 13. Pollock & Maitland, supra note 12, at 527.
\item 14. Pollock & Maitland, supra note 12, at 458-60.
\end{itemize}
the early assault case of *I De S et ux. v. W Des.*

Damages were given to keep the peace. At a time of weak central authority and policy it was the private cause of action in trespass and the trespass on the case that performed the civilizing function. The idea of honor ran deep. In actions "before an English local court of the thirteenth century, the plaintiff will claim compensation, not only for damages (damnum) but also for the shame (hantage, hontage, dedecus, pudor, vituporium) that had been done to him." In the King's Courts this element was regarded in the awarding of damages.

In the Eighteenth Century the power of the jury to express its view of the defendant's action by large award was a constitutional right. Its social role is plainly witnessed in its capacity to set damages at a level to discourage the dangerous practice of dueling.

The emphasis on the compensatory nature of tort damages is a creature of modern tort law, where a conceptual break has been made from criminal law. The experience of the law in the Star Chamber began a process where the worlds of crime and tort were separated for most purposes. Their admixture in the 1630s in vindictive prosecutions and punishments led to the end of the Star Chamber. The thoroughgoing reliance upon private rights of action gave way as government agents became effective, and from the viewpoint of the citizen, safer prosecutors. However, the criminal law roots of tort have remained fast in the award of punitive damages.

It is only the English courts that have found punitive damages confuse the civil and criminal functions of the law and are thus anomalous in the civil sphere. But most courts in the common law have agreed with the sentiments of Justice Windeyer of the Australian High Court in *Uren v. John Fairfax & Sons:*

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15. Y.B. Lib. Ass. folio 99, plactitium 60 (1348).
18. Merest v. Harvey, 128 Eng. Rep. 761 (1814) ("It goes to prevent the practice of dueling . . ."). In the same case, the social aspect of the award is emphasized by Gibbs C.J. "I wish to know, in a case where a man disregards every principle which actuates the conduct of a gentleman, what is to restrain him except large damages?" *Id.* The social aspect does not resonate with modern commentators, see Ellis, *supra* note 6, at 29. See Michael Tilbury, *Factors Inflating Damages Awards, in Essays on Damages* 98-106 (P.D. Finn ed., 1992).
19. John H. Baker, *An Introduction to English Legal History* 137 (3d ed. 1990); see also Ellis, *supra* note 6, at 8 (discussing the historical roots of award damages to mollify anti-social behavior).
21. Broome v. Cassell & Co., 1972 App. Cas. 1027, 1087. The early English cases were widely cited to allow American courts to give supercompensatory damages where "the injury is inflicted under circumstances of aggravation, insult or cruelty, with vindictiveness and malice; but in view of all such circumstances, to impose what is sanctions called exemplary and sometimes punitive damages, in addition to the actual damages." McWilliams v. Bragg, 3 Wis. 424, 431 (1854). The deterrent notion was stressed, Whipple v. Walpole, 10 N.H. 130, 132 (1839). Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers,* 42 Am. U. L. Rev. 1269 (1993).
Compensation is the dominant remedy if not the purpose of the law of
torts today. But fault still has a place in many forms of wrongdoing.
And the roots of tort and crime in the law of England are greatly
intermingled. Some things that today are seen as anomalies have roots
that go deep, too deep for them to be easily uprooted.\textsuperscript{22}

Lord Devlin could not live with the apparent anomaly, declaring in \textit{Rookes v. Barnard}\textsuperscript{23} that punitive damages be restricted to three narrow categories, namely: (1) "oppressive, arbitrary, or unconstitutional actions by servants of the
government;" (2) cases in which "defendant's conduct has been calculated by
him to make a profit for himself which may well exceed the compensation
payable to the plaintiff;" and (3) where the award is expressly authorized by
statute.\textsuperscript{24} Even to admit these categories was a grudging concession to
precedent. So disgruntled was Lord Devlin that he thought the court may have
to reform the law by prescribing an "arbitrary limit on awards of [punitive]
damages."\textsuperscript{25} This penchant for rejection did not find acceptance in other
Commonwealth law jurisdictions. Lord Devlin's categories were savaged by
some of his brethren, Lords Reid and Wilberforce.\textsuperscript{26} Lord Wilberforce directly
undermined Lord Devlin's aversion to non-compensatory goals. He recognized
that while compensation may be the predominant principle in tort damages,
"there is . . . a delictual element which contemplates some penalty for the
defendant."\textsuperscript{27} He went on to say:

\begin{quote}
It cannot lightly be taken for granted, even as a matter of theory, that
the purpose of the law of tort is compensation, still less that it ought to
be, an issue of large social import, or that there is something inappropriate
or illogical or anomalous (a question-begging word) in including a
punitive element in civil damages, or, conversely, that the criminal law,
rather than the civil law, is in these cases the better instrument for
conveying social disapproval, or for redressing a wrong to the social
fabric, or that damages in any case can be broken down into the two
separate elements. As a matter of practice English law has not
committed itself to any of these theories: it may have been wiser than
it knew.\textsuperscript{28}
\end{quote}

\begin{footnotes}
\textsuperscript{23} 1964 App. Cas. 1129.
\textsuperscript{24} Id. at 1226-27.
\textsuperscript{25} Id. at 1227. In A.B. v. South West Water Services, 1993 Q.B. 507, the Court applied the
categories of Lord Devlin as though it were interpreting a statute, Sir Thomas Bingham M.R. at 530-
31.
\textsuperscript{26} Broome v. Cassell, 1972 App. Cas. 1027, 1087, 1114.
\textsuperscript{27} Id. at 1114.
\textsuperscript{28} Id.
\end{footnotes}
The restrictive English approach has been an unhappy experiment. It has found no following elsewhere in the Commonwealth and is now, on its own turf, questioned by the English Law Commission in a Consultation Paper. The Commission submits for consideration a widening of the English rule that would permit the award of punitive (exemplary) damages where it is proved that "(a) the parties were in a relationship of inequality at the time of the wrong, and (b) that there has been conscious and deliberate wrongdoing by the defendant which shows a contumelious disregard for the plaintiff's rights." The Law Commission does not see the overlap in the purposes of criminal law and an award of punitive damages as a fatal blow against the legitimacy of punitive damages. The English courts, however, have set their face against recovery of punitives outside the narrow confines of earlier law and will not contemplate their recovery when the action sounds in negligence. This runs counter to Australian cases that have allowed punitive damages because of the defendant's conduct rather than the formal pleading of the tort.

The unsettled place of punitive damages in Commonwealth law stems from the compartmentalization of civil law and criminal law. Those same forces are at play in the United States, but the stakes are higher in the schizophrenic American legal culture. Like the English law, the realms of tort and criminal law have been divided, but unlike the English law, the remedial rights-based jurisprudence is still alive and calls for the use of punitives where the criminal law has failed to map the field of wrongs that call for remedy. That call results in punitive damages being a marked characteristic on the face of American tort law, while they are rare, if juristically controversial, exceptions to the dominant drive for compensatory damages.

III. THE RISE OF UNITARY THEORY

The history of mixed purposes reflected the indispensable role of tort law in the evolving society. This, however, appeared untidy to later theorists and some courts. The English courts were dominated by a Benthamite faith that they should be subordinate to Parliament. To be intimately involved in social regulation through common law rules ran counter to their subordinate role. At best, they were institutions that gave redress for recognized wrongs, redress that

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33. Punitive or exemplary damages are found mainly in defamation cases where the very nature of the interest protected—reputation—defies the conventional compensation analysis. See Michael Tilbury, supra note 18, at 86, 90-92, 95-99.
34. For discussion see Gerald J. Postema, Bentham and the Common Law Tradition 263-301 (1986).
for tort was compensation. Deterrence or retribution, with their public policy and social morality aspect, were functions reserved for the legislative and the executive prescription. The courts' function was purely supplementary—it was the cat's paw.35

In the United States the courts remained active social institutions, untouched by the Benthamite attack, but were increasingly subjected to social science perspectives of their functioning.36 The realists and, later, the law and economists gave tort law an outside perspective that isolated its purposes as the rationally comprehensible goals of compensation and optimal deterrence.37 The society-based mixed system was set aside. In this context it was conventional to separate tort and criminal law. Tort law was seen as a pricing scheme.38 On the other hand, criminal law was left as a system that carried the full sanctioning weight of the law which may vindicate the victim and wreak retribution. (I leave these terms vague because the courts were rarely intent upon giving them any exact definition.) The idea was that criminal law was public law with all the symbolism of the penalty exacted by the state.39 It is little wonder that the legitimacy of courts awarding punitive damages was deeply questioned.40 If punitive damages were to be justified, that must be found in a compensation or

35. In Shaw v. Director of Public Prosecutions, 1962 App. Cas. 220, the House of Lords created the offense of conspiracy to corrupt public morals, a common law crime. The exercise of such power was singular, see R v. Gibson, [1991] 1 All E.R. 439.

36. William W. Fischer, III, Morton J. Horwitz, and Thomas A. Reed, American Legal Realism 232-36 (1993) (describing the evolving dominance of the social sciences). The Benthamite agenda was for legislative law reform—"a fully rational, systemic science of legislation, the immediate focus of which was criminal jurisprudence." Postema, supra note 34, at 263.


40. Part of this was a loss in faith, perhaps a civilizing move that vindication/punishment/retribution should be publicized. A. John Simmons, Locke and the Right to Punish, in Punishment 219, 250 (A. John Simmons et al. eds., 1995). Doctrines of criminal origin like transferred intent that survived in tort law were regarded as fossils; see William L. Prosser, Transferred Intent, 45 Texas L. Rev. 650 (1967). See also James B. Sales and Kenneth B. Cole, Jr., Punitive Damages: A Relic That Has Outlived Its Origins, 37 Vand. L. Rev. 1117 (1984).
deterrence function. So it is that the vast bulk of scholarship has directed itself to an assessment of punitives in light of its delivering the goods on compensation and deterrence. Its goal of retribution was awkward, seeming rather primitive and smacking of revenge.41

Throughout the common law world, the keepers of the flame that punitive damages had legitimate retributive purposes were some common law courts. The flame, while exceedingly weak in England,42 was only marginally more vital in other common law jurisdictions.43

The next section will sketch some underlying theories, but first it is necessary to set forth the substantive rules that govern the award of punitive damages, rules which I have argued are remarkably similar throughout the common law world. The formulae all reveal a judicial desire to protect citizens from arrogant abridgement of their rights.

IV. SUBSTANTIVE FORMULAE

The verbal formula requires the jury to determine that the defendant acted in willful or reckless disregard of plaintiff's rights.44 The test usually demands a subjective state of mind even though the action may be sounded in negligence.45 The conduct must have been outrageous because of an "evil motive or reckless indifference to the rights of others."46 Fourteen states require

41. Oliver Wendell Holmes, Jr., The Common Law 37-38 (1881) (regarding forms of liability as survivals from more primitive times that should be reappraised). I thank my colleague John Goldberg for this point.

42. The latest case in which the English courts have spoken about exemplary (punitive) damages voices concern about their arbitrariness and potential for extraordinary quanta. Elton John v. MGN Ltd., [1996] 2 All Eng. Rep. 35 (1995). Lord Justice Hirst, in the context of a defamation action by singer Elton John, urged more stringent review of exemplary damages and recommended that juries be apprised of comparable physical injury cases and that on appeal courts consider such comparisons. He added:

[Principle requires that an award of exemplary damages should never exceed the minimum sum necessary to meet the public purpose underlying such damages, that of punishing the defendant, showing that tort does not pay and deterring others.]


46. Burnett v. Griffith, 769 S.W.2d 780, 789 (Mo. 1989). Conduct short of intentional wrongdoing may be sufficient to justify punitive damages in some jurisdictions. Courts use a variety of formulas to spell this out, including "reckless disregard for the rights of others," Allman v. Bird, 353 P.2d 216 (Kan. 1960); or "willful misconduct, wantonness, recklessness, or want of care
malice, twenty-two conduct exceeding gross negligence, eight gross negligence, and two have statutory requirements. In Australia, the court by long usage requires proof of the defendant's "conscious wrongdoing in contumelious disregard of another's rights." The formulae vary but at their heart is the idea that a right is invoked, thus constituting, on the defendant's part, a theft-like act. As the United States Supreme Court has recognized, the award of punitive damages is highly discretionary. It invests much power, as previously mentioned, in the jury. Due process is, however, not flouted if the jury is appropriately charged and judicial and appellate review of the award is granted. The highly discretionary nature of the punitive damage award is captured in Commonwealth jurisprudence. The potential for largess has led to the restriction of punitive damages in England. Elsewhere the courts have been concerned to control the range of damages by reference that largess should not exceed awards in excess of those garnered for compensation for devastating physical injuries. The absence of juries in most of these Commonwealth cases, except for

indicative of indifference to consequences," In re Air Crash Disaster Near Chicago, 644 F.2d 594 (7th Cir. 1981), cert. denied, 454 U.S. 878, 102 S. Ct. 358 (1981). Conduct that is merely negligent, even if it causes severe damage, is insufficient to justify punitive damages. This is usually held to be true of "grossly negligent" conduct when those terms are used as a synonym for "extreme carelessness" as opposed to "recklessness." Compare Moore v. Wilson, 20 S.W.2d 310 (Ark. 1929), with Williamson v. McKenna, 354 P.2d 56 (Or. 1960), suspended by statute as stated in Winn v. Gilroy, 681 P.2d 776 (Or. 1984).

47. Currently, only four states, Michigan, Nebraska, New Hampshire, and Washington, do not allow any type of punitive damage awards. However, Michigan and New Hampshire do allow "non-economic compensatory damages" which may, in practice, be similar to punitive damages. Thirty-two of the states that allow punitive damages recovery do not allow for the recovery of punitive damages in cases of vicarious liability (or any derivative of such, like employer-employee liability). In the 46 states which permit punitive damage recovery, there are four different "threshold" categories of conduct which are required for punitive damages recovery. They are (1) malice (14 states) (most difficult to prove); (2) conduct exceeding gross negligence but not constituting malice (24 states); (3) gross negligence (6 states); and (4) various statutory requirements (2 states) (usually easiest to prove). Richard L. Blatt et al., Punitive Damages, A State by State Guide to Law and Practice § 3.2 (1991 & Supp. 1993).


50. Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 18, 111 S. Ct. 1032, 1043 (1991) (noting the impossibility and undesirability of drawing "a mathematically bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case").

51. Carson v. John Fairfax & Sons, 178 C.L.R. 44 (1993) (the majority in discussing the vindictory nature of damages for defamation accept that a court reviewing the jury award may have regard to disabling physical injury cases in judging reasonableness. Consistent with this the trial judge may indicate to the jury the ordinary level of the general damages component of personal injuries awards. Justice Brennan, now Chief Justice, filed a trenchant dissent).
defamation, may protect against jury unruliness obviating some of the procedural protections found vital by the United States Supreme Court.\textsuperscript{52}

In the common law jurisdictions, punitive damages have survived the "decriminalization" of criminal law,\textsuperscript{53} the concern of courts for certainty in legal rules, the bent of lawyer-economists to view torts through the lens of optimal deterrence, and the entreaties of those who would promote compensation as the sole purpose.\textsuperscript{54}

The Commonwealth courts at the end of the Nineteenth Century repudiated the notion that wrongful motive alone could render a lawful act tortious.\textsuperscript{55} The American courts maintained the subjective wrong notion;\textsuperscript{56} indeed, Oliver Wendell Holmes opined that no civilized system of law could avoid the imposition of liability for an act designed to cause harm without justification.\textsuperscript{57} With their faces set against the gauging of liability via the subjective intent, it would have been a short step for the Commonwealth courts to abolish punitive damages. Yet this was not done. The reason is the strong reaction against intentionally malicious tortious action. Just as fault has persisted as the foundation for tort liability, a sense has been maintained that an arrogant flouting of rights deserves censure by the courts. In the many formulations for the award of punitive damages, a strong core is apparent that very bad behavior will not be tolerated. Rights of citizens should be closely guarded against consciously arrogant abridgement. As stated previously, that punitive damages should have been preserved in these adverse conditions, gives good reason to believe that in a legal culture of rights protection, as found in the United States, they should flourish.

\textsuperscript{52} Atiyah & Summers, supra note 1, at 169-77, and see Louis Kaplow, The Value of Accuracy in Adjudication: An Economic Analysis, 23 J. Legal Stud. 307, 329 (1994) (jury determinations are "black-box" pronouncements generating little information for future guidance). This is not to say that judges rather than juries are superior decision-makers in any one case; empirical work shows that juries are not more pro-plaintiff or generous across the board of tort cases. Kevin M. Clermont & Theodore Eisenberg, Trial By Jury or Judge: Transcending Empiricism, 77 Cornell L. Rev. 1124 (1992). The usual argument by commentators has been that jury unruliness needs to be constrained. David Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1257 (1976) [hereinafter Punitive Damages], urges that the judge be given more power; see also Ellis, supra note 6, at 59 (arguing the need to reduce uncertainty).


\textsuperscript{54} In England punitive damages have been embattled because the dominant philosophy is one of compensation, but even so the English law commission discussion paper is sympathetic to releasing punitives from the straitjacket of Rookes v. Barnard, 1964 App. Cas. 1129. Cf. Kronman, supra note 37, at 87, empowering the community to make decisions about the public good.


\textsuperscript{56} The leading American case is Tuttle v. Buck, 107 Minn. 145, 119 N.W. 946 (1909).

\textsuperscript{57} Aikens v. Wisconsin, 195 U.S. 194, 25 S. Ct. 3 (1904); Oliver W. Holmes, Jr., Privilege, Malice and Intent, 8 Harv. L. Rev. 1 (1894); J.B. Ames, How Far An Act May Be a Tort Because of the Wrongful Motive of the Actor, 18 Harv. L. Rev. 411 (1905).
V. THE SEARCH FOR A RATIONALE

A. A Grab-Bag of Reasons

The courts have shown a good deal of wisdom to resist academic categorizations urging singular normative bases for punitive damages. The term “punitive damages,” when unpacked, will have been seen as having many purposes. This article, like most others, takes one purpose and explicates it in some detail. But I make no claim that this is a sole purpose or that it is the most important; although, I do claim it has considerable explanatory and normative force. So amoeba-like are punitive damages that I fear most of us in legal academe have been unduly procrustean in pressing our theories upon the old venerable remedy. Like the common law, and a teenager’s room, punitive damages are untidy and defy the work of academic neatniks. In this essay I make an argument that, historically and theoretically, the function of punitive damages can be understood by viewing its invitation to the jury to apply an open-textured rule. Within a system with republican roots the jury plays an integral part. But I want to stress that my argument is not exclusive. The work of many scholars has shed light on the function and role of punitive damages. I discuss below much of the work that has proceeded from the deterrence model of tort liability rules.

In a seminal article, Dean Ellis proposes, in Biblical allusion, seven purposes gleaned from judicial opinions and the writings of commentators: “(1) punishing the defendant; (2) deterring the defendant from repeating the offense; (3) deterring others from committing an offense; (4) preserving the peace; (5) inducing private law enforcement; (6) compensating victims for otherwise uncompensable losses; and (7) paying the plaintiff’s attorneys’ fees.”

These seven purposes can be organized conceptually under three rubrics: the compensation rationale, the deterrence rationale, and the retributive rationale. Professors Chapman and Trebilcock adopt these rubrics and engage in an instructive discussion of the fit of the rationales with the doctrinal law developed by the courts. They examine the first order issues of proscribed conduct and quantum of damages under each rubric and turn to second order issues of vicarious liability, insurability, the relevance of wealth, and procedural protections. This pattern of analysis follows a well-trodden path. A rationale is selected and a detailed examination is made to ascertain consistency. Usually the fit is ill. Accordingly, recommendations are made to pull the law into line—to make the fit good.

58. Ellis, supra note 6, at 3.
60. Id. at 761-825.
61. Izhak Englard, The Philosophy of Tort Law 153 (1993) (arguing that at a normative level the scholarly reform proposals reflect the monistic or pluralistic conception of the underlying tort theory).
Some commentators, of whom David Owen is the most outstanding, propose a much more complex moral basis for the law. Owen draws on ideas of freedom, truth, equality, and community in laying down formulations of the law. Those foundations inform morally the purposes and the limits of punitive damages. Owen’s important insight is the appropriate use of punitive damages for “serious abuses of power.”

Other schools of legal thinking have eschewed such analysis but invite a wider “non-liberal” perspective. As Angela Harris has stated:

In liberal theory, there is no single moral good for a community; values are idiosyncratic and heterogeneous. . . . The doctrine of punitive damages starts from a different premise: that certain values, in this case the rules of deference and demeanor necessary for social interaction, and therefore for the constitution of personality, are both collective and internalized. Thus, the legal principles that draw upon these rules can be contextualized and particular rather than abstract.

This communitarian reasoning leads to an emphasis on the social role of the jury. The jury is the vehicle for voicing conventional morality. The central and appropriate role of the jury has been pressed by others.

With this eclectic backdrop the drama of punitive damages is sure to have a long life on the nation’s law review pages. The struggle to clarify the foundations of punitive damages may often seem syphilean. My contribution is not an account that ploughs a new furrow, but, rather, builds on the work of the above commentators. It confirms the wisdom of most courts in their adherence to traditional doctrine.

B. Compensation and Remedial Gap-Filling

The circumstances of the tort may be such as to require greater damages than to replace actual palpable losses. The victim may suffer losses that cannot be measured by out-of-pocket losses. The injury itself may cause non-economic loss including pain and suffering and loss of enjoyment of life. The circum-

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64. Angela P. Harris, Rereading Punitive Damages: Beyond the Public/Private Distinction, 40 Ala. L. Rev. 1079, 1109 (1989). This atomistic description of liberal theory has been attacked as a caricature, Stephen Holmes, The Anatomy of Antiliberalism (1993).
stances of the tort may aggravate the victim's injury. A dignatory interest may be at stake, where for example a person is subjected to a racial epithet. A relationship may be torn where a psychiatrist has sexual intercourse with his patient. In each of these instances some actual losses may be suffered but the bulk in outrage and the damages can be said to compensate for that outrage. In English law these damages have been separated from exemplary damages.

Only a small part of punitive damages are represented by aggravated damages. The utility and practicality of the division has been doubted. The distinction has not surfaced so strongly in American jurisprudence, although if law reform measures restricting punitive damages continue to proliferate, the litigation bar will no doubt press that “aggravated damages,” compensatory in nature, are distinct and separate and do not fall within the punitive restrictions. Recognition of the division between punitive and aggravated damages prompts the insight that the term “punitive damages” is multidimensional.

Litigation costs may be encompassed in an award of punitive damages. Elsewhere, intangible losses are enfolded into damages recovery. Wrongful death damages are an example. Under Lord Campbell’s Act, the grandfather of all wrongful death statutes, the damages were strictly confined to economic loss sustained on the death of the relative. But with prevailing notions of compensation and deterrence this was an inadequate remedy. “It is better to kill than maim” was not a motto to commend itself to a principled body of law.

72. See Julius Stone, Double Count and Double Talk: The End of Exemplary Damages?, 46 Austl. L.J. 311 (1972). Windeyer J. in Uren v. John Fairfax & Sons Pty. Ltd., 117 C.L.R. 118, 152 (1966), doubted that the “labels” “aggravated” and “exemplary” denoted damages really different in effect; in preserving the distinction he opined that “we shall sometimes find ourselves dealing more in words than ideas.” Id.
73. For a recent discussion see Michael Blanton, Aggravating Circumstance Dangers and the Process Due: Implications of the Missouri Supreme Court’s Decision in Bennett v. Owens-Corning Fiberglas Corp., 64 U.M.K.C. L. Rev. 261 (1995). Reformers in this area are intent upon abolition of punitive damages and should therefore be aware of the argument that aggravated compensatory damages are not punitive. Law reformers in New Zealand face the opposite result where the compensation scheme abolished tort liability for personal injuries. In Donselaar v. Donselaar, [1982] 1 N.Z.L.R. 97, the New Zealand Court of Appeals (the highest court in New Zealand) construed this to abolish actions for compensatory damages but to leave on foot actions for exemplary damages. The United States Supreme Court in Molzof v. United States, 112 S. Ct. 711 (1992), defined the term “punitive damages” as employed by the United States Torts Claims Act finding that pain and suffering were not included with “punitive” damages.
Thus courts and legislatures moved to allow further damages for intangible losses suffered on the death of a family member. The Scots, belying their reputation, early created the solatium payment, elsewhere damages for loss of companionship and grief were allowed. These damages are given in the face of proscription against punitive damages, or, where punitives are permitted, the same compensatory elements may be folded into punitive damages.

Punitive damages are a valuable weapon where remedies are limited and social policy frustrated. For example, the courts have developed tort remedies to secure and maintain long-term relational contracts in the torts of inducement to breach of contract and bad-faith breach of contract. Conventional measures of damages for breach of contract do not capture the relational interests at stake. The possibility of punitive damages provides a more satisfactory mechanism. In these categories punitive damages are employed to fill the gaps in available remedies. It is unfortunate that the law has been content to invoke the use of the term “punitive damages” for gap filling and for the wider “quasi-criminal law” functions to be discussed in the bulk of this paper. A proper appreciation that the function is to compensate better or to avoid breakdowns in agency relationships may allow a nuanced development of punitive damages in this sphere.

C. Deterrence: Law and Economics

Deterrence is probably the most universal rationale. The courts often refer to deterrence in terms of making the wrongdoer smart. The penalty is directly

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80. The tort has been mainly confined to the insurance contract: see Foley v. Interactive Data Corporation, 765 P.2d 373 (Cal. 1988) (refusing to extend the tort beyond insurance, to wrongful dismissal). In Freeman & Mills, Inc. v. Belcher Oil Company, 900 P.2d 669 (Cal. 1995), the Court confined the tort to insurance, rejecting the tort of bad-faith denial of contracts.
82. A discussion of the gap-filling function of punitive damages requires a separate paper. However, the distinction ought to be made. The categories may overlap as with bad-faith breach of insurance contracts, where both the quality of the act is reprehensible and the relationship is one that requires the support of remedies beyond contractual damages. Punitive damages are often recoverable. A few of a large number are: Travelers Ins. Co. v. Savio, 706 P.2d 1258 (Colo. 1985); Southern United Life Ins. Co. v. Caves, 481 So. 2d 764 (Miss. 1985); Jackson Nat. Life Ins. Co. v. Receconi, 827 P.2d 118 (N.M. 1992); Kizziah v. Golden Rule Ins. Co., 536 So. 2d 943 (Ala. 1988); Sere v. Group Hospitalization, Inc., 443 A.2d 33 (D.C. App. 1982).
targeted toward the wrongful act. This is specific deterrence. Of greater moment is general deterrence. The imposition of punitive damages will influence the price of the activity thus reducing its incidence to an optimal level. Alternatively, safer substitutes may be encouraged, or greater care taken to avoid accidents.\textsuperscript{84} The ideal of general deterrence is well-established in tort jurisprudence.\textsuperscript{85} Why are super-compensatory damages required? In some contexts, the utility attained by the defendant in an activity outweighs the compensatory damages. For example, too few victims may initiate litigation to bring home to the defendant the full social costs of the activity.\textsuperscript{86} Harms may not always be easily traceable to tortious activity, and thus not fall to be priced by the tort system. Litigation costs may be high.\textsuperscript{87} This may be an especial problem where the harm is intentionally unlawful and will be more consciously disguised. Intentional misconduct signals that the derived benefit to the actor will considerably outweigh the victim's costs. Punitive damages may be made in order to ferret out these wrongful acts. Plaintiffs and their attorneys are provided an incentive to engage in an expensive search in hopes of obtaining a super-compensatory award. In formal terms, Cooter justifies punitive damages by stating that in their absence "enforcement errors [would] enable injurers to externalize a portion of expected social costs that they cause."\textsuperscript{88} Thus, punitive damages should be set in order to deter at the level that "eliminates the advantage of noncompliance and forces potential injurers to internalize the expected social costs of their actions."\textsuperscript{89} Without punitive damages, the incentives to conform to the law are inadequate.\textsuperscript{90}

Other theorists have proposed that punitive damages may be assigned a more pervasive function. Jason Johnston has recognized the barriers to efficiency in the tort system—litigation costs and uncertainty. He recommends a "properly safeguarded" regime of punitive damages in order to overcome those barriers and to create "optimal incentives for choosing investments in safety."\textsuperscript{91} Johnston's recommendations that pair punitive liability with strict liability for economic loss would both punish and induce optimal deterrence.\textsuperscript{92} Others of the same school have conceived of punitive damages as sustaining an efficient property rights regime by encouraging in thin markets exchange rather than expropriation.\textsuperscript{93}

\textsuperscript{84} The dichotomy was first developed by Guido Calabresi, The Costs of Accidents: A Legal and Economic Analysis (1970).
\textsuperscript{86} Dan B. Dobbs, Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies, 40 Ala. L. Rev. 831, 857 (1989); Ellis, supra note 6, at 24.
\textsuperscript{87} Dobbs, supra note 86, at 857.
\textsuperscript{88} Cooter, supra note 83, at 1148.
\textsuperscript{89} Id.
\textsuperscript{90} Id. at 1194.
\textsuperscript{92} Id. at 1438.
Professor Galligan proposes an argument that draws on the same economic analysis. It shares an affinity with the gap-filling compensation just-presented argument that punitive damages may be given to more adequately compensate. Professor Galligan proposes that punitive damages—or augmented damages—are given to generally deter harm-producing activities. He points out that the law does not extend liability in numbers of contexts, such as for negligently caused pure economic loss. The law may refuse to accord direct redress for these wrongs because of the administrative burden or costs so entailed. This implies a shortfall in the quotient of damages necessary to deter generally these wrongful acts. The augmented award allows the shortfall to be made up; the plaintiff and the augmented damages are acting as a proxy to achieve the correct costing of harmful activities.

The economic analysis literature is extensive and dominant. In the important collection of papers in the Alabama Law Review, the majority of scholars took a strongly economic view of the operation of punitive damages. The description of tort law and criminal law as an engine of deterrence is powerful. For tort lawyers the multitude of tort rules could be analyzed with the tools of economics. The pressure to reduce social costs of interactions led to a search to place liability on the least cost avoider. For criminal lawyers deterrence explains why society should punish wrongdoers. Nevertheless, the deterrence rationale has a weakness born of its utilitarian roots. An effective deterrence regime has nothing to do with responsibility of the individual. It may be, for example, that deterrence would be better effected by resort to collective responsibility. This may inevitably catch the innocent, but so be it. Immediately the utilitarian horrible is conjured up. To save a township, it may be necessary to kill an identified but innocent individual. The utilitarian jumps at the opportunity to save the township. By this step he will increase the quotient of happiness. In the criminal setting, moreover, the deterrence model allows the cruel punishment. If

95. Id. at 44-52.
96. Id. at 84.
98. Chapman and Trebilcock, supra note 59; Dobbs, supra note 86; Malcolm E. Wheeler, A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation, id. at 919; Ellis, supra note 6; George L. Priest, Insurability and Punitive Damages, id. at 1009; David Friedman, An Economic Explanation of Punitive Damages, id at 1125; Cooter, supra note 83; Mark F. Grady, Punitive Damages and Subjective States of Mind: A Positive Economic Theory, id. at 1197; E. Donald Elliott, Why Punitive Damages Don't Deter Corporate Misconduct Effectively, id. at 1053. Dobbs is not usually regarded as a lawyer-economist, but in this paper he takes a strong deterrence line. As discussed above, the articles of Owen, Moral Foundations, supra note 49, and Angela Harris, supra note 64, eschew this analysis for moral and communitarian bases respectively.
100. J.J.C. Smart & Bernard Williams, Utilitarianism For and Against 67-73 (1973).
shoplifters could be optimally deterred by the death penalty, and happiness improved thereby, no reason could be leveled against the exaction of the penalty.\textsuperscript{101} The path of modern tort law has trodden close to accepting a deterrence model. In the DES cases the form of liability tracks responsibility for creating risk of injury.\textsuperscript{102} The movement in mass tort adjudication has been away from adherence to the causation link that tort law traditionally required.\textsuperscript{103}

The deterrence rationale requires responsibility only in the sense that those who may control producing activities will be faced with incentives to take due care. Thus one could hold an innocent liable provided that the party responsible would thus be encouraged to internalize the costs of his activities.\textsuperscript{104} In the punitive damages sphere the mechanism will encourage the attorney as bounty hunter to root out such costly behavior bringing parties to book, thus creating \textit{in futuro} incentives to avoid the behavior. The working of this deterrence system is, however, arthritic. It requires a coordination between client and attorney that is not found in fact. The private interests of the attorney do not align with that of the claimant. The private interests of attorney and claimant do not always reflect the public interest.\textsuperscript{105} For

\begin{footnotes}
\footnote{101. \textit{Id.} (admitting the dilemma but indicating that the event would be sufficiently rare not to sway either an act utilitarian or a rule utilitarian).}
\end{footnotes}
example, both the attorney and claimant may find it advantageous to settle a claim expeditiously. The attendant confidentiality frustrates the law's efficiency purpose to foster the disclosure of information. Furthermore, depending on the attorney's fee structure, she will have an interest in early settlement of the claim to avoid the unreasonable expenses of pressing the claim to court. The claimant's interest may be otherwise. The potential conflict is greater if we allow that claimants often have non-financial reasons for pressing claims, which are foregone when settlement is reached by the attorney.

The deterrent effects of punitives on corporations are difficult to discern. In the presence of insurance to cover the risk of punitive damages and in light of the diffused impact on product design, deterrence must be a most inaccurate and uncertain goal. The information forcing function of punitive damages may also be confounded. In face of punitive damages company officers may adopt strategies that inhibit the revelation of product safety information. An entire industry may hunker down when threatened by litigation.

None of these oft-repeated arguments are a fatal blow against the deterrence rationale. Imperfection is conceded by deterrence theorists. Their agenda is toward a system that faces the inherent imperfections and recommends redress. However, these theorists must concede that if another system of equal or better deterrent effect could be devised without the heavy transaction costs of tort law, we should embrace it. Perhaps one could look to a scheme which combines regulation and governmental compensation. The persistence of punitive damages demonstrates that deterrence is but part of the rationale. The reason tort law lingers with its heavy transaction costs is its essential role in social cohesion and individual responsibility. It is the backwards review of responsibility, rather than the creation of incentives for due care, that explains the persistence of punitive damages.

107. Priest, supra note 98; Ellis, supra note 6, at 71-76 (alluding to the practice and effect of permitting insurance cover).
108. Cf. John P. Burns et al., Special Project—Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation, 36 Vand. L. Rev. 573 (1983) (pointing to the impediments in asbestos litigation); Barry I. Castelman, Asbestos: Medical and Legal Aspects (2d ed. 1986). The tobacco industry is notorious in its united front against liability suits. Robert L. Rabin, A Sociolegal History of the Tobacco Tort Litigation, 44 Stan. L. Rev. 853, 858 (describing the cigarette companies "intransigence"). This is exemplified by the reaction to Liggett's settlement in a class action suit on behalf of smokers and five state Medicaid suits: A Fork in Tobacco Road, Time Magazine, March 25, 1996, at 47 (describing the settlement as a "seismic shift").
110. Owen, supra note 62.
D. Retribution and the Moral Core of Tort Law

Persons may not arrogantly invade the rights of others even where that may be efficient. A rights boundary is maintained. Rights cannot be traded unless the rights possessor consents to the trade. A forced trade is wrong not because it is inefficient (though it often is) but because it flouts a moral precept. The right needs to be explained in this way lest the individual right be regarded merely as an article of trade. I assign the right a functional or consequential role. It is to fit our relationships into a society which is marked by social peace and cohesion and full and equal citizens' participation. We proscribe the ability to sell ourselves or others into slavery, not because it is inefficient but because to allow such trades diminishes our dignity to be treated as equals. Norms reflecting equality and maintaining rights attract general social compliance. Most people, most of the time, live by rules that respect rights. These rules are adhered to not because of the fear of punishment but because consciously to flout them is simply abhorrent.

The punitive damages rules spring from the social roots of the law. The law symbolized what correct relationships were between citizens. The law promoted participation and dialogue, the measure of equal citizenship. Behavior which intentionally and consciously invades rights deserves censure. We have usually delegated that censure to the state in the enforcement of criminal law. Fear of overreaching by private enforcement is ever present. However, where enforcement is the monopoly of the state, want of zeal, cumbrousness, or conflicting interests immediately are of concern. Here our society has opted for a combination of enforcement of mechanisms.


114. "People comply with the law most of the time not through fear of punishment, or even fear of shaming, but because criminal behavior is simply abhorrent to them. . . . Shaming . . . is critical to understanding why most serious crime is unthinkable to most of us." John Braithwaite, Crime, shame, and reintegration 71 (1989).

115. A. John Simmons, Locke and the Right to Punish, in Punishment 219, 234-35 (A. John Simmons et. al eds., 1995) (arguing that the power is delegated to the state under a Lockean contract).

In this paper I support a version of retribution as the appropriate rationale in most cases.117 It is the rationale that is most unsettling for tort lawyers because they are steeped in notions of compensation and deterrence as appropriate goals in tort law. Criminal law is generally viewed as the law’s weapon in obtaining retribution for a person wronged by an antisocial act. Retribution seems hard-edged and unforgiving for the tort scholar where constant adjustment in relationships demands flexible rules.118 But criminal law may be incomplete in mapping the circumstances where retribution is necessary.119

The code of criminal law does not encompass all those acts that may be described as so heinous as to devalue the victim, robbing her of her equal value as a citizen. Enforcement by a grant of punitive damages accords equality to the victim and enforces a norm that in this transaction she is treated, albeit by ex post facto determination, as being of equal worth.120 Thus, the private push for retribution is satisfied. The magnitude of the punishment is a measure of the inequality spoken to by the wrongdoing. The heinousness of the act expresses contempt by the wrongdoer for the victim’s value.121 As Galanter and Luban argue, this fits nicely with the historical rationale of punitive damages. It emphasizes “affronts to the honor of the victim.”122

In exulting retribution, at one level or another, the forward-looking rationale of deterrence is also promoted.123

The law gives vent to the private interest in retribution, to accord the wrongdoer his just deserts, for a social or public reason. It is to solidify those norms which maximize participation and full citizenship. In criminal law theory retribution has been revivified because of the abject failure of deterrence and rehabilitation as rationales for punishment.124 It accords with restored ideals of responsibility and a shift against a calculus that treats individuals as a means to an end.125

As singular rationales, compensation and deterrence were found wanting. As a singular rationale, retribution is also far from satisfactory. Yet, it is the

119. Galanter & Luban, supra note 117, at 1440.
121. Id. For a discussion of Hampton’s view see Galanter & Luban, supra note 117, at 1433.
122. Ellis, supra note 6, at 15-17; Galanter & Luban, supra note 117, at 1433.
beginning of a theory that justifies punitive damages in tort, and for that reason I will dwell a little more on the shortcomings.

E. Some Reflections on Retribution and Punitive Damages

Three issues should be framed on retributive theory: why exact punishment; who should suffer punishment; and what should be the degree of punishment. If we take the first, some theorists argue that there is an extrinsic good in the wrongdoer's suffering. In these terms retribution, the exacting of just deserts, is a primitive, a good in itself without reference to its consequences. This proposition is a conversation stopper. But it is hard to see why retribution should be a base value. Another approach is more nuanced. It argues for a rebalancing between wrongdoer and victim. As Ashworth says: "It is unfair that the offender should be allowed to 'get away with' that advantage, and it is therefore right that he should be subjected to a disadvantage so as to cancel out (at least symbolically) his ill-gotten gain." This account is troublesome because burdens and advantages are not evenly distributed according to victim and wrongdoer status. Although inflexible criminal sanctions may be inadequate in adjustment, an advantage of punitive damages is their adaptability in the event of varying burdens and advantages. Hence, the Ashworth rationale may hold for punitives in more situations than state-imposed sanctions. For example, courts generally take account of defendant's wealth in awarding damages.

Another theory proposes another basis for retributive punishment. It is that punishment annuls the wrong done and returns matters to their status quo. In a version adapted as persuasive by Luban and Galanter, this is taken up by

126. H. L. A. Hart's definition asserts three things: first, that a person may be punished if, and only if, he has voluntarily done something morally wrong; secondly, that his punishment must in some way match, or be the equivalent of, the wickedness of his offence; and thirdly, that the justification for punishing men under such conditions is that the return of suffering for moral evil voluntary done, is itself just or morally good.


131. G. W. Hegel, Philosophy of Right (T.M. Knox trans., 1952).
Jean Hampton. Punishment cannot annul the act; rather, punishment defeats the wrongdoing that asserted mastery over the victim. Punishment now is a reverse act of mastery. This has been criticized as assuming equality at the outset, but the equality is measured in terms of human dignity where our core democratic presumption is that every individual has an equal right to be respected. Nevertheless, calibration of the penalty to reassert one's equality is difficult to conceive. For example, if the wrongdoer is a corporation, how is the penalty to be set? The penalty necessary to exert mastery via the award of punitive damages seems almost boundless. Moreover, who is to be the target? The corporation does not live and breathe. Are its officers and shareholders to be punished?

A last basis for retribution is the most simple and closest to the legal tradition. Punishment is reprobation and denunciation of the wrongful act. At least one moral thread identified above is that public denunciation protects the social fabric. This is the reason for maintaining the sense of outrage at the infringement. Others see reprobation as a good in itself not requiring a showing of satisfactory consequences. To defend this view, an argument must be made that punishment is necessary to support reprobation.

132. Jeffrie G. Murphy & Jean Hampton, Forgiveness and Mercy 127 (1988); Hampton, supra note 120, at 1686: "[R]etribution is a response to a wrong that is intended to vindicate the value of the victim denied by the wrongdoer's action through the construction of an event that not only repudiates the action's message of superiority over the victim but does so in a way that confirms them as equal by virtue of their humanity."


135. Hampton, supra note 120, at 1685-89, applies her retributive theory to Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (1981), wherein the jury awarded a family of a burn victim $125 million in punitive damages. The damages were based on the profit-maximizing decision by Ford to maintain the fuel tank placement on its vehicle. Ford put a price on life and the jury, by granting retribution, defeated Ford's equality-defeating decision. The resolution of the jury award to $3.5 million allowed Ford to "get away with something." Id. at 1689. But the proportionality of the punishment with the most gravity of the wrongful conduct may be defeated by the vagueness and uncertainty of a jury setting the punishment, that steers away from proportionality. Malcolm E. Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 Va. L. Rev. 269, 310, 311 (1983); see also Ausness, supra note 6, at 41.


139. Pettit & Braithwaite, supra note 133, at 161.
may indeed pose a problem when one turns to criminal sanctions like imprisonment. Why is a fine not sufficient if the public through its institutions determines that the action is wrong?\textsuperscript{1}\textsuperscript{140} The length of the sentence is a weak proxy for moral condemnation we feel for criminal wrongdoers.\textsuperscript{1}\textsuperscript{141} With money damages, however, this symbolic act of payment is critical and may be sensitively calibrated. This was long ago recognized with damages for defamation. Money could not replace the good name besmirched, but the payment was a powerful symbol of denunciation.\textsuperscript{1}\textsuperscript{142} This explains the prevalence of the common law's resort to punitive damages for defamation.\textsuperscript{1}\textsuperscript{143} To obtain a measure of reprobation does not require the assertion of mastery by the victim through punishment; a degree that may be impossible to implement if the wrongdoer is a large corporation. But it does service by way of reprobation. In another way, the punitive damage award asserts the values of society in bringing home to the wrongdoer correct values.\textsuperscript{1}\textsuperscript{144} To levy punitive damages is to educate in the coin of commerce.\textsuperscript{1}\textsuperscript{145}

In any of these versions of retributive theory, there is no reason to give the state a monopoly on enforcement of these norms. Provided overreaching and self-serving behavior is constrained, private enforcement is entirely justifiable.\textsuperscript{1}\textsuperscript{146} Who is to be punished? Retribution may require punishment of all and only wrongdoers or punishment of some of the wrongdoers but only the wrongdoers. The requirement is an advance on the deterrent argument exhibiting an indifference as to who is punished provided that the wrongdoer is deterred. To use the DES example above, the New York court in Hymowitz\textsuperscript{1}\textsuperscript{147} declared that all distributors and manufacturers of DES in the nation with a significant market share would be liable in proportion to that market share, although in the individual case they could show that its DES could not have caused the plaintiff's injury. This sits comfortably with deterrence theory but not with retribution where no person other than a wrongdoer should be punished.\textsuperscript{1}\textsuperscript{148}

\begin{itemize}
\item \textsuperscript{140} Dan M. Kahane, \textit{What Do Alternative Sanctions Mean?}, 63 U. Chi. L. Rev. (forthcoming 1996).
\item \textsuperscript{141} Pettit & Braithwaite, \textit{supra} note 133, at 161-62.
\item \textsuperscript{142} Windeyer in Uren v. John Fairfax & Sons, Proprietary Ltd., 117 C.L.R. 118, 150 (1966); Carson v. John Fairfax Ltd., 178 C.L.R. 44 (1993).
\item \textsuperscript{143} A tradition only faintly recognized in the first amendment jurisprudence of the United States Supreme Court in the cases flowing from \textit{New York Times v. Sullivan}, 376 U.S. 254, 84 S. Ct. 710 (1964).
\item \textsuperscript{144} Nozick, \textit{supra} note 138, at 375.
\item \textsuperscript{145} See C. L. Ten, Crime, Guilt and Punishment 45 (1987).
\item \textsuperscript{146} But compare Jeffrie G. Murphy, \textit{Retributivism, Moral Education and the Liberal State}, 4 Criminal Justice Ethics 3 (1985) at 6, who wonders how the state should have any role under retributive theory. \textit{See also} A. John Simons et al, eds., in Punishment (1995).
\item \textsuperscript{147} Hymowitz v. Eli Lilly and Co., 539 N.E.2d 1069 (N.Y. 1989).
\item \textsuperscript{148} The definition of wrongdoer may be shifted to accommodate the example, but then its meaning would be lost. It may weaken to a version that no person is individually responsible—society is the villain. Writers are critical of this slippage of individual responsibility. \textit{See also} Anne M. Coughlin, \textit{Excusing Women}, 82 Cal. L. Rev. 1 (1994).
\end{itemize}
To punish some but not all wrongdoers falls short of the retributive goal. In Kant’s terms there is a categorical imperative to punish. The tort private enforcement rule fueled by the availability of punitive damages, avoids the encumbrances of state enforcement. But the imperative may be socially destructive by denying resort to mercy and forgiveness. It may be, for example, that corporate wrongdoing is better prevented by the state forbearing to enforce sanctions. The criminal justice system would be unworkable if all criminals served time. The system lives on discretion and avoidance of over-legalization for society. A concern little raised is that private enforcement with the aid of punitive damages may ride roughshod over sensitive, long-sighted enforcement techniques used by the state. While this is a cost, it may not be as prevalent as the lack of official enforcement engendered by laxity, bad faith, or just lack of resources of state officials. In any event, the state can always adjust to overly strenuous private enforcement by resorting to legislation to restore balance.

On the question of how to punish, the retributivists have devised detailed schemes of desert for different types of wrongdoing. To establish penalties is central and according society’s presumptive condemnation of a particular kind of wrongdoing. It supports the widely held view that a proper purpose is denunciation. But at the stage of application, the call for discretion is strong, and this for good reason. More effective enforcement of underlying social norms may stem from suspending sentences leaving social mores and the threat of future enforcement to admonish the wrongdoing. A clash of understandings about fundamental norms may lead a court to condemn the wrongful act, but adjust the penalty to reflect the true dilemma of the wrongdoer. Again, the exaction of punitive damages as embodying a highly discretionary rule allows for such adjustment to heinousness. Hence, penalty is calibrated within the broad rule. In other words, the rule has within it an excuse where behavior,

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149. Even if a Civil Society resolved to dissolve itself with the consent of all its members—as might be supposed in the case of a People inhabiting an island resolving to separate and scatter themselves throughout the whole world—the last Murderer lying in the prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds, and that bloodguiltiness may not remain upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of Justice.


152. Pettit & Braithwaite, supra note 133, at 177; Rychlak, supra note 136, at 332 (stressing the utility of denunciation).

153. The Queen v. Dudley, 15 Cox C.C. 624, 14 Q.B.D. 273 (1884) (some survivors of a shipwreck were found liable for the murder of a cabin boy, who was killed and eaten in order to survive); U.S. v. Holmes, 1 Wall. Jr. 1, 26 Fed. Cas. 360 (E.D. Pa. 1842) (criminal liability for throwing overboard passengers to save the boat from being swamped). The rich tapestry of social backdrop and convention is described by A.W. Brian Simpson, Cannibalism and the Common Law (1984). The jurisprudential conundra are discussed by Lon Fuller, The Case of the Speluncean Explorers, 62 Harv. L. Rev. 616 (1949).
although wrongful, could not be regarded as an arrogant disregard of the plaintiff's rights.\footnote{154}{The common law in fact recognizes the obverse lesson of punitive damages awards, i.e., that some rights should not be asserted even though they are formally abridged. “Gold-digging” actions for defamation provide an example: Newstead v. London Express Newspaper, Ltd. [1940] 1 K.B. 377.}

The retributive theory, now commonly embraced, looks to consequences and is to be so judged. The discussion has indicated that in many respects the law of punitive damages is consonant with retributive theory, indeed even more so than state-enforced criminal law. Nevertheless, if the theory is rooted in its consequences, it is incomplete, since social goals have not been spelt out.

VI. REPUBLICAN THEORY

A. Formulation

The target of the punitive damages rule, as of any legal or social rule, is embedded in some conception of the good in society. The liberal theoretician will identify individual freedom or liberty as the value to be maximized. Rules should be fashioned to maximize the capacity of individuals to pursue their own interests, provided that in so doing they do not trespass on the rights of others.\footnote{155}{J. S. Mill, On Liberty (Penguin, 1974):

The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant... The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independencies of right, absolute. Id. at 68-69.}


The theory to be espoused here is likewise a consequentalist theory. It is akin to the liberal theory, except that the interest maximized is that of welfare of individuals within a society. This contrasts with some liberal political theorists who conceive of the individual as a disconnected entity.\footnote{157}{Thomas Hobbes, Leviathan 266 (C. B. Macpherson ed., 1968) (where men can enjoy liberty in the nature; if in a community the political complexion is irrelevant to freedom which may be enjoyed).}

For the liberal theorist, law is a means of promoting liberty, but not necessarily a part of what liberty is.
The idea of liberty as protection against interference has a long history in Western thought. For the republican theorist going back to Aristotle, freedom from interference cannot be conceived of without the presence of others in society and the condition that each person as a participant in a free society is not interfered with and is given equal protection before suitable laws. The law guarantees this freedom to a citizen. For the liberal, being left alone is freedom; for the republican, freedom is a condition of citizenship to claim equality before the law. Within a community a person may participate in the process of self-rule. Freedom is inseparable from law. Citizenship is woven in the law. Its roots harken back to the Roman republic. To be free was to be a full and equal party to the rule of Roman law: "full libertas was [coterminous with civitas]." The same notion can be found in the medieval terms "freedom" and "franchise."

The republican wrapping of the individual with the community and the law concerns some liberals who see that the individual may be subordinated and freedom lost. Richard Epstein, for example, worries that communitarian or republican theories were part of the standard stock and trade of many "enlightened" fascist theories. He sees that voluntary associations are in danger. Liberalism, he argues, upholds communitarian values while not endangering

158. J.G.A. Pocock, The Machiavellian Moment (1975). Constitutional law has attracted the attention of those proposing a republican discourse. It has two sources: historical scholarship, e.g., Gordon S. Wood, The Creation of the American Republic, 1776-1787 (1969); Robert E. Shalhope, Republicanism and Early American Historiography, 39 Wm. & Mary Q. 334 (1982); but cf. J.C.D. Clark, English Society 1688-1832: Ideology, Social Structure, and Political Practice During the Ancien Regime 423-24 (1985); and normative critique that runs counter to liberalism (at least in some respects), e.g., Alasdair C. MacIntyre, After Virtue (1981). As Richard Fallon states, the term is difficult to define. He sees it would encompass a few core tenets: that "human beings are essentially political animals, that they can fulfill their natures only by participating in self-government, and that the most important aims of the political community should be to promote virtue among the citizenry and to advance the common good." Richard H. Fallon, Jr., What is Republicanism, and Is It Worth Reviving?, 102 Harv. L. Rev. 1695, 1697 (1989) (citations omitted). Intellectual streams are set forth powerfully in David Lieberman, The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain 8-22 (1989). As explained below, the version adopted here has the notion of "full dominion," a socially based liberty at its core. In Michelman's terms republicanism affirms a "positive freedom" and not simply the "negative" freedom of liberalism. Frank I. Michelman, Traces of Self-Government, 100 Harv. L. Rev. 4 (1986).

159. Kronman, supra note 37, at 36.
160. Kronman, supra note 37, at 37.
161. Chaim Wirszburgi, Libertas as a Political Idea at Rome During the Late Republic and Early Principate 3-4 (1950).
162. C.S. Lewis, Studies in Words 125 (1967).
164. Epstein, supra note 163, at 323.
165. Id. at 324; see Holmes, supra note 64, at 98-246, arguing that liberalism includes within it many communitarian ideals.
liberty. This may be the case where the theory is enriched by reference to the individual in society. If an individual is to fulfill a life's plan it must be done with a society of fellow beings who also must be free to pursue their life plans. Communities determine individuals' identities. The kind of society must be pluralistic in the sense that "a multiplicity of values" is not only recognized, but "their pursuit must be a real option available to its members."

But society and pursuit of life plans depend upon culture, custom, and a public conception of justice rooted in our concept of the good. No doubt statist republicanism may be used to subvert freedom. It is essential, therefore, that the republican idea has embedded within it guarantees from oppression of the totalitarian state. Numbers of liberty-based restraints may be proposed. Braithwaite and Pettit, in framing their republican theory, recognize the need to stipulate conditions for the republican community. These conditions comprise affording the citizen what they call "full dominion." The individual enjoys full dominion if and only if:

1. She enjoys no less a prospect of liberty than is available to other citizens.
2. It is common knowledge among citizens that this condition obtains, so that she and nearly everyone else knows that she enjoys the prospect mentioned, she and everyone else knows that the others generally know this too, and so on.
3. She enjoys no less a prospect of liberty than the best that is compatible with the same prospect for all citizens.

The last requirement is delphic but is explained by Braithwaite and Pettit in terms of a choice between two political societies. Let us dub them Athens and Sparta. In each the citizens have equal prospects for liberty, but suppose in Athens the prospects are larger because, for example, it exacts smaller taxes than Sparta. Athens then ought to be preferred. The citizen of Sparta will enjoy less dominion than the citizen of Athens.

Dominion is defended as a goal or target of the criminal justice system because it meets three desiderata. These are whether the target is uncontroversial, stable, and satiable. Pettit and Braithwaite gauge whether a criminal justice system may conform to these desiderata, while keeping faith with the target. As a preliminary matter, I investigate whether tort liability for punitive damages may also comply.

167. Id. at 46-69; see also Holmes, supra note 64, at 200: "[L]iberals retained an emphatic conception of the common good." But cf. Sandel, supra note 166, criticizing the attempt to bring liberalism and republicanism together.
168. Pettit & Braithwaite, supra note 133, at 64-65. This describes a view of liberalism enunciated by Holmes, supra note 64, at 198-256.
Take the first, uncontroversiality. Crime invades dominion by destroying or compromising the victim's dominion: his prospect of liberty is surrendered. If we turn from crime to other acts that invade dominion, it is uncontroversial that a consciously wrongful act directed against the rights of others flouts those others' equal prospect of liberty. A society that guards liberty cannot tolerate wantonly wrongful acts that injure others' person or property. Thus, a system directed toward full dominion would protect citizens against such actions by bringing its enforcement machinery to bear.

Take the second, stability. Legal sanction demands that negative liberties be protected. The state should provide machinery to vindicate rights and, at the same time, that machinery should avoid becoming oppressive. In the sphere of criminal law, concern is that for the state to drive to eradicate liberty-robbing crime may be counterproductive. The apparatus of criminal law enforcement may fill the land eroding citizens' faith in negative or individual freedom. It follows that not only are individual rights a necessity, but also the state must show restraint in enforcement of criminal law. The dangers of an overzealous state are nicely overcome in permitting private enforcement of the kinds of liberty-robbing actions at the heart of tortious punitive damage awards. The dangers in overreaching of state action are avoided by obviating the need of the criminal law to map the multifarious and changing range of proscribed behavior. At the same time, the liberty of the citizen to be free from consciously arrogant abuse of rights is protected.

Take the last, satiability. The target of dominion should be tested against the possibility that voracious demands may be made for the punishment of the guilty in criminal law. A problem besetting deterrence theory is that any punishment is justifiable if it furthers society's good. But under the dominion principle, the punishment should, in order to protect the citizen's liberty, be minimally coercive. We may decide that corporate wrongdoing in knowingly selling dangerous products could be curbed by shooting managers of the corporation. Indeed, empirical studies may show this. A principle of dominion searches for the least-intrusive strategy to protect the victim's dominion. This may be via regulation or tort action. The tort action with punitive damages is symbolic of a finding of wrongdoing. It protects the victim's liberty, symbolically by condemning the wrongful act, and, tangibly by money damages. The victim is thus assured that she is not devalued as a person by the wrongful act, and that her dominion is worthy of respect. The tort action also promotes reintegration in the community of the victim and the offender. Compensation

170. Tort law is a well-used category for resolution of problems that occur in other fields where the resolution within that field would be problematic, e.g., tort law solving the problems surrounding enforcement of long-term relational contracts. See Partlett, supra note 81.

171. Pettit & Braithwaite, supra note 133, at 80. It may be that the dominance of imprisonment as criminal punishment in preference to corporate punishment stems from a republican notion of satiability; for a suggestion of republican roots see Kahane, supra note 140, at 23-25.
aids the victim in this process and the offender, while punished, may continue to function productively and act as a good citizen.172

An important attribute of the republican ideal is that the institutions that undergird it are not coercive. A significant scope is given to formative institutions that seek to encourage deliberation between citizens, state officials, and the state itself.173 Virtuous habits are thereby cultivated. Dominion is enhanced by wider appreciation of accepted behavior and the hand strengthened of non-coercive enforcement through means of shame or reprobation.174 Civic virtue guards against official corruption and wrongdoing. Tradition in the legal profession may be seen as one of these formative institutions which promotes deliberation and wise decisionmaking.175 The jury is a direct way in which the community is brought within the administration of justice. Service imposes a civil obligation and democratizes deliberations of the courts. Its central place in the federal and state constitutions is therefore quite natural.176 Juries, as Akhil Amar says, are political institutions and not procedural. They exist to "promote democracy for the jurors, not efficient adjudication for the parties."177

B. The Advantage of a Republican Theory

Retribution as a base for justifying punitive damages has much to commend it. But it falls short. Retribution does not have a clear goal, a conception of the good, which is to be maximized. Just deserts as a just criterion fails to answer many questions about the desirable shape of the law. But retribution is a potent idea because it fulfills the goal of republican dominion in a number of ways. It respects the liberty of the citizen in not punishing the innocent. It reviews the individual transaction and modulates desert to recognize the victim's liberty. It explains why criminal law does not adequately fulfill society's punishment objectives—the coercive state is constrained. And finally, retribution allows for subtle sanctions such as reprobation as an appropriate sanction.

172. This is something that the criminal law punishment leaves out of the equation. G. Ganz, Criminal Injuries Compensation: The Constitutional Issue, 59 Mod. L. Rev. 95 (1996); Coffee, supra note 38, at 231 (discussing the compensatory nature of the criminal law).

173. Petitt & Braithwaite, supra note 133, at 82; Kronman, supra note 37, at 42. The formative agenda in inculcating "civic virtue" is fully developed in Sandel, supra note 166, at 317-51.

174. Braithwaite, supra note 114, at 68-83; Kahane, supra note 140.

175. Kronman, supra note 37, at 215, discussing tradition in constraining appellate judges; more extensively Kronman discusses the ideal of the "lawyer-statesman" at length, id. at 109-162. Most economists are highly suspicious of formative institutions, often distilling them into sets of individualistic motivations. But liberalism as of the genre of Madison requires "virtue," Holmes, supra note 64, at 227.

176. Akhil Reed Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131, 1183-89 (1991) (referring to both the grand and the petit jury). Amar describes the jury as the "paradigmatic image underlying the Bill of Rights," id. at 1190.

I have suggested above how punitive damages in tort law may fit the retributive republican model outline. The availability of private enforcement empowers citizens to assert dominion. The ability to demand redress and process of claiming itself is a formative institution. The participation of the jury in the process and the discourse between judge and jury are likewise instruments for inculcation of civic virtue.

The capacity of the court in awarding punitive damages furthers dominion by graduating damages to accord with heinousness. Furthermore, damages carry a significant symbolic power. The victim is reintegrated in society through payment and the offender reintegrated by bowing to process and continuing to operate in the community. The tort system accords equal respect to the wronged individual. The legitimacy, then, of the political community is enhanced by its affording private rights of action to enforce liberty-robbing infringements. The process confirms the centrality of personal responsibility, which may be occluded when enforcement is exclusively left to public officials.

C. An Excursion on Corporations

In this account of the compatibility of punitive damages with the republican goal of dominion, can one be attacked as quixotic? Society, where individual actors promote a political union, may be argued to be remote from modern industrial society, where corporations play such a highly influential role. Since corporations are overwhelmingly defendants in tort suits seeking punitive damages, this issue is particularly pertinent in this paper. In short compass, my argument is that the republican model is apposite where corporations are major players. In contrast, the deterrence and purely retributive rationales have severe shortcomings.

In deterrence theory, the corporation is an organization with its own governance structure. Any rule should be designed to direct the sting of the penalty to those human actors within the organization who will be in the best position to steer the corporation from its wrongdoing. Punitive damages may be awarded against the corporation’s human agents or vicariously against the corporation. But punitive damages are a blunt instrument set against an enigmatic organization.

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178. Some criminal law theorists omit corporate crime, e.g., George P. Fletcher, Rethinking Criminal Law (1978).
180. Cf. Owen, Civil Punishment, supra note 49, at 110, arguing the company is more sensitive than the individual to the deterrent effect of punitive awards. But elsewhere Owen displays little faith in deterrence. Owen, Punitive Damages, supra note 52, at 1285-86.
181. The corporation itself could not be said to be an entity with mental capacity to intend consciously to wrong another. See Donald R. Cressey, The Poverty of Theory in Corporate Criminal Research, 1 Advances in Criminological Theory 31 (1988).
182. The issue is one of group as collective behavior, see Mancur Olson, Jr., The Logic of Collective Action (1965); Kenneth J. Arrow, Social Choice and Individual Values (2d ed. 1963).
It may be that more responsive corporate behavior would be garnered by enlisting the corporation to keep its own house in order by superior monitoring of potential wrongdoers within its organization. It follows that, if the corporation has initiated and maintained reasonable monitoring, it should not be vicariously liable, lest it lose its incentive to monitor. But that good housekeeping itself may expose the corporation to a tort suit for punitive damages since it will now more likely be taken to know of its wrongdoing. However, if the corporation is not vicariously liable, the plaintiff faces a potential defendant—the corporate officer—who is a person of straw. Thus, without the prospect of collecting a judgment, the machinery for private enforcement is still-born. The limited liability enjoyed by corporations may also blunt the deterrence incentives faced by corporations. Too little may be spent on precautions to avoid accidents.

With the weakness of deterrence signals, a retributive rationale is more appealing. A punitive damage award represents a wrongdoing corporation’s just deserts. A corporation may be punished in proportion to desert as a measured way of expressing the community’s degree of reprobation. Provided the corporations can be viewed as rational actors (and they are indeed society’s most rational, as profit maximizers), they are amenable to retributive calculus. It cannot be said of corporations that weaknesses of the flesh or mind should mitigate punishment. Moreover, reprobation may assuage the individual’s hurt in being treated as less than an equal. To suffer such insult at the hands of an entity that is regarded as quintessentially rational points even more to the need for retribution. However, here I want to urge the superiority of a republican concept. The idea is that reprobation is fully embraced where an individual’s dominion is invaded by the wrongful act of the corporation. In an era where overweening corporate power is a concern, the sense of control in asserting dominion is provided by a legal outlet that allows private enforcement against large corporations. The citizen, by dint of access to punitive damages, is restored to full rights as an equal by the symbolic power of punitive damages as


185. Von Hirsch, supra note 137. A practical problem exacerbating the ensuring of proportionality of punishment is the combination of criminal and civil punishment and the multiplicity of actions that may be brought against large corporations. Corporations may be overpunished if courts are insensitive to these matters. If deterrence is the rationale the same concerns loom large. Some regard these as confounding a theory based on retribution or deterrence, Ausness, supra note 6, at 57-74. But they call rather for carefully tailored rules and not the abandonment of the sustaining rationale.
well as compensated. The citizen is then more than a cipher in the economic system.

A pure retributive theory holds that only the guilty should be punished. This is a prime obstacle in applying the theory to a corporation. Those that suffer from the imposition of punitive damages include innocent shareholders. But retribution tied to a republican compact is more complete. The cost of a shareholder's voluntary arrangement with a corporation is the responsibility that she shares for the corporation's wrongdoing.

The shareholder is a participant in a voluntary joint venture. Her association with the corporation garners financial and psychic rewards. Limited liability of shareholders does not reflect on the blameworthiness of shareholders, but is, perhaps mistakenly, a mechanism leading to more efficient capital formation.

To be sure, the modern corporation has widely spread shareholders, who enjoy limited liability, and have no close attachment to the corporation. It is for this reason that punitive damages may be most efficacious. They provide a sting that comes to the attention of shareholders. Their availability overcomes some of the drawbacks of limited liability. The award is symbolic of wrongdoing and shames at least those who were close to the corporate decision. The corporation is more than a web of contracts or artificial entities, but may be seen

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190. Shaming is an aspect of reprobation that importantly moderates the viciousness of penalties but may more effectively enforce social norms and satisfy proportional retribution. Some cultures are particularly amenable to shaming as punishment, e.g., Japanese culture, see Braithwaite, supra note 114, at 62-65. Shaming may also play a reintegrative role through apology ceremonies, John Braithwaite & Stephen Mugford, Conditions of Successful Reintegration Ceremonies, 34 Brit. J. Criminology 139 (1994). See supra text at note 114. But in American society it may be efficacious. Large numbers of illegal aliens and small numbers of inspectors have created problems with compliance with the Fair Labor Standards Act in the Los Angeles garment industry. Secretary of Labor Reich has devised an enforcement policy to have manufacturers and retailers monitor their contractors to guard against sweatshop working conditions. Garment Firms in Los Angeles Agree to Police Contractors for Wage Violations, Washington Insider (BNA) June 21, 1995. Compare Coffee, supra note 38, at 200-01 (arguing that exercise of punitive damages will diminish its stigma).
as a politico-legal system where deterrence and retribution operate in microsym.\textsuperscript{191}

The award of punitive damages of significant quantum calls for explanation from management thus reinforcing its accountability. The process of exaction, payment, and explanation brings the corporation to book in the eyes of the wide community\textsuperscript{192} and thereafter permits its reintegration as a wholesome and useful participant in the social endeavor.\textsuperscript{193}

\textbf{D. A Republican Explanation}

To this point I have outlined the essence of the republican ideal, and how within that ideal a willful wrongdoer may be penalized in punitive damages. The justification comports with the desiderata that applied to punishment of criminal wrongdoers.

My thesis is that the further a community departs from the republican ideal, the more the application of punitive damages will become problematical. Those damages may become arbitrary and erratic. If I am correct, this may explain the

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\textsuperscript{191} Brent Fisse & John Braithwaite, Corporations, Crime and Accountability 81 (1993).
\textsuperscript{192} The corporation may be seen as a democratizing institution:
The object and intention of the legislature in authorizing the association of individuals for manufacturing purposes was . . . to facilitate the formation of partnerships without the risks ordinarily attending them, and to encourage internal manufactures. There is nothing of an exclusive nature in the statute; but the benefits from associating and becoming incorporated . . . are offered to all who will conform to its requisitions. There are no franchises or privileges which are not common to the whole community. In this respect incorporations under the statute differ from corporations to whom some exclusive . . . privileges are granted. The only advantages of an incorporation under the statute over partnerships . . . consist in a capacity to manage the affairs of the institution by a few . . . agents, and by an exoneration from any responsibility beyond the amount of the individual subscriptions.


\textsuperscript{193} Note I do not enter the thicket of toxic and class action suits. See Gary T. Schwartz, \textit{Mass Torts and Punitive Damages: A Comment, 39 Vill. L. Rev. 415 (1994)} (the common law jury process of assessment of punitive damages which can be evaluated as inflicting normatively inappropriate multiple punishments). The overexaction of punitive damages flouts the proportionality principle of retribution and the republican gloss proposed in this article. The solution is to be found in reform of procedural rules. Schwartz, \textit{id.} at 431, alludes to the national class action for punitive damages. He ponders, however, that the suggestion is of a "public" character and raises anew the question of why criminal law is not the appropriate instrument.
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realities of punitive damages, their volatility, their severity, and their frequency in hot zones throughout the nation.

In establishing this argument, something should be said about the substantive rules of award of punitive damages. Those rules are framed in a highly discretionary and highly localized fashion. They invest a great deal of discretion in the jury to award damages within the context of the dispute. Therefore, much uncertainty and diversity is invited. The payoff for the open-textured rule is that dominion is maximized by its operation in this fashion. The community garners a great sense of participation by an individual rendering of justice where case-specific decision-making drives toward fair outcomes. The entire process is a formative institution where all participants are brought within the community’s web of the law. The retributive aspects of the ideal are met by juries and judges calibrating the award to accord with its heinousness.

But this is an ideal. The law may have a republican goal of dominion but also depend upon the substrata of that republican community to nurture the goal. In almost all circumstances the substratum is mainly intact, hence supporting the law and the dominion which flow from it. For example, as Michael Saks shows, the civic responsibility of the majority of juries is demonstrated. The substratum,
however, may disintegrate once the institutions of the jury, the judiciary, and the legal profession lose civic responsibility or practical wisdom.\textsuperscript{197} Restraint, so important in exercising punishing power, is swamped by the irresponsible exercise of power. Isolated jurisdictions around the nation may be particularly susceptible to this. The next two sections will discuss the evidence that the crisis in punitive damages is isolated to hot zones. Then why should the aberrations have occurred in these zones? Only empirical studies will answer these questions, but as I then argue, the very uncertainty ought to make us slow to accept radical reforms of the law. The reforms may be wasteful and pernicious.

VII. THE EVIDENCE RELATING TO PUNITIVE DAMAGES

The target of critics of the tort system has shifted over the years. Medical malpractice and product liability are two areas to receive a crisis rating. 


The cognitive ability of the jury to deal with the complexity of legal concepts, in particular concepts of the law of negligence, is thoroughly discussed by Neal R. Feigenson, \textit{The Rhetoric of Torts: How Advocates Help Jurors Think About Causation, Reasonableness, and Responsibility}, 47 Hastings L. Rev. 61 (1995) (offering a comprehensive summary of jurors' interpretation of the law of negligence, dependent on counsels' arguments and jurors' decision-making). The unpredictability and unconstrained nature of jury decisions increases horizontal inequity. Such has been an abiding concern with non-economic losses in personal injuries. This is exacerbated by juries' and jurors' reactions to instructions, see Edward T. McCaffery et al., \textit{Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards}, 81 Va. L. Rev. 1341 (1995).


\textsuperscript{197} Kronman, supra note 37, at 151-52.
Transcending all these areas are punitive damages awards. Critics argue that if liability has been too pro-plaintiff, the remedy of super compensatory damages has badly exacerbated the already loose and uncertain rules. In confirmation, these critics say that punitive damages are routinely awarded, that they are of great quantum, that the frequency and size has been increasing, and that this is a phenomenon of national proportions. 198

The work of Daniels and Martin provides a debunking of much of the rhetoric. Reality is more complex as analysis is extended to cover a large number of jurisdictions over a wide expanse of years. The authors discuss and analyze data derived from local jury verdict reporters. 199 This information, which is generated for the use of attorneys, is fairly accurate and covers the majority of verdicts in these jurisdictions. Eighty-two sites covering one hundred counties in sixteen states are included to reflect a combination of regional balance and available source material. 200 The information is sliced in various ways to show plaintiff win rates in various categories and median awards in those categories.

In respect of punitive damages, the authors' data for 1988-90 reveal that punitive damages were awarded in 4.5% of all verdicts and in 8.3% of winning verdicts. But some sites revealed no punitive damages awards, while some reported a 20% rate in winning verdicts. 201 Punitives were more likely in cases involving financial harm than in physical harm. 202 Local influences were at play. In Los Angeles County, the median punitive damage award increased far in excess to comparative figures for other sites. 203 A large number of insurance bad-faith claims seems to explain this discrepancy. 204 Five sites had medians above $100,000. Two of the five had relatively few punitive damage awards. 205

199. Id. at 66-68.
200. Id. at 68.
201. Id. at 241 (Cook County Illinois yielded a rate of 1.4%; Travis County, Texas yielded 29.1%—the highest rate). Id. at 214.
202. Id. at 217-18. In physical harm cases the punitive damages rate was low fluctuating from 0.8% in Cook County, Illinois, to 12.7 in Bexor, Texas. It exceeds 5% in 9 of 22 sites, and exceeds 10% in three sites. Id. at 219. In financial harm the rate was from a low of 2.1% in Cook County, Illinois, to 44.4% in District 9, Texas. Id.
203. The book's conclusions are confirmed in another recent survey. U.S. Dept. of Justice, Bureau of Justice Statistics Special Report, Civil Jury Cases and Verdicts in Large Counties, Civil Justice Survey of State Courts, 1992, July 1995. "Juries included punitive damages as part of the overall award in 6% of the cases in which the plaintiff won. Punitive damages accounted for about 10% of all money awarded to plaintiffs. The median award was $50,000. Twenty-four percent . . . were over $250,000, and 12% were $1 million or more." The statistics are broken into different torts revealing patterns similar to those of the books' authors. Not all the studies that demonstrate a sober view are recent, see Punitive Damages: A Constructive Examination. Report of the Special Committee on Punitive Damages, 1986 ABA Sec. Litig.
204. D&M, supra note 198, at 218.
205. Id. at 221.
The authors look at verdicts over a twenty-one year time frame to gauge whether the trend is to higher frequency and severity. The rates for bodily injury remained remarkably stable. For financial harm, the figures display higher punitive damage rates and variability between sites is marked. In Dallas over the twenty-one year period the rate was 15.3%, in Jackson, MO 21%; and in Los Angeles, 32.2%. But in Cook County, Ill., the overall rate was only 5.5%. Plaintiffs are more likely to receive punitive damages in emotional/reputational cases but the reported cases are very small and do not allow for meaningful temporal comparisons.

Have the quantums of damages risen rapidly? Once more the figures are mixed. For Cook County, the median award dropped in the period 1977-80 from $18,145 to $12,000 and then rose to $28,750 in the 1986-90 period. Fluctuations are evident in figures from other sites. In Los Angeles median awards are substantially higher than elsewhere. But that is not representative. The high end of the award, the top 25% of verdicts, reveal the greatest increase. The financial harm cases accounted for the largest proportion of cases in the top 25% of the punitive damages distribution. As mentioned it was those cases that mainly fueled the Los Angeles increases.

Lastly, Daniels and Martin discuss whether punitive damages represent a greater and increasing proportion of compensation dollars. They find no general pattern of increase in the "percentage of the total award represented by punitive damages over time or an increase in the rates of punitive damages to other damages."

As with data on products liability and medical malpractice awards the picture for punitive damages is complex and variable. Twelve sites reported no punitive damages, but three reported rates of over 20% of winning verdicts in 1988-90 data. The typical award is modest with ten sites below a $50,000 median and five more under $30,000. But five of twenty-two sites have median awards in excess of $100,000.

The authors conclude that the system has not "devolved into chaos or some other degenerate state, but [constitutes] an orderly system that did not change in any major way over the 21 year period." The law, it seems, is like politics in that it is all local. So often we see a smooth surface where complexity is the reality. The authors make the

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206. *Id.* at 224-25.
207. *Id.* at 224.
208. *Id.* at 227-28.
209. *Id.* at 234.
210. *Id.* at 238.
211. *Id.* at 241.
212. *Id.*
point that until we understand the nature of claims, it will be impossible to know the effectiveness of any law reform. Why do individuals choose to pursue claims? How do plaintiffs' lawyers select claims they will pursue? How are matters settled? The authors make a plea for this kind of research. They may be right to do so, but it is painstaking. Frank Sloan and colleagues, for example, attempted to obtain information about the claims process in medical malpractice by interviewing claimants in respect of a set of medical malpractice claims in Florida. This work reveals that many of the assumptions about the purposes for claiming, the way in which lawyers are selected, and claimants' satisfaction with the claims system, are far removed from the assumptions that many hold of the claims process. As Daniels and Martin show, work done by Michael Saks and others on jury decision-making debunks the notion that that central institution is monolithically pro-plaintiff and anti-corporation.

The same pattern can be seen in figures recently published by the Bureau of Justice Statistics. The same sites of problem punitive damages linger. In Dallas, Texas, the median award for 1992 was $3,996,555; for New York, New York, $940,792; and for Los Angeles, California, $1,103,945. Wayne, Michigan, however, revealed a mean of $3,000, whereas the mean for 1988-90 was $124,150. Cook County also had declined from $31,500 for 1988-90 to $9,000 (1992).

Jury verdicts are but the tip of the claims process. Most cases are settled and the information on settlements is aggregated. Jury verdicts, however, are telling, because they cast a shadow on the entire claiming process. The size and frequency of punitive damages influence the willingness to, and size of, settlements. They also have a gravitational pull on whether claims are lodged in the first place. The greater the value of the claim the more probable that it will be initiated. The valuation may even encourage those claims that have a reduced chance of success. A plaintiff's attorney is likely to perform a hard-nosed appraisal of the value of the claim taking it as a function of the chances of success and its expected return on settlement or verdict. The concern may be especially great if the damages are uncertain. The system becomes costly if claims are pushed to later settlement or to court.

It is this part of the claims pyramid that attracts analysis from some who assail punitive damages. Their contention is that many claims are stimulated by the prospect of inclusion of punitive damage claims. These are commonly

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218. See supra note 203.
219. I have not adjusted for inflation; the Martin & Daniels figures are quoted in 1990 dollars.
221. Sloan et al., supra note 216, at 78-89; Coffee, supra note 38, at 232.
lodged, so it is asserted, in actions against business and government. The studies of the type analyzed above, founded on jury verdict data, fail to select out for the influence of claims. These may lengthen the time to reach settlement or increase the payouts for claimants.

This research is of little consequence, for it fails to address the fundamental issue. It is trite to say that the possibility of punitive damages may increase payouts; any other result would be surprising. The question is never broached that the stimulus may be desirable in bringing to book conscious wrongdoing in order that it may be better deterred and just deserts allocated. Of course, the critics of punitive damages have something else in mind. They would assert that the claims are brought to claim illegitimately damages from deep pockets of business or government. This is plausible but nothing has shown this to be the case. Nuisance claims are possible but the rate of success, as reflected in jury verdicts, is not high; the abuse, if any, is not likely to be great. In any event, these costs must always be set against the benefits in attacking behavior that consciously flouts the rights of others.

If, however, disparities are found in the frequency and severity of punitive awards in some jurisdictions it is fair to ask why that should be the case. This is a task that Daniels and Martin set for further researchers. They, however, venture some suggestions in the hot zone of Los Angeles in awards of punitive damages for financial harms where a dramatic change occurred in the high end of the award spectrum over the time intervals analyzed. They suggest that the outlier figures are caused by bad faith breach insurance claims. Elsewhere, in examining medical malpractice data on plaintiff win rates in Indiana (on one data set, 46% of malpractice claims settled with payout), they suggest the lack of a competitive insurance market.

This prompts a research strategy. Much of the criticism of punitive damages has been devoted toward jury awards in Alabama. Jury verdict data reported by the Wall Street Journal indicate that juries have awarded punitive damages ten times more often than juries in other states. The median award is stated to be $250,000, more than three times the national median.

222. Peter W. Huber, Liability: The Legal Revolution and Its Consequences 130-31 (1990) (describing the exaction of punitive damages as "institutional punishment").
225. D&M, supra note 198, at 120.
227. Professor George Priest is presently compiling and analyzing data drawn from the "Alabama" experience. I have not had the opportunity of considering it at the time of writing this article. See George L. Priest, Punitive Damages Reform: The Case of Alabama, 56 La. L. Rev. 825 (1996).
What could account for the Alabama hot zone? First, a close examination of the data is necessary. The data may represent jury awards unmodified by the court on remittur or the appeal court on appellate review. The Alabama Trial Lawyers Association claim this is substantial.228 The reporting in Alabama may be more accurate than in other states where punitive damages are not fully reported.229 Any research should control for differences in substantive law and for the threshold test for the award of punitive damages.230 In the former the Alabama Supreme Court has pointed to the use of common law as a regulatory device to fill the gap in consumer protection laws in the state.231 Other states with more adequate laws will not have the press of consumer related claims. Further analysis of the Alabama experience is needed.232 Do the larger punitive damages awards occur predominantly in the financial loss cases or are the cases clustered in bodily injury or property damage? Alabama statistics need to be compared with the statistics in other jurisdictions with similar experiences in litigation for the same mix of cases at the same time.

The embryonic state of research on punitive damages awards makes any conclusions hazardous. The Congressional testimony of Professor George Priest has stated that in 1992-93 of all tort cases in Bullock County, 76.5% included a punitive damages claim; 65.1% in Lowndes County; and 78.3% in Barbour County. Standing alone the figures are remarkable but cannot be meaningful without comparative figures.233 Professor Priest’s testimony in Johnson v. Life of Georgia234 included the statement that the Alabama experience “is unparalleled in the history of American jurisprudence.”235 However, in contrast to these claims for punitive damages, a review of the awards of large punitive damages in Alabama from 1990 to 1994 is instructive.236 One hundred twelve

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229. Id. at 4.
230. On the latter Alabama requires “malice, willfulness, with wanton or reckless disregard for the rights of others,” a test that puts it squarely in the center of those allowing punitive damages. Whitt v. Hulsey, 519 So. 2d 901, 906 (Ala. 1987).
232. In Johnson, id., the court referred to some statistics.
cases were listed in this time frame in which state courts had awarded large punitive damages. Of the cases the problem counties accounted for only thirteen awards. Bullock County has one case, and Barbour and Lowndes six each. As one would have expected the more densely populated urban counties accounted for the majority of punitive damages awards:

Jefferson - 24  
Mobile - 24  
Montgomery - 13

Seventy-two of all awards were in financial loss cases. Thirty-six of the awards were for personal injuries, usually product liability cases. All the verdicts from the three problem counties were for financial loss or harm. The complaint is usually directed toward large awards against insurers in these counties. But in terms of numbers revealed above the numbers of reported verdicts may be commensurate with the rural, poor, and thinly populated nature of these counties.\textsuperscript{237} If the size of awards and settlements have been disproportionate to others counties’ experiences, no simple explanation is available. It may be that the courts and juries lack experience with claims of this type. Jurors may have low educational levels perhaps disinclining them from sympathizing with corporate behavior. Defendants’ wealth may dazzle juries whose life experience has never exposed them to corporate folk ways and potential revenues. The defendant insurers are not part of this community: they are not seen as contributors to its life and welfare. The potency of effective plaintiffs’ representation may weigh heavily with a jury and judge that may relate to the plaintiffs’ attorney rather than with a remote insurer. Again in order to understand the punitive damages experience we need research that investigates: (1) the patterns of legal representation, (2) the relationship of the bar to the community, (3) the attitude of jurors to the participants, and (4) results stemming from all types of claims—financial harm, personal injury, civil rights, and dignitary harm.

These data may demonstrate that highly effective plaintiff’s attorneys have found sympathetic courts and juries in these counties.\textsuperscript{238} It is unlikely that citizens in these counties have been singled out as targets of arrogant tortious acts. If these counties are the “rotten boroughs” of tort liability, it may be like the English rotten boroughs, that care must be taken in roundly condemning institutions that do not conform with pristine premises.\textsuperscript{239} As suggested

\textsuperscript{237} The Department of Geography of the University of Alabama has prepared county-by-county comparisons in 1990 of population density, rural populations, urban population, white population, black population, average value of owner-occupied housing units, unemployment rate, total employment, estimated per capita income, poverty rate, and various measures of educational achievements.


\textsuperscript{239} The rotten boroughs of England were in principle contrary to democratic presuppositions of proportional representation. Yet they allowed for the appointment to Parliament of men of
previously the law of punitive damages is a localizing rule that depends on the jury for its application. The jury as an institution gives citizens a self-governing capacity, encourages deliberation, and educates about responsibility. The highly discretionary nature of the substantive rule bestows on judges and juries a freedom in particular application that is subject to only loose review.

VIII. THE MISSING OF TARGETS

The strong localizing nature of punitive damages rules and the counter-arguments of reformers to centralize and standardize the administration of justice places the debate in the constitutional law maelstrom that sets local against national regulation of social activities. The Supreme Court has maintained the basic strength of the localizing consumer law made by adopting the due process restrictions of appropriate jury instructions, post-trial review of reasonableness to fit the aims of the award, and appellate review of the jury award. More recently the Alabama Supreme Court has decided that the trial should be bifurcated between the liability stage and the damages stage in order to limit the prejudicial evidence that may prejudice jury deliberations. The Court also prescribes that the defendant’s profiting from the conduct and wealth ought to be in evidence to enable an award to sting. Any criminal sanctions are relevant, as are other civil actions. These provide a measure of discipline and relevant information to juries. The extraordinary step by the Court was to declare that half of the punitive damage award after payout of plaintiff’s attorney fees should be paid to the State General Fund. However, if the hot zones result


240. The role of federalism is revivified in United States v. Lopez, 115 S. Ct. 1624 (1995) (holding that Congress had exceeded its power to regulate commerce in enacting the Gun-Free School Zones Act of 1990). In his concurring opinion Justice Kennedy (joined by Justice O’Connor) stressed the republican ideal that federalism enhances freedom “by the creation of two governments, not one.” Id. at 1638. The government is responsible to the citizen, and liberty is realized by “two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the other between the citizens and the States.” Id. Erwin Chemerinsky & Barry Friedman, The Fragmentation of Federal Rules, 46 Mercer L. Rev. 757 (1995) (favoring uniformity but recommending some flexibility to allow experimentation). See also the rules and standards debate: Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 Duke L.J. 557 (1992); Sunstein, supra note 194; Sandel, supra note 166, at 347 (arguing for federalism—as "disposed sovereignty" and "citizenship formed across multiple sites of civic engagement"—in a pluralist version of republican politics).


from a decay in the republican compact it is difficult to see how these mechanisms will materially help.

The more radical solution is to abolish or cap punitive damages. Such responses directly attack the rationale of the substantive law. The retributive purpose as mediated by republican norms, long an established part of American law, would be forfeited. The reforms represent a move to centralize solutions away from the formative localizing institution of the jury. Centralization has political implications where powerful interest groups may more readily influence regulation. All this ventured for no demonstrable improvement in pragmatic goals of certainty and predictability.

In conclusion, my argument is this. First, that the case has not been made that punitive damages are problematic either nationally or locally. If “hot zones” exist they require close study in order to discover the reasons for extraordinary awards. In the absence of information, radical reforms are either meaningless or destructive. While I am concerned about the waste engendered by meaningless law reform, it would not call for lengthy comment. However, it is destructive law reform that is the grist of this essay. This forms my second major conclusion. If I am correct that punitive damages have a prime place in our republican ideals of the law, reforms that centralize decision-making, that undermine exercise of jury discretion, are wrong. If the institution has gone awry, attention should be paid to mending the presuppositions that nurture it, rather than in devising reforms that derogate from the essential value of full dominion of the citizen.