# Punitive Damages: Why the Monster Thrives

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INTRODUCTION

Twenty years ago, in *BMW of North America, Inc. v. Gore*, the Supreme Court ruled for the first time that a punitive damages judgment awarded by a state court jury was unconstitutional under the Due Process Clause of the Fourteenth Amendment.1 Previously, the Court had expressed concern about the proliferation of punitive damages awards “run wild”2 and declared that the Due Process Clause of the Fourteenth Amendment imposes “substantive limits”3 on the magnitude of civil penalties that it had described as “quasi-criminal”4 punishment. In *BMW*, the Court held that on a claim of fraudulent misrepresentation in connection with the sale of a car, a punitive judgment of $2 million—500 times the plaintiff’s actual harm of $4,000—was grossly excessive.5 To curtail disproportionate punitive awards, the Court enunciated three guideposts to govern judicial review when damages awards are alleged to be unconstitutionally excessive: the reprehensibility of the defendant’s wrongful conduct; the ratio of the punitive award to the compensatory liability assigned by the jury; and the difference between the punitive award at issue and the civil penalties the state imposes for comparable offenses.6 Seven years later, in *State Farm Mutual Automobile Insurance Co. v. Campbell*, the Court invalidated a state jury’s punitive verdict that bore a ratio to the compensatory damages liability of about 145-to-1, explaining that “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”7

Studies of punitive damages awards indicate that long after *BMW* and *State Farm* the same phenomenon prevails: juries impose punitive damages in civil litigation that range in the tens and even hundreds of millions of dollars, and in

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5. *BMW*, 517 U.S. at 575–85. The car the plaintiff had purchased was scratched while in transit to the dealer. Pursuant to BMW’s standard policy and the applicable rules in many states, when the cost of repairing presale damage did not exceed 3 percent of the vehicle’s suggested retail price, the manufacturer repainted and sold the automobile as new without disclosing the damage. The jury convicted the distributor of fraud for failure to disclose the damage, awarding $40,000 in compensatory and $4,000,000 in punitive damages, which the Alabama Supreme Court reduced to $2,000,000 on appeal.
6. See id. at 574.
7. 538 U.S. 408, 425 (2003). In *Philip Morris USA v. Williams*, the Supreme Court again rejected a punitive damages award that was predicated on a defendant’s wrongful conduct against other victims not before the court. 549 U.S. 346, 357 (2007).
ratios multiple times larger than single digits. The frequent incidence of “blockbuster” punitive awards and their frequent reduction or reversal on appeal raises questions as to the adequacy of the guidance that the Supreme Court formulated in *BMW* and *State Farm* to rein in the problem of grossly excessive punitive awards. Blockbuster punitive awards represent recent recurrences in the centuries-long debate about the proper purpose, scope, and administration of the punitive damages doctrine—a controversy that one commentator characterized as embodying “one of the most hotly contested issues in all of tort law.”

This Note argues that the most troubling aspect of punitive damages awards bears only an incidental relation to their magnitude or disproportionality. Various studies report that the vast majority of punitive verdicts that are not settled are further litigated on post-trial motions or appeals. In those proceedings, the bulk of the awards are reversed or reduced, by some accounts in as many as 75 percent of the punitive judgments challenged, while defendants and the courts incur substantial additional costs. That phenomenon should be of great significance in any analysis of the fundamental fairness and efficiency of public proceedings that determine the imposition of quasi-criminal punishments. These statistics highlight the doctrine’s flaws, which have profound implications for judicial integrity and the fairness and efficiency of the justice system. These implications are not mentioned anywhere in the Supreme Court’s punitive

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9. *See* W. Kip Viscusi, *The Blockbuster Punitive Damages Awards*, 53 EMORY L.J. 1405 (2004) (analyzing sixty-four punitive damages awards in amounts of $100 million or more and noting that the frequency of such assessments had been rising). *See infra* note 174 for a breakdown of the results of that analysis.

10. *See infra* Section II.G.


12. *See infra* Section II.G; *note* 181. Unsurprisingly, the estimates of this percentage vary greatly from study to study and from jurisdiction to jurisdiction.
damages jurisprudence, and they have been essentially ignored in the academic literature. The significance of recent statistical trends in punitive damages awards remains unexplored. Neither constitutional scrutiny by the courts, nor scholarly conclusions regarding the legitimacy of the common law punitive damages doctrine, have reckoned with this vital piece of empirical evidence; thus, a potentially decisive point has been entirely absent from the debate.

This Note suggests that efforts to remedy the doctrine’s shortcomings have fallen short for two critical and interrelated reasons. First, because the doctrine’s underlying problems remain unaddressed, attempts by courts, legislatures, and academics to curtail outsized punitive awards have proven inadequate. In turn, the inefficacy of judicial, statutory, and scholarly labors raises an obvious question: How can the doctrine’s continued existence in its traditional form be justified in light of the disturbing record of fundamentally inequitable and even arbitrary judgments punitive damages awards produce?

This Note argues that Supreme Court punitive damages jurisprudence and other attempts at punitive damages reforms have been unsuccessful overall because efforts have failed to address the doctrinal and prudential flaws inherent in the doctrine itself. As detailed in Part II, the most significant concerns include: an overlap and tension between civil and criminal law purposes and constitutional principles; multiple punishment of defendants and windfall recoveries for plaintiffs; vicarious liability; excessive jury discretion unconstrained by effective instructions; a consequentially high rate of false-positive punitive judgments and judgments that are reversed or reduced on appeal; and inadequate guidance for judicial review. These characteristics of punitive damages generally operate in concert to produce the particular outsized awards that gave rise to the Supreme Court’s concerns in BMW, State Farm, and other cases.

In particular, the punitive damages discourse has failed to address the problem because of its limited scope. The debate tends to focus on the large size of the individual awards and the infirmity of particular policies that determine the amounts in individual cases, but successful reform will require a critical reconsideration of the doctrine—the operation of the remedy and all its various components—as a whole. The discourse has focused on treating the effects of the doctrine, neglecting the underlying causes. This unduly narrow approach fails to consider that one element of an integrated doctrine might produce an outcome that could pass constitutional scrutiny when evaluated by itself, but when considered within the totality of the doctrine’s component parts, could generate unacceptable results—punitive damages judgments that cross over the line and “enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.”13 The modern punitive damages problem is multifaceted, not one-dimensional. Effectively correcting the doctrine’s shortcomings demands a conceptualization that regards the integral elements of the doctrine as functioning in their totality, not in isolation. This Note begins its outline of a

broader alternative perspective by first providing a historical sketch of the punitive damages doctrine.

Part I of this Note presents an overview of the punitive damages doctrine. It details the excessive and disproportionate judgments that have engendered centuries-long controversies over the doctrine’s legal and practical implications and the fundamental unfairness and inefficiencies the doctrine continues to inflict upon the justice system. This Part examines the history and evolution of the doctrine and reviews how its major substantive and procedural components, which emerged from early common law punitive damages cases, embody basic flaws that were engrafted at the doctrine’s inception. Part II identifies the aspects of punitive damages doctrine that most contribute to its controversial results and analyzes the conceptual objections and constitutional dimensions each issue presents. Part III surveys reforms advanced by courts, legislatures, and commentators to address the various concerns that application of the doctrine has raised over time. This Part highlights the ineffectiveness of reform efforts in addressing the problem comprehensively. This Part suggests that all attempts at reform have thus far ignored perhaps the most significant concern: the high rate of erroneous punitive verdicts that juries render. Part IV suggests a broader approach to address the various conceptual and practical problems reviewed in Part II and the weaknesses of the reforms discussed in Part III. Part IV focuses on several vital issues to which punitive damages jurisprudence and scholarship have devoted little attention: the traditional role of the jury; the inadequacy of judicial oversight in restraining punitive awards; the high rate of unconstitutionally excessive punitive awards; and the doctrinal and normative implications of that experience for the fair and efficient administration of justice. Part IV’s appraisal concludes that an effective response to the doctrine’s fundamental problems entails a full overhaul of punitive damages law. Most importantly, the task of determining the amount of punitive damages awards ought to shift from the jury to the judge in all cases, even when a jury determines liability.

I. MONSTROUS IN THE MAKING: SPONTANEOUS GENERATION OF PUNITIVE DAMAGES

A. OVERVIEW: THE DOCTRINE IN ITS LABYRINTH AND THE BIG DEBATE

From its origins in Anglo-American common law, the punitive damages doctrine has always been a controversial concept. In a civil action against a defendant who has engaged in outrageous misconduct, a jury may award monetary damages in an amount larger than the sum necessary to make the victim whole for the actual injury suffered. The extra recovery serves, in the modern conceptualization of the doctrine, as punishment and deterrence. A punitive award seeks to penalize the offender for the wrongful action. It is also meant to deter the act’s repetition to dissuade not only the defendant, but also
the public in general from engaging in similar behavior.\textsuperscript{14} Punitive awards are subject to postverdict judicial review under a reasonableness standard.\textsuperscript{15} As formulated and applied, the remedy has been a topic of intense debate among courts, legislators, and scholars. In a vast body of judicial rulings,\textsuperscript{16} statutes,\textsuperscript{17} and academic literature,\textsuperscript{18} the doctrine’s history, theory, and practice have been differently interpreted and its purposes disputed as unclear and contradictory. During the course of this enduring debate, the fundamental fairness and efficiency of the concept have been constantly questioned. The doctrine’s effects on the justice system—and on society as a whole—have been challenged on various economic, philosophical, normative, and constitutional grounds.\textsuperscript{19}

Most prominently, critics denounce the doctrine because of the disproportionately large verdicts—in the tens and even hundreds of millions of dollars—that

\begin{thebibliography}{99}
\bibitem{Keeton} See W. Page Keeton et al., Prosser and Keeton on Torts § 2, at 9 (5th ed. 1984) [hereinafter \textit{Prosser & Keeton}].
\bibitem{PhilipMorris} See, e.g., Philip Morris USA v. Williams, 549 U.S. 346, 354 (2007) (rejecting a state court punitive damages award predicated in part on harm that the defendant’s conduct caused to persons not in the litigation before the court); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422–23 (2003) (reversing a punitive damages award as grossly excessive when measured against the three \textit{BMW} guideposts); \textit{BMW}, 517 U.S. at 575 (reversing a state punitive damages award as a violation of due process because, even as reduced by the state courts by considering only the defendant’s in-state wrongdoing, the jury’s assessment was grossly excessive when evaluated under the Court’s three guideposts); TXO Prod. Corp. v. All. Res. Corp. 509 U.S. 443, 459–62 (1993) (affirming a punitive damages award of $10 million against actual damages of $19,000—a ratio of 526-to-1—upon a determination that the punitive award could properly consider the potential harm that the defendant’s conduct would have inflicted on the victim and others had the wrongful scheme succeeded); \textit{Haslip}, 499 U.S. at 14–23 (affirming the constitutionality of a punitive damages verdict imposed under vicarious liability and resulting in a punitive award of $1,040,000, approximately four times greater than the compensatory damages and more than 200 times the plaintiff’s out-of-pocket expenses).
\end{thebibliography}
juries have awarded in some high-profile cases. On post-trial review a significant number of those judgments are invalidated because the defendant’s conduct did not justify punishment, or they are reversed or reduced because the penalty meted out was unconstitutionally excessive. Improper verdicts raise profound concerns. They prolong the litigation and ultimate resolution of the underlying dispute, they impose greater costs on the parties and the courts, and they engender results that call into question the fundamental fairness and efficiency of the justice system.

The doctrine’s dual aims of punishment and deterrence have led the Supreme Court to describe punitive damages as imposing “quasi-criminal” penalties. This characterization reflects a multitude of complex problems. Conceptually, one set of difficulties involves the blurring, duplication, overlap, and even usurpation by private law of the boundaries and aims of public law functions of criminal proceedings. As the Supreme Court recognized, punitive damages awards “serve the same purposes as criminal penalties.” Largely for this reason, punitive damages present an acutely troubling constitutional issue: the infliction of punishment through private litigation and judicial proceedings that lack the standards that are constitutionally guaranteed in criminal prosecutions as checks against the exercise of the state’s coercive power to impose punishment. These standards include the protections regarding proof beyond a reasonable doubt, self-incrimination, excessive penalties, double jeopardy, and—in federal courts and state courts in all but two states—a unanimous verdict.

20. See supra note 8.
21. See infra Section II.G.
22. See generally Ellis, supra note 18 (arguing that the lack of coherent standards and vagueness in the criteria for determining punitive damages result in awards far beyond what is justified by fairness).
24. See infra Section II.A. The conceptual oddity and disturbing effects of punitive damages have provoked considerable furor and perplexity. That reaction is perhaps best captured by the strong language critics have used in describing the idea. Detractors have denounced punitive damages as a “monstrous heresy . . . an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law,” Fay v. Parker, 53 N.H. 342, 382 (1872); “a jurisprudential Frankenstein’s monster,” Aaron Xavier Fellmeth, Civil and Criminal Sanctions in the Constitution and Courts, 94 GEO. L.J. 1, 10 (2005); an “illogical legal relic,” Ingram, supra note 19, at 205; and “an anomaly, a hybrid in search of a rationale,” Galanter & Luban, supra note 18, at 1394. Champions of the doctrine, on the other hand, are no less hyperbolic with their praise. According to one account, punitive damages are “extraordinary sanctions” that provide “important protection for average citizens against entities too powerful to be constrained by lesser remedies.” Rustad & Koenig, supra note 18, at 1330, 1333. Another defends the common law doctrine as “perhaps the most important instrument in the legal repertoire for pronouncing moral disapproval of economically formidable offenders.” Galanter & Luban, supra note 18, at 1428.
26. See id.; U.S. CONST. amends. V, VI, VIII, XIV.
27. The Supreme Court has held that the Sixth Amendment requires unanimous jury verdicts in criminal proceedings in federal courts but that this rule does not apply to the states through the Fourteenth Amendment. See Apodaca v. Oregon, 406 U.S. 404, 404–05 (1972); Johnson v. Louisiana, 406 U.S. 356, 356 (1972). Only Oregon and Louisiana permit nonunanimous jury verdicts in criminal
Concerns about punitive damages encompass not only the doctrine’s purposes, but also its methods and their effects. One fundamental concern is the imposition of extra punishment on a wrongdoer by means of double counting elements of damages or awarding multiple punitive judgments against the same defendant—often to multiple plaintiffs, in multiple jurisdictions—for injuries arising out of the same conduct. A second set of concerns questions the justification for the large windfalls granted to some plaintiffs, potentially to the exclusion of other victims similarly harmed. These concerns also challenge the appropriateness of a private party using the state justice system to take property from another in a way that confers a benefit far in excess of both the victim’s actual loss and what the circumstances and equity would warrant.

A third area of difficulty relates to the methods of assessment and administration of punitive damages. At the forefront of these concerns are the grave implications associated with the economic and normative judgments of juries. Jury verdicts, based on open-ended instructions, are accorded the force of law, even though the vague instructions often fail to properly constrain the jury’s exercise of discretion. Unconstrained jury discretion produces generally unpredictable—and unreasonable—verdicts. Finally, many critics despair that these formidable problems arise in what essentially amounts to a doctrinal void: the absence of a sound and fully developed punitive damages theory, and the Supreme Court’s failure to fill that gap with a compelling rationale to justify the doctrine’s continued existence. Even punitive damages advocates recognize the serious limitations imposed by the doctrine’s jurisprudential disarray and acknowledge that, in some circumstances, punitive damages present significant constitutional concerns that have not been sufficiently addressed by Supreme Court jurisprudence, federal legislation, or academic theory.

Many reforms have been proposed and adopted to improve the theory and administration of punitive damages law. Reforms advanced by judicial decisions, statutes, and scholarly commentary have endeavored to curtail the availability of punitive awards in some types of actions, fix caps on their amounts, split recoveries between plaintiffs and the state, raise the standard of proof, bifurcate trials into liability and punitive phases, and shift determination of punitive damages amounts from the jury to the court. Regardless of the source,
these measures have failed to cohere around a unifying rationale by which the doctrine, and its often inequitable and inefficient outcomes, can be persuasively explained. At bottom, the message these efforts convey is the same: punitive damages must be curtailed because any valuable purposes they serve are substantially undermined by the difficult problems they create. For this reason, some reform efforts have only intensified the controversy.35

Another mark of the significance of the issues punitive damages controversies present is the attention the common law doctrine has received from the U.S. Supreme Court. The Court has added a substantial body of constitutional jurisprudence addressing various aspects of the problem. Noting the concern about punitive damages “run wild”36—as demonstrated by “extreme results that jar one’s constitutional sensibilities”37 and that “must surely ‘raise a suspicious judicial eyebrow’”38—the Court reviewed challenges to punitive damages judgments in nine cases between 1989 and 2008.39 Though expressing significant

35. At one end of the spectrum, academics have proposed novel concepts, creative models, and innovative semantics—some of these endorsed by judges—designed to justify the assessment of punitive damages. Some conceptions would embrace the application of punitive damages with little concern about their magnitude, and in some cases even in the absence of outrageous conduct, effectively stripping the “punitive” from punitive damages and leaving efficient deterrence as the doctrine’s sole aim. See, e.g., A. Mitchell Polinsky & Steven Shavell, Punitive Damages: An Economic Analysis, 111 HARV. L. REV. 869, 874 (1998). For critical reviews of this concept, see Colby, supra note 11, at 609–13; Galanter & Luban, supra note 18, at 1447–51; Sharkey, supra note 18, at 365–70. Views at the opposite end of the spectrum have advocated that the punitive damages remedy has outlived its usefulness and should be abolished entirely or at least in specific circumstances. See supra note 18. In England, where the punitive damages concept originated in common law and has been settled doctrine since at least 1763, the remedy was essentially dispatched by judicial decision in 1964, restricting punitive awards for all but three rare types of actions after a longstanding debate that paralleled the controversy in this country. See Rookes v. Barnard, [1964] 1964 A.C. 1129 (HL) 1131 (appeal taken from Eng.) (holding that punitive damages could be awarded in cases “(i) of oppressive, arbitrary, or unconstitutional acts by government servants; (ii) where the defendant’s conduct had been calculated by him to make a profit for himself which might well exceed the compensation payable to the plaintiff; [or] (iii) where expressly authorised by statute”).


37. Id.


39. See Philip Morris USA v. Williams, 549 U.S. 346, 354 (2007); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422–23 (2003); Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 443 (2001) (holding that the proper standard of judicial review to govern state court punitive damages judgment is de novo); BMW, 517 U.S. at 585–86; Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994) (holding that a state’s denial of judicial review of the size of punitive damages awards violated the Fourteenth Amendment’s Due Process Clause); TXO, 509 U.S. at 462 (Stevens, J., concurring) (arguing that neither the Eighth Amendment’s Excessive Fines Clause nor the Fourteenth Amendment’s Due Process Clause guarantee a right not to be subjected to excessive punitive damages); Haslip, 499 U.S. at 14–23 (affirming the constitutionality of a verdict imposing punitive damages on an insurer under vicarious liability using the common law method for assessing punitive damages and resulting in a punitive award approximately four times greater than compensatory damages and more than 200 times the plaintiff’s out-of-pocket expenses); Browning-Ferris Indus. of Vt., Inc. v. Kelco Dispos. Inc., 492 U.S. 257, 263–64 (1989) (holding that the Eighth Amendment’s Excessive Fines Clause does not apply to punitive damages awarded in private civil actions); see also Exxon Shipping Co. v. Baker, 554 U.S. 471, 513–14 (2008) (holding that under U.S. maritime common law, awards of
reservations about some qualities and effects of the concept, the Court declined
to rule that punitive damages awards are per se unconstitutional.\textsuperscript{40} It has
acknowledged that punitive damages “serve the same purposes as criminal
penalties” and that defendants subjected to such awards in civil cases “have not
been accorded the protections applicable in a criminal proceeding,”\textsuperscript{41} but it
effectively side-stepped the constitutional implications of the absence of those
protections in connection with state imposition of what is equivalent to criminal
penalties. At the same time, in \textit{BMW, State Farm,} and \textit{Philip Morris,} the Court
addressed the issue that has stirred the most widespread concerns and grabbed
headlines: punitive verdicts that violate due process because they are grossly
excessive and disproportionate.

The Court’s endeavors in these and other decisions, however, have failed to
cohere around a consistent rationale for its punitive damages jurisprudence.
These decisions have engendered sharp divisions within the Court itself. Dissent-
ers attack what they view as the rulings’ inconsistency, unsound reasoning, and
lack of textual support.\textsuperscript{42} The Court’s punitive damages decisions have also
drawn vigorous criticism from commentators.\textsuperscript{43} Empirical and anecdotal reports
suggest that the Supreme Court’s numerous interventions to curtail the inci-
dence of grossly excessive punitive awards by defining the constitutional con-
tours of the common law doctrine have not achieved the intended results.\textsuperscript{44} The
many recent punitive awards described above\textsuperscript{45} may serve as further evidence

\begin{itemize}
\item \textsuperscript{40} See \textit{Haslip,} 499 U.S. at 17–18.
\item \textsuperscript{41} \textit{State Farm,} 538 U.S. at 417; see also \textit{Haslip,} 499 U.S. at 19 (recognizing that punitive damages
have been considered akin to “quasi-criminal” punishment); \textit{Browning-Ferris,} 492 U.S. at 298 (O’Connor,
J., concurring in part and dissenting in part) (agreeing with the argument that punitive damages are
“penal” under the Court’s jurisprudence); \textit{United States v. Halper,} 490 U.S. 435, 451 (1989) (finding no
violation of the Double Jeopardy Clause of the Sixth Amendment in an action seeking damages against
an offender who had already been criminally prosecuted for the same conduct).
\item \textsuperscript{42} See, e.g., \textit{Philip Morris,} 549 U.S. at 361 (Thomas, J., dissenting); \textit{id.} at 362 (Ginsburg, J.,
dissenting); \textit{id.} at 358 (Stevens, J., dissenting); see also \textit{BMW,} 517 U.S. at 598 (Scalia, J., dissenting).
\item \textsuperscript{43} See, e.g., Colby, \textit{supra} note 32, at 394 (describing the Court’s opinion in \textit{Philip Morris} as
“strangely terse and unreasoned” and seeking to explain the Court’s “cryptic and at times misguided
analysis”). Similarly, another commentator characterized the Court’s punitive damages rulings “as
incoherent as any in the Court’s jurisprudence.” Fellmeth, \textit{supra} note 24, at 9–10. In the words of
another scholar, “the Court’s numerous decisions in the area have amounted to an incoherent muddle.
Indeed, one would be hard-pressed to identify an area of constitutional law that betrays a greater
conceptual incoherence.” Wayne A. Logan, \textit{The Ex Post Facto Clause and the Jurisprudence of
\item \textsuperscript{44} Tellingly, a 2004 study of sixty-four blockbuster punitive damages judgments of at least $100
million imposed by juries pre-1989 through 2003, indicated that forty-three, or approximately 64
percent, were assessed after 1996—the year the Supreme Court decided \textit{BMW.} See Viscusi, \textit{supra} note
9, at 1428–32; see also Redish & Mathews, \textit{supra} note 19, at 12 n.60 (noting that lower court decisions
reveal “the persistence of vast disparities between compensatory and punitive damages, even when
courts purport to apply \textit{Gore’s} guideposts for reviewing punitive damages awards”); Sebok, \textit{From Myth
to Theory,} \textit{supra} note 18, at 1001 (noting that “[a] number of courts have found various methods for
evading \textit{State Farm} and producing punitive-damages awards that effectively reach very high ratios”).
\item \textsuperscript{45} See \textit{supra} note 8.
\end{itemize}
of a fundamental failure in the Court’s jurisprudence, either because lower courts and juries are not properly following its guidance or because some other forces may be at work producing excessive judgments by reason of faults that stem inherently from the common law doctrine itself and its historical development.

B. A DOCTRINE IS BORN

The U.S. Supreme Court remarked that the Anglo-American common law doctrine of punitive damages “dates back at least to 1763.”\footnote{Exxon Shipping Co. v. Baker, 554 U.S. 471, 490 (2008).} The Court’s reference to that historical point relates to two English common law cases, Wilkes v. Wood\footnote{(1763) 98 Eng. Rep. 489; Loftt 2.} and Huckle v. Money.\footnote{(1763) 95 Eng. Rep. 768; 2 Wils. K.B. 206.} Decisions rendered in those actions by the English Court of Common Pleas recognized the principle that in civil actions to redress injuries caused by torts, the damages a jury awards could exceed the amount necessary to compensate the plaintiff for his actual pecuniary loss.\footnote{Id. at 768–69; Wilkes, 98 Eng. Rep. at 498.} The additional sum was referred to as “exemplary damages” and justified as serving various purposes: punishment, deterrence, assessing the degree of reprehensibility of the defendant’s conduct, and recording the jury’s sense of moral outrage as an expression of societal norms.\footnote{Huckle, 95 Eng. Rep. at 769; Wilkes, 98 Eng. Rep. at 498–99.} At the time, such relief constituted a substantial departure from then prevailing rules of damages in civil actions for torts, which limited a plaintiff’s recovery to actual injuries proved and calculable in monetary terms.\footnote{See Rustad & Koenig, supra note 18, at 1288 n.96 (citing I Theodore Sedgwick, A Treatise on the Measure of Damages § 347, at 687 (9th ed. 1912)).}

A close reading of these cases, focusing on the punitive damages concept at its origins, reveals several essential questions not adequately examined in other accounts of the remedy’s history and sheds light on two points. First, as detailed below, the sensational circumstances out of which the common law remedy originated gave rise to inborn doctrinal and procedural flaws. These early developments may help explain how over time the modern doctrine evolved around deep-rooted defects, with courts ignoring, discounting, or tolerating the doctrine’s inherent flaws.

In April 1763, a newspaper known as The North Briton published in its edition Number 45 an anonymous article highly critical of King George III on account of a speech he had delivered in Parliament.\footnote{See id. at 1287–88 n.95 (quoting A.S. Tverberville, English Men and Manners in the 18th Century 44–46 (2d ed. 1957)).} Taking offense at the tone and content of the essay, the King and his ministers declared the publication libelous and ordered an investigation to determine its author. To that end, the King’s Secretary of State, Lord Halifax, authorized the issuance of a general
warrant directing the arrest of the writers, printers, and publishers of *The North Briton* Number 45, without presenting any charges or naming any person. Pursuant to that warrant, numerous persons were arrested, including Wilkes and Huckle. In their lawsuits attacking the legality of their arrests and detention, the jury rendered verdicts against the King’s agents in amounts that far exceeded any actual damages that Wilkes and Huckle had suffered. On post-trial review, the court upheld the judgments over the defendants’ protests that the awards were unprecedented and excessive.53

*Wilkes* and *Huckle* are noteworthy as the first cases in which a court explicitly mentioned and recognized the remedy of punitive or “exemplary” damages.54 But their importance goes further: the events prompted disputes about proper doctrinal standards. On the one hand, the cases indicate disagreement over substantive and quantitative measures used to assess the scope, purpose, size, and proportionality of punitive damages; on the other hand, the court’s decisions involve controversy regarding the methods used to determine proper roles for the court and the jury in the preverdict and postverdict processes—the same types of issues that pervade modern punitive damages debates.55

The Lord Chief Justice issued the court’s rulings for Wilkes and Huckle with little or no grounding in precedent and without legal analysis of the doctrine he had enunciated. In *Wilkes*, he declared that jurors “have it in their power to give damages for more than the injury received” and that such damages were designed not only to compensate the injured person, but also to punish

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53. In *Wilkes*, four King’s messengers, accompanied by a constable, entered plaintiff John Wilkes’s home and arrested him. Under the supervision of Robert Wood, an agent of Lord Halifax, they searched Wilkes’s house to look for evidence, broke the locks of some cabinets, and removed personal books and papers. Wilkes brought an action for trespass, naming Wood as defendant. At trial, Lord Halifax himself appeared and testified as a defense witness. Wilkes’s counsel stressed in his opening statement the larger dimensions of the case. He remarked that the action extended far beyond the plaintiff and “touched the liberty of every subject of this country.” *Wilkes*, 98 Eng. Rep. at 490. He urged the jurors to express their “resentment” against the conduct in question by an award of “large and exemplary damages” against “persons, who by their duty and office should have been the protectors of the constitution, instead of the violators of it.” *Id.* The jury rendered a general verdict for Wilkes awarding him damages of £1000, a considerable sum at the time. See BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 598 (1996) (Breyer, J., concurring) (Appendix) (estimating the amount of Wilkes’s damages in modern currency values).

In *Huckle*, the plaintiff worked as a journeyman for the printer of *The North Briton* at a salary of one guinea (slightly over one pound) per week. In executing the same warrant at issue in *Wilkes*, the defendant Money, one of the King’s messengers, arrested Huckle and held him in custody for about six hours. In Huckle’s suit against Money claiming trespass, assault, and imprisonment, the jury awarded him £300, though he had suffered little or no damages, largely because the defendant “used him very civilly by treating him with beef-steaks and beer.” *Huckle*, 95 Eng. Rep. at 768. An appellate panel affirmed the award over the defendant’s complaint that the award was excessive, and the panel denied defendant’s request for a new trial.

54. See Owen, *supra* note 18, at 368–69; Rustad & Koenig, *supra* note 18, at 1288 n.96.

55. In *Wilkes*, for instance, the defendant argued that damages “should always be reckoned according to the injury received.” 98 Eng. Rep. at 494. The plaintiff, on the other hand, urged the jury to express “their resentment against such proceedings . . . by large and exemplary damages; that trifling damages would put no stop at all to such proceedings.” *Id.* at 490.
the offender and deter similar misconduct and to manifest the jury’s condemna-
tion of the wrongful acts. 56 The Lord Chief Justice’s statement suggests several
basic questions that anticipate the doctrinal and constitutional debate that
followed, both in England and the United States. First, who is the actual
offender for whom punishment and deterrence are intended? Second, whomever
the defendant turns out to be, is punishment and deterrence of that person or
entity called for, and would it serve as an effective sanction under the circum-
stances? Third, if punishment and deterrence are appropriate, what level of
damages would suffice to achieve those purposes and what standards should the
jury apply in making that assessment? Fourth, if public policy demands an
expression of the community’s moral disapproval of the offending conduct at
issue, should the expression come from the jury in a private action, rather than
through the means by which society evinces and formally manifests moral
judgments and records public norms—that is, the criminal law? 57

These questions encapsulate many of the fundamental problems that devel-
oped into the centuries-long doctrinal and practical concerns that the punitive
damages concept engendered. Either implicitly or in clearly recognizable form,
the issues expressed at that formative moment constitute the foundation and
framework for subsequent legal concerns surrounding punitive damages: the
appropriate demarcation between private and public law enforcement and the
respective functions of each system; the proper scope of punishment and
deterrence as purposes of punitive damages; vicarious liability and punishment
and deterrence of the actually blameworthy defendant; the just measure for the
jury’s assessment of damages and the prospect of grossly excessive and dispro-
portionate awards; the plaintiff’s windfall; the basis for one plaintiff serving as
standard bearer redressing societal harms; multiple punishment of the same
defendant in multiple actions brought to redress the same harm; 58 and potential
double jeopardy implications arising from one or more punitive judgments
imposed on the same defendant where the underlying private offense may also
constitute a crime. 59 The court’s treatment of these concerns was crucial, for it
would serve to invest the nascent punitive damages doctrine with form and

56. Id. at 498–99.
57. In Wilkes, these vital questions were raised in the arguments counsel made in Wood’s defense. He stated that he did not understand what the plaintiff had in mind by bringing an action against this particular defendant, “as he was neither the issuer of the warrant, nor the executioner of it.” Id. at 493. On the defendant’s theory, if the constitution had been violated as egregiously as the plaintiff charged:

[W]hy not bring the Secretaries of State, themselves, into Court? Why should Mr. Wilkes commence separate actions against each person? Is Mr. Wilkes, at any event, entitled to tenfold damages? This was the first time [defense counsel] ever knew a private action represented as the cause of all the good people of England. If the constitution has, in any instance, been violated, the Crown must be the prosecutor, as it is in all criminal cases.

Id.
58. See Huckle, 95 Eng. Rep. at 769 (statement of Judge Bathurst that the action effectively set aside fifteen verdicts in different suits brought against the same four messengers).
59. These concerns are addressed in Sections II.A–II.G below.
content and lay the groundwork for the course that courts have subsequently followed when applying the doctrine.

The court’s analytic approach in Wilkes and Huckle focused on the gravity of the misconduct at issue and viewed the punitive award as a fitting remedy for the underlying offenses. Without detailed analyses of the newborn doctrine’s application to the particular circumstances, defendants, and issues the cases presented, the court found that the large verdict was justified to serve the purposes of punishment, deterrence, and public detestation. The court made no mention of any of the other fundamental concerns that are summarized above and discussed in detail in Part II below. These basic questions place doubt on the theory and purposes the court advanced to justify the imposition of punitive damages. Not only did the court in Wilkes and Huckle fail to articulate any standards by which these central issues might be addressed, but the Lord Chief Justice emphasized his view that jury verdicts and damages awards are owed the highest deference. The court’s near total deference to the jury in Wilkes and Huckle serves as an early analogue of the standardless discretion modern juries enjoy in deciding punitive damages awards, a practice that represents possibly the largest determinant of excessive punitive awards.

The court’s decision to allow the assessment of damages in excess of what would make the victim whole was not previously recognized in the common law of torts; the Lord Chief Justice was essentially writing new common law on a clean slate. The circumstances thus called for clear guidance for the jury to check the exercise of its discretion and prevent arbitrary and unjust verdicts, but the court failed to give the jury any meaningful instructions to guide its application of the new doctrine. In Huckle, the Lord Chief Justice rejected the Solicitor-General’s argument that damages should be measured according to the plaintiff’s actual injury. Without offering substantive guidance marking the proper bounds of the new remedy, the court in effect handed the jury a blank check to determine the amount of the extra recovery the Lord Chief Justice indicated was warranted by the aggravated circumstances. Specifically, the Lord Chief Justice “directed and told” the jury that they were not bound to any amount of damages and endorsed the jury’s award of £300. Because of the large size of the liability relative to the nominal injury, the Lord Chief Justice

60. Huckle, 95 Eng. Rep. at 769 (“[I]t is very dangerous for the Judges to intermeddle in damages for torts; it must be a glaring case indeed of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a Court to grant a new trial for excessive damages.”).
61. In fact, the court may have unduly influenced the verdict with commentary on the evidence and instructions given to the jury. In Wilkes, the Lord Chief Justice remarked that if the governmental power that the Secretary of State claimed was delegated truly existed, “it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject.” Wilkes, 98 Eng. Rep. at 498. He stated that the jury had the power to award damages greater than the plaintiff’s injury. See id. The Lord Chief Justice then concluded that the precedents the defendants relied upon to support their actions were “no justification of a practice in itself illegal.” Id. at 499.
63. Id.
inferred that the bulk of the remedy represented exemplary damages, estimating that the compensation portion was likely not more than £20.\textsuperscript{64} Thus the court introduced uncertainty into the assessment of punitive damages and blurred the distinction between punitive and compensatory awards. As a precursor to subsequent courts’ outlook on punitive damages, the Lord Chief Justice elevated judicial deference to the jury’s assessment of damages to its peak and gave short-shrift to postverdict motions seeking a new trial on the ground that the damages imposed were excessive.\textsuperscript{65}

These seminal cases essentially memorialized fundamentally defective judgments. The decisions do not contain any meaningful explication of the methods the court and jury employed to impose punitive damages, and the decisions also lack a compelling doctrinal foundation upon which the awards could rest. Moreover, for common law precedential value, the court embraced a remedy embodying abstract elements and consequences that were not sufficiently supported by the facts. The court failed to consider the implications of its decision on future applications of the doctrine. In other words, the court did not devise a well-reasoned, coherent doctrine to serve a specific purpose based on the facts presented and their logical implications for subsequent cases. Instead, to justify an accomplished fact, the Lord Chief Justice pronounced a jerry-built legal concept as though it had sprung fully formed from the court’s head. As one critic put it, “the doctrine of punitive damages was not created by the courts to serve an expressed purpose, but rather arose as an after-the-fact effort to justify unreasoned and seemingly dubious practices.”\textsuperscript{66} The court’s inherently flawed decisions in \textit{Wilkes} and \textit{Huckle} laid the foundation and framework upon which the doctrine developed, introducing the same features—incoherence and unreasoned, ill-considered judgments—for which modern critics fault the Supreme Court’s punitive damages jurisprudence.

Those early flaws were embedded in the remedy itself and, over many generations, were passed on through common law applications. Absent a more satisfactory doctrinal foundation, modern courts tend to fall back upon a default point, one about which there can be no factual dispute. They declare that punitive damages have been part of Anglo-American common law for a long time. More than 165 years ago, for example, the Supreme Court, noting that although the common law method of determining punitive damages had been “questioned by some writers[,] . . . if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument.”\textsuperscript{67} As recently as 1991, the Court similarly reverted

\textsuperscript{64} See \textit{id.} at 768.

\textsuperscript{65} On this point, the Lord Chief Justice noted that courts “commonly set their faces against” new trials and found “no instance that the Judges ever intermeddled with the damages.” \textit{Id.}

\textsuperscript{66} Colby, \textit{supra} note 11, at 614.

\textsuperscript{67} Day v. Woodworth, 54 U.S. 363, 371 (1851). Some courts and commentators have noted that even in 1852, when \textit{Day v. Woodworth} was decided, the punitive damages doctrine was far from settled. \textit{See Fay v. Parker, 53 N.H. 342, 343–54 (1872)} (“The doctrine in regard to vindictive damages seems
to the virtue of antiquity as a last resort in defense of the doctrine, declaring that “[i]n view of this consistent history, we cannot say that the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be per se unconstitutional.” 68 To reinforce its argument, the Court endorsed an oft-quoted passage from another old case: “If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.” 69 Despite fundamental changes in substantive and procedural law in the last century, the punitive damages doctrine has evolved inconsistently, and the doctrine has so far failed to shed its fundamental flaws. Ongoing adaptation of the common law punitive damages model to modern legal and economic contexts continually creates new grounds for raising old concerns.

C. THE “MONSTER” EVOLVES

The Supreme Court has observed that “punitive damages have evolved somewhat” from the nineteenth-century conception. 70 Over the course of more than two centuries, the doctrine’s evolution has generally proceeded along the substantive–procedural dichotomy. Both evolutionary pathways have set off significant changes in the doctrine’s operation, changes that have only exacerbated lingering foundational concerns. This reactive evolution, and all its attendant problems, reinforces the urgent need for constitutional inquiry of punitive damages and analysis of the doctrine’s components as a coherent whole, rather than ad hoc and piecemeal.

1. Substantive Evolution

Substantively, the doctrinal shifts in punitive damages law encompass shifts in three policies: the types of injuries punitive damages can redress, the types of actions for which punitive awards are available, and the private and public purposes punitive damages are meant to serve.

a. Types of Injuries. The early common law recognized specific causes of action in tort to compensate plaintiffs for injuries by means of awards of monetary damages that made them whole for the actual harms they suffered as a result of defendants’ wrongful conduct. 71 The law drew a distinction between two types of injuries. First was tangible harm, such as destruction of property or physical damage, producing economic losses that could be measured and redressed in calculable pecuniary terms. Second was intangible harm—for

69. Id. (quoting Sun Oil Co. v. Wortman, 486 U.S. 717, 730 (1988)).
71. See CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 137, at 560–61 (1935); Owen, supra note 18, at 380.
instance, mental and emotional pain and suffering stemming from insults, wounded feelings, personal indignity, and affronts to honor—none of which early common law recognized as compensable. The concept of punitive or exemplary damages developed in part to fill the remedial gap created by this distinction. This branching of legal remedies reflected two concepts: the courts’ desire to extend the types of injuries for which the common law should provide compensation, and the intricacies entailed in the calculation of monetary damages to redress intangible harm. In many circumstances, underlying injuries would go unprosecuted by victims who regarded litigation as not worth the trouble or expense. Or, even if the wrongful behavior constituted a criminal offense, law enforcement authorities did not consider the misconduct or the harm it caused sufficient to warrant their attention or the expenditure of public resources.

b. Types of Actions. The broadening of the kinds of injury that the common law of damages recognized as compensable harm was accompanied by growth in other substantive branches of tort law. During the nineteenth century in particular, the types of conduct that the law defined as tortious and classified as causes of action also expanded, a development actuated both by case law and statutes. In many instances legislation codifying or creating private law liability for wrongful conduct also provided criminal or administrative means to define and enforce norms and thus regulate behavior. This development produced overlapping regimes designed to achieve punishment and deterrence, an outgrowth that in turn bore on the course of punitive damages law. First, the punitive damages doctrine’s application extended to many more legal theories and causes of action. Second, in some applications and specific cases, the extension of a punitive remedy to new private law contexts engendered further doctrinal anomalies and contradictions, yielding more inequitable results. As

72. See, e.g., Stuart v. W. Union Tel. Co., 18 S.W. 351, 353 (Tex. 1885) (suggesting that the punitive damages doctrine is likely grounded “in a failure to recognize as elements upon which compensation may be given many things which ought to be classed as injuries entitling the injured person to compensation.”); see also Cooper Indus., 532 U.S. at 438 n.11; Edw. C. Eliot, Exemplary Damages, 29 Am. L. Reg. 570, 572 (1881) (“The difficulty of estimating compensation for intangible injuries, was the cause of the rise of this doctrine. . . . When the early judges allowed the jury discretion to assess beyond the pecuniary damage, . . . it was natural to suppose that the excess was imposed as a punishment.”); Rustad & Koenig, supra note 18, at 1289 n.101; Note, Exemplary Damages in the Law of Torts, 70 Harv. L. Rev. 517, 518–19 (1957).

73. See Prosser & Keeton, supra note 14, at 12.

74. See, e.g., Owen, supra note 18, at 370 n.32; Wheeler, supra note 19, at 305.

75. See, e.g., Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 840–41 (2d Cir. 1967) (noting that “[a] manufacturer distributing a drug to many thousands of users under government regulation scarcely requires this additional measure [of multiple punitive damages] for manifesting social disapproval and assuring deterrence. Criminal penalties and heavy compensatory damages, recoverable under some circumstances even without proof of negligence, should sufficiently meet these objectives”).

76. See Rustad & Koenig, supra note 18, at 1287–97.

77. See id.; see also Roginsky, 378 F.2d at 840–41; Colby, supra note 11, at 616–39; Wheeler, supra note 19, at 305.
more effective public law regimes became available to punish and deter offensive conduct—the two policies that provided the doctrine’s theoretical grounding and had shaped punitive damages’ functional evolution from compensatory to punitive ends—the persuasiveness of traditional justifications for the necessity of punitive damages as tools of punishment and deterrence diminished.

c. Private Law and Public Purposes. As private law evolved, tort doctrine expanded the scope of liability and monetary damages for a broad range of intangible injuries—such as emotional pain and suffering—that were not previously compensable. Before emotional injury was legally compensable, the punitive component of the doctrine had been justified as recovery for intangible harm incidental to and arising from a compensable injury.\(^{78}\) Theoretically, as some commentators noted, the concept of punitive damages should have faded out of existence as emotional injuries became legally compensable.\(^ {79}\) Instead, some early-nineteenth-century courts and scholars shifted the dominant doctrinal grounding for the victim’s extra monetary recovery, moving punitive damages law away from its original compensatory function and justifying the imposition of pecuniary awards in terms of punishment and retribution.\(^ {80}\)

But the doctrinal turn toward punitive ends encountered a significant conceptual challenge—one anticipated as early as defense counsel’s arguments in *Wilkes*.\(^ {81}\) As a leading torts scholar noted: “The idea of punishment, or of discouraging other offenses, usually does not enter into tort law.”\(^ {82}\) To the extent punitive damages theory altered its primary purpose to encompass punishment and retribution for wrongful conduct that violated societal norms and caused both private and public harms, it assumed functions that criminal law traditionally served. This development generated perhaps the most contentious substantive objections to the concept of punitive damages and brought about a major schism among courts and scholars, starting in the nineteenth century and continuing to this day, regarding the proper purposes and administration of

\(^{78}\) See Colby, supra note 11, at 616–39; Ellis, supra note 18, at 13–19; Rustad & Koenig, supra note 18, at 1287–97; Note, supra note 72, at 518–20.

\(^{79}\) See Sebok, *Misunderstanding History*, supra note 18, at 188 (citing 1 *THOMAS ATKINS STREET, THE FOUNDATIONS OF LEGAL LIABILITY* 480, 488 (1906)).

\(^{80}\) See Redish & Mathews, supra note 19, at 15. As a leading treatise writer described this change more than a century ago: “In actions of tort, when gross fraud, wantonness, malice, or oppression appears, the jury [is] not bound to adhere to the strict line of compensation, but may, by a severer verdict, at once impose a punishment on the defendant, and hold him [or her] up as an example to the community. . . . [T]he idea of compensation is abandoned and that of punishment introduced.” Rustad & Koenig, supra note 18, at 1288 (internal quotation marks omitted) (quoting 1 *THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES* § 347, at 687 (9th ed. 1912)). See Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 438 n.11 (2001) (“As the types of compensatory damages available to plaintiffs have broadened, the theory behind punitive damages has shifted toward a more purely punitive . . . understanding.”) (internal citations omitted). But see Sebok, *Misunderstanding History*, supra note 18, at 179–81 (arguing that this reading of punitive damages history is inaccurate).

\(^{81}\) See supra Section I.B.

\(^{82}\) Prosser & Keeton, supra note 14, at 9.
2. Procedural Evolution

Structurally, the common law punitive damages doctrine as it developed in the United States during the nineteenth century was simple. Its early framework may be characterized as unitary. Most cases consisted of one individual plaintiff suing one individual defendant for one injury in one jurisdiction and generally produced one award of damages, often in a unitary verdict that combined compensatory and punitive recovery. This straightforward model served to circumscribe the incidence, magnitude, and administration of punitive awards. But major economic developments that occurred during the industrial revolution of the nineteenth century brought about an expansion of tort law that encompassed new causes of action and remedies for personal injuries and correspondingly enlarged the application and practical effects of punitive damages. These forces radically altered tort litigation. Damages resulting from tortious accidents and improper business transactions increasingly involved more than a single injury, more than one victim and one offender, and harms that implicated more than one jurisdiction. Typical litigation was no longer unitary, but came to be defined by multiplicity: legal conflicts more frequently encompassed multiple plaintiffs, multiple defendants, multiple injuries, multiple actions in multiple states, and possibly multiple punitive awards more commonly litigated through class actions. In time, these circumstances combined to increase the number and size of civil litigation verdicts, both compensatory and punitive, thereby exacerbating the potential for punitive awards to yield arbitrary and inequitable results. As another byproduct, constitutional challenges of punitive damages verdicts as excessive tended to focus analysis on the magnitude of the awards and to minimize or ignore the conceptual and normative impacts of other components and effects of the doctrine viewed as a whole.

II. Growing Pains

Many generations of courts, legislators, and legal scholars have struggled with the multitude of conceptual problems that emerged from the substantive and procedural expansion of the punitive damages doctrine under the historical circumstances described in Part I. Among those concerns, perhaps most fundamental were the difficulties punitive damages posed relating to: (A) the overlap of criminal law and civil law functions; (B) double counting; (C) multiple punishment; (D) windfalls; (E) vicarious liability; (F) standardless jury instruc-

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83. See infra Section II.A.
85. See supra Section I.C.1.b.
86. See supra notes 35–43 and accompanying text.
tions and unconstrained discretion; (G) rate of false positives; and (H) inadequate judicial review. These issues are discussed below in turn. This Part argues that because the courts and punitive damages theorists tend to view these issues independently of one another, instead of comprehensively as interrelated parts of the doctrine as a whole, constitutional scrutiny that treats them in isolation could pass muster under some circumstances, whereas it may fail if the issues were examined more holistically.

A. THE CIVIL–CRIMINAL DICHOTOMY

In the United States, the change in the dominant purpose of punitive damages—from compensation serving to make the victim whole to punishment of the offender so as to deter similar offenses—provoked a conceptual dispute among courts and scholars since the nineteenth century. The private–public law dichotomy concerns the structural symmetry and functions of tort law in relation to criminal law, a relationship fraught with profound constitutional implications. Each camp in that debate bases its perspectives on different readings of the historical origins of punitive damages and varying interpretations of judicial precedents. One view holds that punitive damages never functioned as punishment, and their purpose was solely to provide plaintiffs extra compensation to make them whole for otherwise nonactionable harms inflicted by the defendant’s aggravated wrongs. A contrary reading of history and case law maintained that punitive damages were awarded not only to compensate victims injured by outrageous misconduct, but to punish defendants who inflicted such harms.

But this disagreement was about much more than form and symmetry of the law. Injecting the notion of punishment into the purposes of punitive damages introduced a fundamental question that the compensatory view sidestepped by limiting the doctrine’s function to pecuniary recovery for actual harms—the constitutional protections integral to public proceedings in which punishment is assessed. As one commentator noted, “[I]f punitive damages serve the criminal

87. See, e.g., Morton J. Horwitz, The History of the Public/Private Distinction, 130 U. Pa. L. Rev. 1423, 1425 (1982) (“A final example of the persistent effort of late nineteenth-century legal thinkers to create a sharp distinction between public and private law was the movement to eliminate punitive damages in tort. Because the purpose of punitive damages was to use the tort law to regulate conduct, not merely to compensate individuals for injuries, their imposition was regarded as a usurpation of the public law functions of the criminal law.”).

88. An early proponent of this view was Simon Greenleaf, a prominent nineteenth-century scholar. See Colby, supra note 11, at 617 (“[N]otwithstanding widespread dicta in the decisions of numerous American and English courts recounting the principle that punitive damages may be assessed to punish and deter the defendant, such damages had, in practice, been imposed only as a means of ensuring that the plaintiff was fully compensated for his tangible and intangible losses.” (citing 2 Simon Greenleaf, A Treatise on the Law of Evidence § 253, at 240 n.2 (16th ed. 1899))).

89. This theory was advocated by another nineteenth century commentator, Theodore Sedgwick, creating an academic split over the issue. See Colby, supra note 11, at 618 & n.122 (citing Theodore Sedgwick, A Treatise on the Measure of Damages 515–40 (5th ed. 1869)); see also Fay v. Parker, 53 N.H. 342, 358–61 (1872).
law function of punishing societal wrongs, it is difficult to understand why it is that the defendant is not permitted to avail itself of the various criminal procedural safeguards that the Constitution affords to those accused of public wrongs. On this basis, some judges and scholars have argued that the punitive damages doctrine meets the standards for a determination that the criminal law’s constitutional protections required in proceedings to administer punishments should apply.

The same private–public law distinction and its constitutional dimensions played out in the courts as well, beginning with a number of nineteenth-century state court decisions. Some courts rejected the common law punitive damages doctrine not only as a breach of the pure symmetry of the law, but as violating constitutional principles related to excessive fines, self-incrimination, double jeopardy, confiscation of property, and due process of law.

Nonetheless, the argument against punitive damages did not prevail. Outside the few states that barred or narrowed its application, the doctrine took root. That development was aided by numerous rulings of the U.S. Supreme Court. Over the course of more than 160 years, the Court has repeatedly recognized the overlap that punitive damages awards create between criminal and civil law

90. Colby, supra note 11, at 608.
91. See, e.g., id. at 649 & n.253 (citing Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 298 (1989) (O’Connor, J., concurring in part and dissenting in part) (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963))); see also Wheeler, supra note 19, at 323–51 (citing cases). Punitive damages scholars generally recognize the practical and legal reality that punitive damages serve as punishment and thus present significant constitutional questions. To address the challenges, some theorists endeavor to explain and defend the doctrine by drawing a distinction between the purposes of punitive damages as designed to redress private and public wrongs and correspondingly to impose private and public punishment. See Colby, supra note 11, at 619–22; Galanter & Luban, supra note 18, at 1394; Redish & Mathews, supra note 19, at 19; Sebok, From Myth to Theory, supra note 18, at 1007; Zipursky, supra note 18, at 106. Other theories seek to overcome the constitutional implications of punitive damages by removing the notion of punishment from the purposes of the remedy through two conceptual approaches. In one, this recasting returns to the original function of punitive awards as compensation, either to the victims for individual injuries or to the larger society for the social harms that the offender’s misconduct caused. See, e.g., Owen, supra note 18, at 378–79. A different theory shifts the purpose of the remedy to efficient deterrence by means of enhanced compensatory relief. See, e.g., Polinsky & Shavell, supra note 35, at 889; see also Ciraolo v. City of New York, 216 F.3d 236, 245 (2d Cir. 2000) (Calabresi, J., concurring). For critiques of the law and economics perspective, see Galanter & Luban, supra note 18, at 1447–49; Sebok, From Myth to Theory, supra note 18, at 978.
92. See, e.g., Murphy v. Hobbs, 5 P. 119, 125–26 (Colo. 1884); Fay, 53 N.H. at 382; Spokane Truck & Dray Co. v. Hoefer, 25 P. 1072, 1073–75 (Wash. 1891). In Fay v. Parker, for example, the New Hampshire Supreme Court ridiculed the notion of punitive damages applied as a civil remedy to inflict punishment. Stating the court’s objections, Justice Foster remarked: [The idea of punishment is wholly confined to the criminal law... . What is a civil remedy but reparation for a wrong inflicted, to the injury of the party seeking redress,—compensation for damage sustained by the plaintiff? How could the idea of punishment be deliberately and designedly installed as a doctrine of civil remedies? Is not punishment out of place, irregular, anomalous, ... [and] unjust ... when classed among civil remedies? What kind of a civil remedy for the plaintiff is the punishment of the defendant? The idea is wrong.
53 N.H. at 382.
functions, referring to them as “quasi-criminal” punishment\(^{93}\) and as “serv[ing] the same purposes.”\(^{94}\) Rejecting challenges grounded in large part on the doctrinal conflict, however, the Court has declared that the traditional punitive damages doctrine is not per se unconstitutional.\(^{95}\) As a result, as one commentator noted, “the modern consensus is that, although punitive damages serve criminal ends, they have—rightly or wrongly—been afforded a complete exemption from the special procedural rules designed to ensure fairness in the punishment of public wrongs.”\(^{96}\) But that exemption derives from Supreme Court jurisprudence that applies an unduly constrained analysis of common law punitive damages. Typically, the Court’s constitutional inquiry focuses on the effects of separate aspects of punitive damages that produced the particular excessive verdict at issue, rather than on the operation of the doctrine in its entirety. In this respect, the Court’s decisions have accorded inadequate consideration to the scarcely regulated administration of punitive damages, thus tolerating the inequitable and inefficient results the remedy generates in many cases.

### B. DOUBLE COUNTING AND DOUBLE JEOPARDY

The punitive damages double counting problem developed as an outgrowth of the prevailing conception of tort remedies doctrine. The tort remedies doctrine holds that the imposition of punitive awards functions solely to achieve punishment and deterrence, whereas compensatory damages serve to make the plaintiff whole and nothing more.\(^{97}\) This functional distinction, however, is grounded on tenuous premises. It assumes that a clear demarcation exists between the roles of compensatory and punitive awards and that the dividing line is discernible by jurors in calculating damages in any particular case—readily differentiated in mental compartments that separate the amount their

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95. See Haslip, 499 U.S. at 17.
96. Colby, supra note 11, at 606.
97. See Barnes v. Gorman, 536 U.S. 181, 189 (2002) (“Punitive damages are not compensatory . . . .”); Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 437 n.11 (2001) (“As the types of compensatory damages available to plaintiffs have broadened . . . the theory behind punitive damages has shifted toward a more purely punitive . . . understanding.”); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996) (“Punitive damages may properly be imposed to further a State’s legitimate interests in punishing unlawful conduct and deterring its repetition.”); see also Wheeler, supra note 19, at 305 (listing numerous injuries for which modern tort law provides compensation and potentially allows punitive recovery as well); Redish & Mathews, supra note 19, at 17 (“[T]here can be little doubt that today, punitive damages are awarded for reasons entirely unrelated to compensation.”); Redish & Mathews, supra note 19, at 15–16 (noting that as the concept of actual damages broadened to include intangible harms, nineteenth-century courts “lost sight of this compensatory grounding and began to explain exemplary damages by reference to concepts of punishment and retribution. Punitive damages . . . served the unabombed goal of punishing the victim—a historical fact readily acknowledged by the modern United States Supreme Court” (citing Haslip, 499 U.S. at 19)).
verdicts allocate to each remedial purpose. Reality belies this notion. In practice, compensatory damages embody elements and purposes that considerably overlap with the functions and effects of punitive damages. In some circumstances, substantial compensatory damages, as perceived either from the motive of the plaintiff in commencing the litigation, or the impact a verdict of liability has on the defendant, inherently contain a retributive component that operates to inflict punishment and serve as deterrence in a manner not materially different from the effects of punitive damages. That particular compensatory and punitive damages awarded for the same injury may include duplicate amounts attributable to the wrongdoer’s aggravated harm is well-recognized by courts and commentators. In *State Farm*, for instance, the Supreme Court acknowledged this potential overlap, noting that “[t]he compensatory damages for the injury suffered here . . . likely were based on a component which was duplicated in the punitive award.” Specifically, the court remarked that as to the injuries that the defendant’s wrongdoing inflicted on the victims, “it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element.”

98. See *Cooper Indus.*, 532 U.S. at 439 (noting in the context of theories about jury assessments for deterrence purposes that “[h]owever attractive such an approach to punitive damages might be as an abstract policy matter, it is clear that juries do not normally engage in such a finely tuned exercise of deterrence calibration when awarding punitive damages”); *Cracker v. Chi. & Nw. Ry. Co.*, 36 Wis. 657, 678 (1875) (noting the inherent difficulty for juries in mentally separating compensatory damages awarded for mental suffering from punitive damages for intentional insult, the court remarked: “[B]ut if there be a subtle, metaphysical distinction which we cannot see, what human creature can penetrate the mysteries of his own sensations, and parcel out separately his mental suffering and his sense of wrong—so much for compensatory, and so much for vindictive damages? . . . If possible, juries are surely not metaphysicians to do it”).

99. *Id.* at 426.

100. *Id.* Almost a century and a half earlier, the Wisconsin Supreme Court made the same observation: “[S]uch [compensatory] damages can only be recovered when the aggressor is animated by a malicious motive . . . . The right to recover exemplary damages rests upon precisely the same grounds.” *Wilson v. Young*, 31 Wis. 574, 582 (1872); *see also* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 841 (2d Cir. 1967) (noting that “[m]any awards of compensatory damages doubtless contain something of a punitive element, and more would do so if a separate award for exemplary damages were eliminated”); *Restatement (Second) of Torts* § 908 cmt. c (Am. Law Inst. 1979) (“In many cases in which compensatory damages include an amount for emotional distress . . . there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both.”); Galanter & Luban, *supra* note 18, at 1407 (citing examples, including $10.5 billion in compensatory damages awarded to Pennzoil in a fraud action against Texaco which the jury may have considered as comprising $7.53 billion in actual and $3 billion in punitive damages). In fact, the two assessments are often based on the same events and supported by the same evidence. *See Dorsey D. Ellis, Jr.*, *Punitive Damages, Due Process, and the Jury*, 40 Ala. L. Rev. 975, 1001–02 (1989) (noting that in unitary trials typical of most cases involving punitive damages, the evidence presented and the jury’s deliberations include matters relating to liability, causation, the defendant’s state of mind, the extent of the plaintiff’s injury and monetary recovery, “together with other evidence material only to the punitive damages issue”). The difficulty of properly accounting for the different components of injuries is compounded in jurisdictions in which juries do not apportion the liability and render a single verdict, leaving it entirely to guesswork to separate the amounts that represent compensation from those imposed as punishment, as illustrated by cases as early as *Huckle*. *See id.*
The double counting phenomenon materializes in several forms, each of which produces the same effect: multiplying the defendant’s punishment by augmenting the plaintiff’s damages.\(^{101}\) When a compensatory damages award includes an enhancement that, even if unstated, is motivated in the jury’s assessment by the same circumstances of aggravated misconduct and degree of harm that it weighed in determining punitive damages, the result twice counts that component of recovery and thus both overcompensates the loss and enlarges the penalty. Another form arises in cases in which the punitive award is counted by applying a multiplier of compensatory damages. The impact of double punishment is then compounded if the compensatory verdict either includes a component that the jury contemplates as punishment or is large enough in itself to serve punitive and deterrent aims. A third form of double counting occurs when an award of punitive damages is enhanced by an amount that the jury bases on the actual or presumed injuries the wrongdoer’s conduct inflicted on victims other than the plaintiffs before the court. To the extent other victims later commence litigation against the same defendant claiming redress for their own harms, the punishment imposed on the defendants may duplicate the penalties recovered by earlier plaintiffs.\(^{102}\)

**C. MULTIPLE PUNISHMENTS**

As noted above, in a substantial volume of contemporary punitive damages cases, the litigation entails multiplicity: the offender’s outrageous behavior causes not only damage to the one or few plaintiffs who bring the initial lawsuits, but also mass injuries, actual or potential, to other victims. The entire harm often extends to multiple jurisdictions and often results in the imposition of multiple punitive awards against the same defendant in more than one state to punish the offender’s same outrageous behavior. At the remedial phase of these cases, the juries—swayed by exhortations, formulas, and amounts that plaintiffs’ counsel advocate in closing arguments—typically award punitive damages

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101. The duplication of compensatory and punitive damages that the courts acknowledge may be a function of both what the plaintiffs seek from litigation and what juries award, in some measure giving expression to the plaintiff’s motive. Recognizing the role of the plaintiff’s aim in creating overlap of damages, one commentator noted that “the legal line between punitive damages and compensatory damages does not accurately demarcate the presence of motives or perceptions of punishment. Ordinary compensatory damages may be pursued for purposes of vengeance, retribution, or vindication.” Galanter & Luban, supra note 18, at 1406; see also Sebok, From Myth to Theory, supra note 18, at 1011. Empirical evidence supports these observations. It indicates that juries do not follow strict boundaries defining compensatory and punitive damages according to their stated purposes. In one study of mock juries, for example, 25 percent of the jurors responded that the punitive damages they awarded were meant to provide greater compensation to the plaintiff. See Sharkey, supra note 18, at 390 n.152 (citing Cass R. Sunstein et al., PUNITIVE DAMAGES: HOW JURIES DECIDE 217 n.7 (2002)).

102. Such instances of double counting constitute an aspect of the multiple punishment problem, discussed infra Section II.C., that the Supreme Court invalidated on due process grounds in BMW, State Farm, and Philip Morris. See, e.g., BMW of N. Am. Inc. v. Gore, 517 U.S. at 559, 593 (1996) (Breyer, J., concurring) (“Larger damages might also ‘double count’ by including in the punitive damages award some . . . damages that subsequent plaintiffs would also recover.”).
that take into account the totality of the harms, actual and potential, that the defendant’s wrongdoing produced. In the aggregate, such computations produce punitive awards reaching massive proportions, even if the actual harm inflicted is relatively small as it pertains to a single victim. In determining the full scope of the offense, a jury may then weigh several overlapping considerations, which tend to enhance the size of punitive awards: (1) harms suffered extraterritorially by victims in other states, harms to in-state persons not before the court, whether actual or potential victims, or to the public at large, and harms derived from wrongful conduct unrelated to the offense at issue in the case before the court. In some instances, juries make these considerations to divest the wrongdoer not only of any profit he or she realized from the injury the plaintiff suffered, but of all gains the defendant may have reaped from the offense, even those unrelated to the plaintiff at bar.

Often such litigation occurs in different states, with each award assessed to redress the same total harm and each combined with compensatory damages that also embody a punitive element. In that event, regardless of whether any single punitive award may be justified, the aggregate recoveries from multiple awards potentially may be greater than “reasonably necessary to vindicate the State’s legitimate interests in punishment and deterrence.” These circum-

103. See, e.g., State Farm, 538 U.S. at 420; BMW, 517 U.S. at 572–73 (noting that plaintiff, urging a large punitive damages award, argued that such relief was necessary to take into account BMW’s conduct and harms inflicted nationwide); Colby, supra note 11, at 587 (noting that “punishing the defendant, in a single case brought by a single victim, for the full scope of societal harm caused by its entire course of wrongful conduct . . . has led countless judges and commentators to worry about the potential for excessive multiple punishment: the possibility that several victims will obtain punitive damages awards that were each designed to punish the entire wrongful scheme, resulting in unjustly high cumulative punishment”); Colby, supra note 32, at 397; Thomas C. Galligan, Jr., Disaggregating More-Than-Whole Damages in Personal Injury Law: Deterrence and Punishment, 71 TENN. L. REV. 117, 127 (2003).

104. See, e.g., BMW, 517 U.S. at 572–73 (declaring that punitive damages may not be imposed for conduct occurring beyond the state’s jurisdiction and not impacting the residents of the particular state).

105. See id. (noting that although the Alabama Supreme Court had reduced the jury’s punitive verdict to remove consideration of BMW’s conduct in other states, the assessment of in-state injuries that the award encompassed in relation to the plaintiff’s injury remained grossly excessive).

106. See State Farm, 538 U.S. at 422–23 (noting that the state courts awarded punitive damages to punish and deter conduct that bore no relation to the plaintiff’s harm, the Court declared that “[a] defendant’s dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business”).


108. See, e.g., Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839–41 (“We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill. . . . We know of no principle whereby the first punitive award exhausts all claims for punitive damages and would thus preclude future judgments . . . [T]he apparent impracticality of imposing an effective ceiling on punitive awards in hundreds of suits in different courts may result in an aggregate which, when piled on large compensatory damages, could reach catastrophic amounts.”).

109. BMW, 517 U.S. at 568; see Colby, supra note 11, 587 n.10 (citing cases).
stances have raised some of the most troubling constitutional issues associated with the punitive damages doctrine. The total harm punitive damages question, by one account, should ask not whether any particular instance “can sometimes lead to unconstitutional results, but rather whether the practice is itself unconstitutional.”

Beyond the prospect of being subjected to enhanced punitive damages in a multitude of lawsuits, defendants face the potential unfairness that the multiple punishment problem engenders is further exacerbated by another element inherent in the practice. In any instance of wrongdoing that injures multiple individuals, not every victim necessarily has a meritorious claim that would prevail if litigated or that would present a sufficiently compelling account of the defendant’s offense to persuade a jury that the conduct warrants punitive damages. Various factors may account for these results. The merits of a particular plaintiff’s case may be weaker than another’s. For example, the degree of reprehensibility of the defendant’s conduct may differ from victim to victim, depending on the timing of the offending act, the personal characteristics of a specific plaintiff, or the extent of the actual injury claimed. Otherwise, the defendant may possess a valid defense—for example, statute of limitations, assumption of risk, contributory negligence, or lack of court jurisdiction—that might prevail if asserted against a particular victim. Accordingly, the wrongdoer may be punished for some injuries it did not cause or for which it may otherwise not have been liable, or which it was deprived of an opportunity to contest—and all without receiving fair notice of the course and grade of misconduct to which the entire punishment relates or of the severity of the penalty the state may impose through a private civil proceeding.

The multiple punishment problem may also implicate double jeopardy concerns. As the Supreme Court has recognized, although punitive awards “serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding.” One of those protections is provided by the Double Jeopardy Clause of the Fifth Amendment. A defendant found liable to one plaintiff for punitive damages based on the entire harm its conduct caused to others, then sued by additional victims based on the same total injuries, would

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110. Colby, supra note 11, at 588.
111. See id. at 596. In BMW, for example, the Supreme Court called attention to a case on point. Not long before BMW went to trial, a jury in a similar action brought by another plaintiff against BMW in the same state and grounded on the same allegations of misconduct, found liability for compensatory damages but awarded no punitive damages. See BMW, 517 U.S. at 565–66 n.8.
112. See Colby, supra note 11, at 600–01.
113. See Philip Morris USA v. Williams, 549 U.S. 346, 354 (2007) (noting that punishment for injuring victims who are not parties to the action before the court “would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured?”); Colby, supra note 11, at 653–54.
be at risk of successive punitive awards and thus essentially subject to the
prospect of double jeopardy for the same offense.\textsuperscript{115} Double jeopardy exposure
could also arise in two other situations: first, where the defendant has been
found not liable for punitive damages in a prior action but then faces potential
punitive damages liability in subsequent lawsuits based on the same offense;
and second, where tortious conduct also constitutes a crime, and a judgment
against the defendant in one proceeding is followed by actual or potential
penalties imposed on the same offender in subsequent litigation grounded on the
same misconduct.\textsuperscript{116} On this score, the Supreme Court ultimately rejected the
application of the Double Jeopardy Clause to litigation between private par-
ties.\textsuperscript{117} However, some state courts invoking double jeopardy principles under
state constitutions have held the imposition of punitive damages to be impermis-
sible in civil actions involving conduct for which the defendant could also face
criminal prosecution.\textsuperscript{118}

The fundamental issues raised by the multiple punishment problem fall not
only on defendants, but engender unfairness and legal distortions on the plain-
tiffs’ side of punitive damages assessments as well.\textsuperscript{119} Enabling a single plaintiff
to recover punitive damages that potentially represent the entire harm suffered
by all other victims injured by the defendant’s wrongful conduct effectively
transforms the litigation into a style of class action. In this form, one plaintiff is
conferred the benefit of collective recovery that takes into account the injuries
inflicted on other victims, but without obligation to share the proceeds, nor
bound by any other procedures and burdens associated with class action litiga-
tion.\textsuperscript{120} The plaintiff, for instance, would be permitted to collect an enhanced
assessment of punitive damages based on generalized evidence regarding the
losses other victims suffered, without definition of a class, limitation on the
number of other potential claimants, or the bar to some individual lawsuits that
serve to contain class action liability. One plaintiff’s recovery, however, would
not bar individual actions by other victims whose losses may already have been
reckoned in determining the punitive award for the first plaintiff. Such recovery
would also conflict with a basic principle of punitive damages recovery: that

\textsuperscript{115} See Colby, supra note 11, at 597.
\textsuperscript{116} See id. at 620.
\textsuperscript{117} See United States v. Halper, 490 U.S. 435, 451 (1989) (holding that the Double Jeopardy
Clause does not “preclude[] a private party from filing a civil suit seeking damages for conduct that
previously was the subject of criminal prosecution and punishment”).
\textsuperscript{118} See, e.g., Taber v. Hutson, 5 Ind. 322, 325–26 (1854). Other courts and commentators have
cited double jeopardy concerns among the fundamental problems raised by the punitive damages
document. See, e.g., Murphy v. Hobbs, 5 P. 119, 120 (Colo. 1884); Distinctive Printing & Packaging Co.
v. Cox, 443 N.W.2d 556, 574 (Neb. 1989); Fay v. Parker, 53 N.H. 342, 382 (1872); Spokane Truck &
Dray Co. v. Hoefer, 25 P. 1072, 1074 (Wash. 1891); Ingram, supra note 19, at 217; Note, The
Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages, 41 N.Y.U. L. Rev.
1158, 1181–84 (discussing the double jeopardy implications in cases where wrongdoing is subject to
punishment both by criminal prosecution and punitive damages).
\textsuperscript{119} See infra Section II.D.
\textsuperscript{120} See Colby, supra note 11, at 611 & n.4; Ghiardi, supra note 19, at 285.
liability depends upon the victim establishing a valid claim for compensation. Moreover, in some cases, awarding punitive damages to the first one or few plaintiffs who obtain judgments on the basis of the entire harm the wrongdoer’s conduct caused may reward these early victims but possibly foreclose recovery by others in the event the magnitude of the initial verdicts drives the defendant into bankruptcy, thus barring not only punitive damages but conceivably any compensation at all.121

Lastly, the multiple punishment problem could raise undesirable economic and social consequences, the impacts of which may extend to the general public. If a string of lawsuits against a defendant following a large punitive damages recovery in one of the first few actions forces the defendant out of business, the resulting disruptions could severely affect numerous macroeconomic interests. Business competition may be diminished. Unemployment may rise. And the losses could be passed on to investors and consumers of an industry.122 In some circumstances, fear of such prospects alone may not only deter harmful conduct, but overdeter individuals and institutions, thus discouraging research, production, or investment in legitimate socially valuable activities.123

Despite its many fundamental shortcomings and troublesome effects, the multiple punishment problem remained rooted as a central aspect of the common law punitive damages doctrine, its rudiments, as suggested above, traceable to Wilkes and Huckle. For many years, courts accepted and applied the remedy embodying this element because they turned a blind eye to its harsh-

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121. This concern, though uncommon, is not merely speculative. It came to pass in the asbestos industry in the wake of multiple lawsuits filed against the Johns-Manville Corporation and other asbestos manufacturers. See Jackson v. Johns-Manville Sales Corp., 727 F.2d 506, 526 (5th Cir. 1984) (expressing concern that where punitive awards destroy the viability of a business, the remedy becomes incompatible with the distributive purpose of the strict liability doctrine); see also Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839–40 (2d Cir. 1967); Galanter & Luban, supra note 18, at 1455 n.302 (“[M]ultiple punitive damages are extremely troublesome, for if each award has been appropriately scaled to the heinousness of the deed, multiple awards amount to overpunishment. At the same time, allowing only the first, or the first few, plaintiffs to collect punitive awards seems unfair.”).

122. See Polinsky & Shavell, supra note 35, at 879 (discussing the problems, costs, and potential economic and social harms produced by overdeterrence); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O’Connor, J., dissenting) (“The threat of such enormous awards has a detrimental effect on the research and development of new products. Some manufacturers of prescription drugs, for example, have decided that it is better to avoid uncertain liability than to introduce a new pill or vaccine into the market. Similarly, designers of airplanes and motor vehicles have been forced to abandon new projects for fear of lawsuits that can often lead to awards of punitive damages.” (internal citations omitted)); see also Roginsky, 378 F.2d at 841 (noting that where insurance policies are permitted to protect against punitive damages liability, “the cost of providing this probably needless deterrence . . . is passed on to the consuming public; . . . a sufficiently egregious error as to one product can end the business life of a concern that has wrought much good in the past and might otherwise have continued to do so in the future, with many innocent stockholders suffering extinction of their investments for a single management sin”).

123. See Globus v. Law Research Serv., Inc., 418 F.2d 1276, 1285 (2d Cir. 1969) (noting that if all persons who claim harm from a statement in a stock transaction are permitted to recover not only compensatory but punitive damages, “the sum of the liabilities could well bankrupt an otherwise honest underwriter or issuer who egregiously erred in one instance which affected many”).
ness, or if they saw it, they chose to ignore the unfairness it implicated. Yet, it was not until BMW, and subsequently in State Farm and Philip Morris, that the Supreme Court frontally addressed the constitutional dimensions of the questions the multiple punishment practice posed and declared it a violation of due process.124 Even so, as further elaborated below,125 the Court’s analysis of the constitutional issues punitive damages pose has been constricted and piecemeal. In BMW, for instance, the Court’s resolution of the multiple punishment problem precluded the plaintiff from recovering punitive damages for injuries that the defendant’s misconduct inflicted on other victims, but only as to persons located in other states. It was not until Philip Morris, eleven years later, that the Court clarified that the multiple punishment bar applied to punitive awards that took into account injuries to any victims other than the plaintiffs before the court that rendered the judgment.126 And although the Court considered multiple punishments under these circumstances as a constitutional violation under substantive due process principles, it made no mention of the fundamental procedural defects in the process of standardless jury instructions and unrestrained discretion that contributed to the excessive punitive verdicts in the first place.127

D. WINDFALLS

Under the traditional punitive damages doctrine, the prevailing plaintiff is entitled to receive and keep the full amount of a punitive verdict. When a victim of extreme wrongdoing is made whole by compensatory damages, the excess punitive recovery is considered a “windfall”128 or “bonanza.”129 This component of punitive damages law poses weighty legal, economic, and social policy issues on the plaintiff’s side of punitive damages assessments, some of them as difficult as those associated with the effects of punitive awards from the standpoint of defendants. As one authority framed the threshold inquiry: “[W]hy should a plaintiff, who has no particular entitlement to these damages, receive any—much less all—of them? . . . [W]hy should a plaintiff receive windfall gains that might otherwise be used to compensate other

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124. See Sharkey, supra note 18, at 432 (“The multiple punishments problem has confounded jurists and scholars for the better part of the past three decades.”).
125. See infra notes 202–14 and accompanying text.
128. See Newport v. Fact Concerts, Inc., 453 U.S. 247, 270–71 (1981) (stating that awards of punitive damages to plaintiffs amount to “windfall recovery”); Rosenbloom v. Metromedia Inc., 403 U.S. 29, 84 (1971) (Marshall, J., dissenting) (“These awards are not to compensate victims; they are only windfalls.”); see also Sharkey, supra note 18, at 391.
individuals who incurred injuries as a consequence of the same wrongdoing by the same defendant?" But courts and academic literature often overlook these questions for the same reasons that many of the other concerns the traditional remedy raises for defendants have been widely ignored in the punitive damages debate: because the plaintiff’s windfall has been an integral part of the common law doctrine for centuries, and such longstanding traditions should not be disturbed—regardless of the inequities, inefficiencies, and adverse effects on the administration of justice that they may implicate.

The windfall question has long perplexed courts and commentators. For generations, they have struggled conceptually with this element of punitive damages but have not found a justifiable rationale for it. Despite the difficulty of the issues the windfall implicates, it has been largely overlooked by the courts and minimized in the literature. Some responses to the problem support distribution of the punitive award to the winning plaintiff as an incentive for victims of extreme wrongdoing to pursue litigation and thus achieve the punishment and deterrence objectives of punitive damages, especially in cases where compensatory recovery may be too small to make litigation worth the trouble and expense. Others regard the windfall as a means to compensate plaintiffs for attorney’s fees and losses otherwise unrecoverable. Taking a more agnostic attitude to the issues, another approach makes no pretense of searching for a sound rationale to justify the windfall, essentially dismissing or shrugging off the attendant concerns and regarding this aspect of the punitive damages doctrine as an incidental detail, “a necessary byproduct of adequately deterring the defendant.”

These outlooks do not adequately account for the peculiarity and consequential unfairness and inefficiency that punitive damages windfalls embody. As the Supreme Court noted, “[t]he impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial.”

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130. Sharkey, supra note 18, at 391.
131. Describing the difficulty in an early case, the court remarked: “It is difficult on principle to understand why, when the sufferer by a tort has been fully compensated for his suffering, he should recover anything more. And it is equally difficult to understand why, if the tortfeasor is to be punished by exemplary damages, they should go to the compensated sufferer, and not to the public in [sic] whose behalf he is punished.” Bass v. Chi. & Nw. Ry., 42 Wis. 654, 672 (1877).
132. For discussion of recent judicial and legislative measures to address the problem, see infra Part III.
133. See Note, supra note 72, at 525.
134. See id.
135. Sharkey, supra note 18, at 370; see also Ellis, supra note 18, at 11 (suggesting that the prevailing outlook is fortuitously that “the use that will result in the greatest increase in welfare, utility, or happiness—is to compensate plaintiffs for losses or attorneys’ fees”). Even more unexamined is the explanation of a court that remarked that the windfall is conferred on the plaintiff simply because there is no one else to give it to. See Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854, 869 (Iowa 1994).
numerous concerns with far-reaching implications. First, the desire to induce plaintiffs to undertake private law enforcement functions and compensate them for attorney’s fees and other losses not covered by compensatory damages does not justify punitive awards rising to tens and even hundreds of millions of dollars.137 Second, given the amorphous and virtually all-encompassing scope of what juries can take into account, combined with the imprecision inherent in translating injuries into monetary terms, verdicts in many cases are likely large enough to cover all or most of plaintiff expenses. Thus, the law enforcement and attorney’s fees rationales for the windfall seem largely overstated. Third, the deterrence justification is similarly deficient; it fails to explain how much recovery is “adequate” for effective deterrence and why distributing it to one or few injured parties achieves deterrence in the fairest and most efficient manner. Fourth, the windfall also raises another mode of fundamental unfairness. Until the Supreme Court removed the multiple punishment component of punitive awards in *BMW, State Farm,* and *Philip Morris,* the windfall included recovery not only for the injury suffered by the particular plaintiff before the court, but for the full scope of the actual and potential harms the wrongdoer’s conduct inflicted upon other victims and nonparties.138

By awarding a bonanza to one party and excluding similarly injured victims, windfalls can lead to another inequity. Some injured parties may be unable to litigate due to lack of resources or may be barred from recovery if prior judgments deplete defendant funds.139 Finally, permitting the windfall induces not only meritorious cases, but also frivolous litigation pursued for settlement and nuisance value, leading to greater inefficiency.140

These concerns suggest that the doctrinal and practical effects of the windfall should be considered in a comprehensive analysis of the fairness and efficiency of punitive damages. Courts, legislative reforms, and legal scholars have failed, however, to adequately assess the impacts of the windfall in the context of the punitive damages doctrine.

E. VICARIOUS LIABILITY

The vicarious liability doctrine, under the concept of respondeat superior, imposes liability on employers and other principals for wrongful acts that their employees or agents commit while engaged in conduct within the scope of their

137. See supra notes 8, 9.
138. See supra Section II.C. By invalidating punitive awards for multiple punishment reasons, the Supreme Court established standards for after-the-fact judicial review of punitive judgments. Therefore, verdicts including multiple punishment can be reduced or reversed on appeal, meaning that to remove this element from punitive awards where it may still emerge, defendants must incur additional litigation costs.
139. See, e.g., Jackson v. Johns-Manville Sales Corp., 727 F.2d 506, 526 (5th Cir. 1984) (expressing concern that providing a windfall to plaintiffs in current litigation may foreclose even compensatory recovery to later claimants if the enterprise is forced out of business).
140. See Sharkey, supra note 18, at 371.
The doctrine provides employee-injured plaintiffs with a means to seek compensation from the wrongdoers’ employer or principal. Supporters of vicarious liability reason that the rule enables victims to identify the defendant with the wealth and position to pay damages, absorb the expense, and spread the cost to others—insurers, customers, shareholders, and the general public. In the context of compensatory liability, the rule has been the source of longstanding controversy among courts and scholars who have failed to advance a satisfactory justification for it. As extended to punitive damages, vicarious liability has created even more fundamental objections and conceptual division.

Traceable to the very origins of common law punitive damages, the main objection to vicarious punitive damages is that they impose excessive damages upon parties not directly responsible for the alleged injury and, thus, for whom punishment and retribution may not be warranted. Punishing such a defendant with large punitive damages would lack the three essential principles of fair punishment: sufficient notice of wrongdoing, proportionality, and just deserts. Moreover, penalizing the nominal actor and leaving the actual offender untouched strips all meaning and purpose from the concepts of punishment, deterrence, and retribution—all of which are premised on punishment of the wrongdoer. Compounding the problem, juries must take into account wealth, corporate status, and out-of-state residence when assessing punitive liability. Administering punitive damages to employers and principals rather than the actual offender further increases inequity by passing the burden onto innocent customers and shareholders. Insurance policies covering exposure to punitive damages add complexity by undercutting the remedy’s punishment and deterrence justifications.

141. See Prosser & Keeton, supra note 14, at 13.
142. See id. at 64–65.
143. Id. at 64; Glanville Williams, The Aims of the Law of Tort, 4 Current Legal Pros. 137, 158 (1951) (“All efforts to find a satisfactory reason for vicarious liability have failed . . . .”); see also Prosser & Keeton, supra note 14, at 12–13.
144. Ellis, supra note 18, at 66 (“The arguments used to justify vicarious compensatory damages are, therefore, inapplicable or lamentably weak when applied to vicarious punitive damage liability.”). The same analysis and conclusion applies to a common fact pattern: imposing punitive damage liability on an employer or principal for the outrageous conduct of an agent or employee in circumstances in which the employer may have lacked knowledge of the employee’s actions, may have policies and procedures in place to avert private injury, and may even have suffered harm because of the employee’s or agent’s misconduct, not only through financial penalties, but by loss of good will and reputation. To address these potential inequities, some courts and authorities recognize the “complicity” rule as an exception. Under this approach, the principal is held liable if the agent who caused the injury was unfit for the job, was recklessly hired, retained, or supervised, or occupied a managerial position, or if the principal knew or ratified the wrongful action. See Prosser & Keeton, supra note 14, at 12; Restatement (Second) of Torts § 909 (Am. Law Inst. 1979).
145. See Ellis, supra note 18, at 5–8.
146. See id. at 71 (“Vicarious punitive damage liability cannot be justified as deserved punishment. Indeed, it is usually conceded to be unfair.”).
148. See Prosser & Keeton, supra note 14, at 13 (noting that the functions of punitive damages are not only not achieved when an insured wrongdoer “is allowed to shift the penalty to the shoulders of an
In Haslip, the Supreme Court held that imposing punitive damages upon vicariously liable employers and principals does not “in itself” violate the defendants’ due process rights.149 The Court’s inquiry, however, considered vicarious liability separate from other fundamental issues associated with punitive damages, such as its quasi-criminal characteristics, the windfall, and broad jury discretion. The Court analyzed each of these issues independently rather than as a whole.150

F. JURY INSTRUCTIONS AND DISCRETION

The common law punitive damages doctrine, as the substantive and procedural adjustments discussed above attest, has indeed “evolved.”151 As the domain of private law developed over time to encompass new rights and remedies, the punitive damages doctrine expanded as well in numerous ways that combined to extend the remedy to many more offenses and injuries.152 In one crucial respect, however, the traditional model defied evolutionary growth, and its jurisprudence remained frozen in time. How the jury performs its role in the assessment of punitive damages has stayed essentially the same since the function was fixed in Wilkes and Huckle more than 250 years ago. Throughout the course of extensive progression in many substantive areas of the law, juries continued to perform their role in determining punitive liability and reckoning the amount of awards under scant, amorphous guidance. In sum and substance, jury instructions tell the panels that they can exercise practically unfettered discretion—a latitude checked only by postverdict trial court or appellate review.153 The efficacy of this safeguard, however, is qualified by judicial ambivalence toward the jury, with two polar outlooks both bearing adverse consequence. The courts exhibit either effusive deference to the jury154 or scornful disregard for it.155 One practice creates a likelihood that excessive innocent party, but are actually frustrated when the wrongdoer is thus afforded protection against what is essentially a criminal punishment imposed by the law”); Ellis, supra note 18, at 75–76.

149. See 499 U.S. at 15. In Exxon Shipping Co. v. Baker, the Court returned to the question of a corporation’s liability for a punitive award imposed because of an employee’s reckless behavior in a case arising under federal maritime law. 554 U.S. 471, 484 (2008). The Court was equally divided on whether the federal maritime law applicable in this context should mirror the state common law doctrine it upheld in Haslip that recognized such liability.

150. See infra notes 202–11 and accompanying text.


152. See supra notes 80–86 and accompanying text.


154. See, e.g., Ellis, supra note 18, at 39; Ellis, supra note 100, at 995 (remarking that although the jury has historically been “‘eulogized by judges and lawyers in terms more glowing than have been applied to any other institution,’ it has in reality always been viewed ambivalently as an adjudicative body” (quoting CHARLES W. JOINER, CIVIL JUSTICE AND THE JURY xvii (1962))).

155. See, e.g., Wheeler, supra note 19, at 318 (noting that the high incidence of courts reducing or vacating punitive damages awards “reflects a punitive damages system that seriously undermines the
punitive awards will not receive adequate scrutiny by the courts, and the other may diminish confidence in the integrity of the jury system.

That the jury’s unguided method and broad decisional authority in awarding punitive damages have stayed relatively unchanged while the substantive law evolved significantly to encompass expanded substance and more recognized legal claims—with attendant greater complexity—could explain a central aspect of the greater incidence and magnitude of punitive judgments that define the modern punitive damages problem. Yet, remarkably, this point is also overlooked in much of the vast body of jurisprudence and academic literature that the punitive damages debate has produced. In describing the scope and administration of the common law punitive damages doctrine prevalent today, courts and commentators divide sharply on most essential points except perhaps one. Many agree on the shortcomings of the jury’s role in the operation of the remedy. Specifically, there is substantial accord that the measures for assessing both liability and amounts of punitive damages are vague and uncertain, jury instructions are too bare and devoid of meaningful guidance, and the jury’s discretion in fixing punitive liability and awards is not sufficiently restrained. Thus, the results that jury-assessed punitive awards produce in many cases raise grave concerns. As noted by the authors of a study of mock juries, for example, decision making of jurors regarding punitive damages produces “erratic, unpredictable, and arbitrary . . . possibly even meaningless awards.”

Perhaps most disturbing, as discussed below in Section II.G., analysis of the outcomes of punitive damages verdicts on appeal indicates that a significant number of those awards yield false positives; they are reversed or reduced by

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156. But see Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 61–62 (1991) (O’Connor, J., dissenting) (noting that much of the recent, rapid rise in the frequency and size of punitive awards was attributable to changes in the law, exposing “constitutional defects that inhere in the common-law system”). A before-and-after snapshot of the jury’s historical role in the operation of the common law punitive damages doctrine illustrates the point. In Huckle, the court granted the jury unlimited license to award an unprecedented extra measure of damages without providing clear definition of the offenses and injuries to which the enhanced remedy would apply or offering detailed guidance regarding the considerations the jury should weigh in making that assessment. See Huckle v. Money, (1763) 95 Eng. Rep. 768; 2 Wils. K.B. 206. In brief, vagueness and uncertainty in the assessment of punitive damages, virtually unbounded jury discretion in imposing punitive liability and reckoning the size of the award, absence of definite jury instructions to constrain the exercise of that latitude, and the court’s uncritical deference to the jury’s judgment effectively determined the outcome in Huckle and would become the controlling principles for jury guidance and judicial attitudes toward common law punitive damages in the centuries to come. As the Supreme Court has acknowledged, that is the model still observed today. See, e.g., State Farm, 538 U.S. at 413; Honda Motor Co. v. Oberg, 512 U.S. 415, 432–33 (1994); Haslip, 499 U.S. at 15–16.


158. Sunstein et al., supra note 19, at 2074; Ellis, supra note 100, at 990 (“This process for imposing a punitive damage sanction is so lacking in fundamental fairness as to deny defendants, especially unpopular and institutional defendants, the due process guaranteed by the fifth and fourteenth amendments.”).
the courts on post-trial or appellate review. The meaning of this outcome is clear: the juries get it wrong most of the time insofar as the punishment they impose is either greater than necessary to achieve the legitimate ends of punitive damages or is assessed against defendants whose conduct was not sufficiently wrongful to justify quasi-criminal punishment or who in fact may not have been liable at all. But this empirical record attests to another troublesome feature of the system. It suggests that the method the punitive damages doctrine prescribes to respond to these concerns—post-trial judicial review—is palpably flawed, thus building into the justice system yet another round of inefficiency and unfairness. The discussion that follows examines these issues in turn.

The courts’ traditional instructions regarding punitive damages are scant and vague. Typically, they tell the jury that if it finds the defendant liable for the injuries the plaintiff claims, it may, entirely within its discretion, award punitive damages for the purposes of punishing the defendant and deterring it and others from committing similar offenses.159 To these ends, the instructions generally permit the jury, in reckoning the size of damages, to weigh the character and wealth of the defendants, the severity of their conduct and extent of the plaintiff’s injury, and, based on those considerations, to assess an amount sufficient to serve punishment and deterrence purposes.160 To some courts and commentators, this skeletal model of instructions gives cause for grave concern. They warn that the absence of defined standards and clear guidance confers upon juries virtually unrestrained discretion to impose punitive liability and assess the amount, and that this flaw creates risk of inviting improper influences to enter into jury decisions. Thus, this prevalent, essentially standardless scheme, contrary to due process principles, yields substantial arbitrariness and wide inconsistency in the size of punitive verdicts in similar cases, as well as grossly excessive awards in particular instances.161 This defect in the system has been

159. See, e.g., TXO, 509 U.S. at 463 n.29; Haslip, 499 U.S. at 6 n.1; Browning-Ferris, 492 U.S. at 281.
160. See, e.g., TXO, 509 U.S. at 463 n.29; Haslip, 499 U.S. at 6 n.1; Browning-Ferris, 492 U.S. at 281.
161. See State Farm, 538 U.S. at 418 (“Vague instructions, or those that merely inform the jury to avoid ‘passion or prejudice,’ . . . do little to aid the decision maker in its task of assigning the appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory.”); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 588 (1996) (Breyer, J., concurring) (“The standards the Alabama court applied here are vague and open ended to the point where they risk arbitrary results.”); Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994) (“Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of the defendant’s net worth creates the potential that juries will use their verdicts to express biases against big business, particularly those without strong local presences.”); TXO, 509 U.S. at 474–75 (O’Connor, J., dissenting) (“[J]uries sometimes receive only vague and amorphous guidance [before imposing punitive damages]. Jurors may be told that punitive damages are imposed to punish and deter, but rarely are they instructed on how to effectuate those goals or whether any limiting principles exist. . . . [I]t cannot be denied that the lack of clear guidance heightens the risk that arbitrariness, passion, or bias will replace dispassionate deliberation as the basis for the jury’s verdict.”); Colby, supra note 11, at 671 (noting the sparse guidance juries are given and the “nearly unfettered discretion” they exercise); Ellis, supra note 18, at
the subject of severe concern voiced by several Supreme Court Justices. In Browning-Ferris, for example, Justice Brennan, joined by Justice Marshall, remarked that without standards to determine the size of a punitive damages award, “juries are left largely to themselves in... this important, and potentially devastating, decision,” and that the terse instruction the jury was given in that case constituted guidance that was “scarcely better than no guidance at all.” More disturbing, according to Justice Brennan, was that the practice revealed “a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best.”

Integrally related to the problem of standardless jury instructions regarding punitive damages are equally grave concerns articulated by courts and scholars about juries’ unrestrained discretion in imposing punitive awards. More than a century ago, the Supreme Court recognized that “[t]he discretion of the jury in [punitive damages] cases is not controlled by any very definite rules.” That observation holds true today; juries still exercise the same vast discretion in assessing punitive liability and fixing the amount. The Supreme Court, in both majority and dissenting opinions, has repeatedly expressed concern over this expansive latitude. It has also acknowledged that the absence of standards to limit the scope of that authority entails substantial risk of engendering arbitrary results. In Gertz v. Robert Welch, Inc., the Court sharpened its criticism of the jury’s performance, stating that “juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views.” More recently, the Court conceded that “unlimited jury

42 (noting that “[i]n the emotionally charged context of a civil trial... where the jury is invited to assess punitive damages with little guidance and less constraint, decisions will be affected by latent biases or redistributional inclinations”); Ellis, supra note 100, at 989 (noting that much uncertainty in punitive damages law stems from “standardless substantive law of punitive damages” and that in most states decisions as to both liability and amounts are “delegated to juries that are provided with little guidance”); Wheeler, supra note 19, at 285 (noting that “the law provides no guidance as to what constitutes appropriate punishment or what factors the jury should consider in deciding how much deterrence is desirable... This complete absence of standards and guidance creates a serious risk of error in determining the size of punitive damages awards”).

162. 492 U.S. at 281 (Brennan, J., concurring).

163. Id.


166. See, e.g., Honda Motor, 512 U.S. at 432 (“Punitive damages pose an acute danger of arbitrary deprivation of property.”); Haslip, 499 U.S. at 43 (O’Connor, J., dissenting) (noting that vague instructions “encourage inconsistent and unpredictable results by inviting juries to rely on private beliefs and personal predictions. Juries are permitted to target unpopular defendants, penalize unorthodox or controversial views, and redistribute wealth”). Despite these forceful criticisms of the jury’s standardless discretion in assessing punitive damages, the Supreme Court has yet to examine the issue with the probing analysis it calls for. See Wheeler, supra note 19, at 276 (noting that “the Supreme Court has never determined whether the procedures by which punitive damages have been awarded to private plaintiffs satisfy the dictates of due process”).

discretion . . . in the fixing of punitive damages may invite extreme results that jar one’s constitutional sensibilities.” In practice, the extreme results that the Court referred to in Haslip have materialized in various ways. The Court, sometimes using strikingly frank and sharp language, has recognized this reality as raising fundamental problems. Among the outcomes the Court has found troubling, some of which it has specifically rejected, are: grossly excessive and disproportionate punitive awards; jury bias against certain disfavored corporate, out-of-state, or wealthy defendants; verdicts meant to send strong messages or achieve public policy or legislative purposes; and punitive awards with extraterritorial effect.

Although recognizing the problem vague jury instructions and unconstrained discretion present, and expressing strong fundamental reservations in this connection, the Supreme Court’s jurisprudence has repeatedly declined to address these issues holistically as elements of due process analysis regarding the operation of the punitive damages doctrine in its totality.

G. FALSE POSITIVES

Perhaps the most striking problem the common law punitive damages doctrine raises is one that has received the least attention from courts and scholars. To what extent do the elements of vague jury instructions coupled with expansive discretion create conditions in which juries can introduce into their deliberations impermissible methods and considerations and thus produce the tainted or


170. See, e.g., State Farm, 538 U.S. at 420 (“This case . . . was used as a platform to expose, and punish, the perceived deficiencies of State Farm’s operations throughout the country.”); BMW, 517 U.S. at 572 (rejecting the plaintiff’s argument that a large punitive damages award was necessary to induce BMW to change its nationwide policy, stating that “by attempting to alter BMW’s nationwide policy, Alabama would be infringing on the policy choices of other States”); Honda Motor, 512 U.S. at 432 (“[T]he presentation of evidence of a defendant’s net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.”); TXO Prod. Corp. v. All. Res. Corp., 509 U.S. 443, 464 (1993) (agreeing that “emphasis on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident”); see also TXO, 509 U.S. at 490–91 (O’Connor, J., dissenting) (“[J]uries may generally assess an amount of damages against railway corporations which, in similar cases between individuals, would be considered unjust in the extreme. It is lamentable that the popular prejudice against these corporations should be so powerful as to taint the administration of justice, but we cannot close our eyes to the fact.”) (quoting Ill. Cent. RR. Co. v. Welch, 52 Ill. 183, 188 (1869))).

171. See, e.g., State Farm, 538 U.S. at 419; see also Ellis, supra note 100, at 989–90 (noting that the uncertainty that flows from the jury’s standardless guidance and vast discretion invites juries in some cases to take into account irrelevant considerations).

172. See, e.g., BMW, 517 U.S. at 572–73.

173. See Haslip, 499 U.S. at 17; see also infra notes 202–11 and accompanying text.
grossly excessive punitive verdicts that have so troubled the Supreme Court and commentators? There is a measure by which to gauge, both quantitatively and qualitatively, the performance of juries in assessing punitive damages: the incidence of awards reversed or reduced by trial or appellate courts in post-verdict proceedings. Empirical evidence gathered from several studies suggests that the frequency of rejection of punitive awards upon post-trial judicial review is significant. In various studies of actual cases, the proportion of reversals or reductions ranges from nearly 30 percent to as high as 78 percent, depending on the types of cases or the jurisdiction in which they are brought.174 Potentially, these figures could be higher because a significant number of punitive verdicts are settled, either separately or as part of a global disposition of the underlying litigation.175 Analytically, these statistics point to a conclusion with far-reaching implications. In vast numbers of cases, the combination of amorphous and open-ended jury instructions and virtually unchecked discretion over the awarding of punitive damages is yielding a disturbingly high rate of false positives.

174. A study of sixty-eight punitive awards in two California counties reported that the courts remitted the amounts in thirty-two cases, or about 47 percent. See Galanter & Luban note 18, at 1409 (citing Mark Peterson et al., INST. FOR CIV. JUST. (RAND), PUNITIVE DAMAGES: EMPIRICAL FINDINGS 28 (1987)). Another study, examining forty-five New York cases decided by appellate courts, reported that in thirty-five cases—or 78 percent—the courts reduced or reversed the punitive awards upon finding that the evidence to support liability was insufficient or that the amount assessed was excessive. See Wheeler, supra note 19, at 288. In an analysis of sixty-four cases with blockbuster punitive damages exceeding $100 million, twenty-five were settled and twenty-five were reversed or reduced. Out of nineteen cases decided on appeal, the appellate courts affirmed the judgment only once and reversed or reduced in thirteen cases or 72 percent. Five were still pending at the time of the study and no additional information was available regarding the rest of the cases. See Viscusi, supra note 9, at 1416–17 & fig.1. A report by the United States General Accounting Office on product liability litigation in five states indicated that in 29 percent of the cases the courts remitted punitive awards. See U.S. GEN. ACCOUNTING OFFICE, PRODUCT LIABILITY: VERDICTS AND CASE RESOLUTION IN FIVE STATES, at 46, tbl.3.7 (1989). Another analysis of punitive awards in 119 state court actions reported that the affirmation rate was less than 2 percent. See William M. Landes & Richard A. Posner, THE ECONOMIC STRUCTURE OF TORT LAW 302–07 (1987). Figures reported by studies of mock juries provide additional support for the frequency with which actual jury assessments of punitive damages do not accord with the appellate analysis and decisions of judges. In a switch of roles, one such study reported that 65 percent of juries that reached verdicts on the facts of actual cases determined that punitive damages should be awarded, whereas the appellate and trial judges who had decided those cases had ruled otherwise. See Reid Hastie, David A. Schkade & John W. Payne, A Study of Juror and Jury Judgments in Civil Cases: Deciding Liability for Punitive Damages, 22 LAW & HUM. BEHAV. 287, 304–06 (1998).

To put the data from these studies in perspective, how punitive damages verdicts fare in post-trial judicial review relative to the results on appeal of criminal cases may be revealing. As opposed to the significant proportion of punitive judgments reversed or reduced by trial or appellate courts, data reported in one study of the outcomes of appeals in federal criminal cases indicate that the overall reversal rate was 11.7 percent. See Michael Heise, Federal Criminal Appeals: A Brief Empirical Perspective, 93 MICH. L. REV. 825, 831 (2009). Although substantive differences between civil and criminal systems limit the comparison of these results, the striking contrast is nonetheless instructive. See id. at 830–31 (noting differences in standards of proof and standing to appeal). Among the reasons for the difference, it is probable that the much more rigorous standards that govern criminal punishment—detailed jury instructions and defined limits on jury discretion, together with a higher standard of proof, which are precisely the constraints punitive damages assessments lack—diminish the likelihood of error and thus account for the lower reversal rates of criminal judgments.

175. See Viscusi, supra note 9, at 1452, fig.1.
Many—if not most—of the defendants assessed these penalties do not warrant punishment at all, or at least not in the excessive amounts juries too often imposed.\textsuperscript{176} In either event, the meaning of a reversal or reduction of a punitive damages judgment amounts to the same thing: in exercising its broad discretion with only sparse guidance, the jury committed constitutional error.

From the standpoint of defendants improperly or excessively punished by judgments ultimately reversed or reduced, the consequences represent manifest unfairness. Even if eventually vindicated on appeal, they must incur substantial extra costs—economic, emotional, reputational, and otherwise—to obtain a proper verdict. The impacts of such results are also significant when viewed from the perspectives of the justice system and the larger society. Additional litigation generates inefficiencies in the form of extra costs not only to defendants, but to the public in requiring greater resources necessary to pay for the additional burdens on the courts. Perhaps more profound are the normative implications of such a high rate of false positives. Avoiding error, along with the arbitrariness and fundamental unfairness it engenders, is a basic tenet of our justice system. Impelling that demand for utmost certainty is a deep concern that any large-scale failure to reach the truth and achieve justice can engender loss of confidence in the justice system, eroding its legitimacy.

Primarily for these reasons, criminal proceedings heighten the burden of proof, which is placed on the government, and accord constitutional protections to the defendant subjected to potential penalties. This arrangement is so structured, according to one scholar, because “[p]revailing principles of public morality assert that it is morally desirable to reduce the number of ‘innocent’ persons punished even at the cost of allowing more ‘guilty’ persons to escape punishment.”\textsuperscript{177} To protect against error in criminal punishment or civil liability of the wrong offender, or against penalties imposed in excessive amounts, the justice system demands use of the most rigorous and reliable evidence. To those ends, evidentiary rules exclude hearsay and methods and materials whose validity or reliability is not sufficiently proven, largely because of the probability that admissibility of such proof would tend to yield an unacceptably high incidence of erroneous verdicts.\textsuperscript{178} Although criminal and civil contexts differ substantially, punitive damages jurisprudence recognizes that at some point—regardless of which part of the justice system imposes it—punishment is punishment; thus, an excessive penalty may cross over constitutional bounds. To that extent, the consequences to the justice system of penalizing the wrong person, or the right person in an unjustifiable amount, may not be materially different. Also a matter of degree is how much room for error the justice system and society at large is prepared to accommodate in state proceedings that mete

\textsuperscript{176} Commenting on this concern, one scholar remarked that “[t]here is little assurance that those upon whom punitive damages are assessed committed a wrongful act, or that those not assessed therein did not, however ‘wrongful act’ may be defined.” Ellis, supra note 18, at 39–40.

\textsuperscript{177} Id. at 40–42.

out punishment. Few may quibble if the rate of reversal or reduction of punitive awards were unremarkable. But if the figures reported by various studies bear out, and the number of false positives—defendants improperly or excessively punished—reaches the scale of error in more than 30 percent, and as much as 50 or even 70 percent, of all punitive damages verdicts, this likely would engender substantial loss of confidence in the justice system and its legitimacy. As the reversal and reduction outcomes make evident, the checks on the punitive damages doctrine may be woefully deficient as well.

That a judicial doctrine designed to remedy claims of injury caused by extreme misconduct would consistently produce results through error in an inordinately high proportion of its applications should signal that it may be inherently flawed. It should also make apparent that the remedy is in need of immediate overhaul, at least with regard to those elements causing the dysfunction.179

H. JUDICIAL REVIEW

As a safeguard against jury mistakes in assessing liability and the amount of punitive awards, the common law punitive damages doctrine relies upon postverdict judicial review by trial and appellate courts, a procedure applying a standard of reasonableness.180 The Supreme Court’s response to the various components of the punitive damages doctrine—which work as a whole to create the fundamental unfairness and inefficiency in the justice system—is grounded almost entirely on ensuring the availability of judicial review and reinforcing its operation. Implicit in the Court’s approach is a premise that the functioning and application of the common law punitive damages scheme, despite its discomforting faults, are satisfactory as long as adequate provisions for judicial review of jury punitive awards are available. This conception is central to each of the major Supreme Court decisions that embody modern punitive damages jurisprudence.181

The Court’s emphasis on post-trial judicial review may be misplaced, however, as it embraces a basic flaw of its own. In essence, the correction of jury or


180. See id. at 15 (“Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury . . . . The jury’s determination is then reviewed by trial and appellate courts to ensure that it is reasonable.”); see also Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994).

181. See State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 429 (2003) (reversing the jury’s punitive damages award as excessive upon finding that the appellate courts had not properly applied the BMW guideposts); Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 431 (2001) (holding that the proper standard of review for federal appellate court scrutiny of the size of a punitive award is de novo); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585–86 (1996) (finding Alabama’s appellate court review of a punitive damages award inadequate as a constitutional inquiry for excessive-ness); Honda Motor, 512 U.S. at 432 (holding unconstitutional a state’s failure to provide for judicial review of punitive damages awards).
judicial error that the Court’s approach offers, insofar as it focuses on procedures to check the jury’s discretion and reverse or reduce excessive judgments, applies subsequent to—rather than in anticipation of—the flawed assessment. Coming after the fact, relief is often too late in that it does nothing about the central concerns regarding the inconsistency and uncertainty that characterize many punitive damages determinations. In this respect, the procedure raises two major problems: one implicating fundamental fairness and the other the institutional legitimacy of the justice system. The Court’s doctrinal course subjects defendants to the substantial burden of seeking additional relief from a basically deficient process. And it tolerates as an integral part of the justice system an institutional practice known to produce judgments embodying error with a frequency and consistency that raise substantial questions about its legitimacy.

Moreover, postverdict judicial review serves as an insufficient safeguard against jury error in punitive damages determinations because, like the jury process itself, judicial inquiry in this area is also virtually standardless, creating circumstances in which courts essentially substitute their own value judgment for the jury’s or base their assessment on a “visceral” response to the verdict. Finally, the level of unfairness to defendants forced into further litigation to challenge the significant number of erroneous punitive verdicts is compounded by another aspect of the punitive damages doctrine. In the underlying litigation, the coercive power of the state to punish misconduct is initiated by private individuals in pursuit of their own interests and gains. They are therefore not bound by any ethical or legal standards of neutrality like those that constrain to some degree public prosecutors and regulators from vigorously pressing punitive sanctions against defendants to advance their self-interest.

182. As Justice O’Connor noted in dissent in Haslip, “[t]he Court relies heavily on the State’s mechanism for postverdict judicial review . . . but this is incapable of curing a grant of standardless discretion to the jury. Post hoc review tests only the amount of the award, not the procedure by which that amount was determined.” 499 U.S. at 43; see also Sebok, From Myth to Theory, supra note 18, at 994 (“Missing from BMW was the idea that the Constitution required that the process give juries, as opposed to appellate courts, any specific kind of guidance outside of the traditionally vague instructions . . . .”); Ellis, supra note 18, at 55.

183. On this point, one commentator remarked that “[a]ppellate review . . . does little to minimize the risk of erroneous results in the present system, because the appellate process also lacks clear, consistent standards and creates a risk of error in other ways.” Wheeler, supra note 19, at 288; see also id. at 289–90 (noting that appellate review often fails to take into account the extent to which jury error in assessing compensatory damages can affect the amount of punitive damages, and “[b]ecause juries are not instructed to adhere to any ascertainable standard or to apply any specified set of factors, no appellate court can determine that the jury improperly applied or ignored any standard or set of factors”); Ellis, supra note 18, at 39 (noting that judicial review “is less of a constraint on jury discretion in the punitive damages area than in other areas” primarily because of the large scope of jury discretion and the tendency of appellate courts to accord deference to jury awards of damages).


III. THE FAILURE OF REFORMS

Reforms effectuated by Supreme Court jurisprudence to curtail excessive punitive damages awards have relied primarily on providing guideposts and ratios and ensuring judicial review. Numerous measures adopted by other courts or statutes have sought to respond to some of the major punitive damages concerns. But these efforts have been ineffective in remedying the most fundamental issues, at least insofar as empirical results suggest that the problems persist relatively unchanged and that, in attempting to address some specific difficulties, the reforms adopted or considered give rise to new issues implicating equally troublesome questions.

A. FINANCIAL REFORMS

To deal with concerns about the incidence of excessive awards, some states adopted upper limits on punitive damages. Under these schemes, the amounts of punitive judgments are capped by a multiplier of compensatory damages, a maximum ratio between compensatory and punitive damages, or a combination of both. Scaling punitive awards by such methods offers the benefits of providing mechanical guidance and yielding arithmetic results. But such formulaic methods have drawbacks. Foremost is that they do not sufficiently take into consideration the double counting or multiple punishment problems. A ratio that provides a broad scale, such as the single-digit guidepost suggested by State Farm, still creates room for vast variations.

Other punitive damages reforms, overlooking concerns about excessive verdicts, aim to address the windfall problem. To this end, some states have enacted split-recovery legislation. Those statutes provide for apportioning punitive damages awards between the plaintiff and the state in varying proportions and with the state portion paid to the general fund or allocated to designated public purposes. The split-recovery approach, however, is an inapt remedy for the overarching problems the punitive damages doctrine poses. One weakness of the scheme is normative. Taking away a portion of the

186. *See BMW*, 517 U.S. at 616–19 (Appendix to Dissenting Opinion of Ginsburg, J.) (listing various controls enacted or under consideration by many states to curtail punitive damages).

187. *See* Galanter & Luban, supra note 18, at 1395 n.7 (indicating that ten states have enacted such caps).

188. As detailed in Section II.B, compensatory damages, insofar as they represent a measure of actual harm produced by the degree of outrageousness of the defendant’s conduct, already incorporate an element of recovery designed for punishment and deterrence.


190. *See* Sharkey, supra note 18, at 373 & n.75 (noting that eight states have adopted split-recovery schemes and in four others such statutes were repealed or expired). Ohio’s Supreme Court adopted a similar scheme. *See* Dardinger v. Anthem Blue Cross & Blue Shield, 781 N.E.2d 121, 144 (Ohio 2002).

191. The amounts distributed to the state varied from 50 to 75 percent. *See* Sharkey, supra note 18, at 377 (listing the states).
victim’s punitive winnings and distributing it to the state does nothing to relieve
the concern that the award may be excessive and undeserved in the first place.
From the standpoint of the unfairness visited upon the defendant and the
normative failing of the justice system that the result suggests, it does not matter
that the plaintiff is entitled to keep only part of a faulty punitive judgment.
Viewed as a whole, the split-recovery statutes suggest that conferring an
undeserved windfall upon plaintiffs is just as indefensible and unjustified as
inflicting undeserved punishment on defendants.

Split-recovery statutes suffer from an even more fundamental shortcoming.
The approach reintroduces into the punitive damages equation the most difficult
constitutional implication that the greater part of punitive damages jurispru-
dence seeks to avoid or ignore: the protections guaranteed in judicial proceed-
ings in which the state’s coercive power to punish is invoked.192 The entire
punitive damages structure rests on a premise that the imposition of punishment
deterrence in a civil action serving private law functions is justified because
the state does not play a role in the initiation of the litigation or gain from its
proceeds. This distinction was reinforced by the Supreme Court’s holding in
Browning-Ferris that punitive damages do not violate the Excessive Fines
Clause because that constraint on the state’s power to punish applies only to
criminal cases.193 Browning-Ferris left open the question as to whether a
private party sharing an award of punitive damages with a state may implicate
the Eighth Amendment’s Excessive Fines Clause. The split-recovery scheme,
whether enacted by statute or proclaimed by judicial decree, clashes with this
principle insofar as it brings the concept and functions of private tort damages
closer to that of fines serving public revenue purposes.194

192. See supra note 19 and accompanying text.
193. Specifically, the Court declared that the prohibition against excessive fines “does not constrain
an award of money damages in a civil suit when the government neither has prosecuted the action nor
has any right to receive a share of the damages awarded.” Browning-Ferris Indus. of Vt., Inc. v. Kelco
Disposal, Inc., 492 U.S. 257, 263–64 (1989). The Court further remarked that in the case before it the
state “has not taken a positive step to punish, as it most obviously does in the criminal context, nor has
it used the civil courts to extract large payments . . . for the purpose of raising revenue.” Id. at 275.
194. See Ellis, supra note 100, at 993 (“That punitive damages are more like ‘fines’ than ‘damages’
have become increasingly clear as states have enacted legislation to divert a portion of them from
plaintiffs’ pockets to the public coffers.”). The split-recovery approach has come under attack on other
grounds. In Colorado, the state supreme court invalidated the state’s split-recovery statutes as authoriz-
ing unlawful takings in violation of the state and federal constitutions, as well as on policy grounds that
it shifts to plaintiffs the burden of financing state government functions that should be borne by the
general public. See Kirk v. Denver Publ’g Co., 818 P.2d 262, 264 (Colo. 1991). In other states, the
statutes withstood challenges grounded on theories of excessive fines and takings. See, e.g., Haskins v.
Bus. Men’s Assurance, 79 S.W.3d 901, 904 (Mo. 2002); DeMendoza v. Huffman, 51 P.3d 1232, 1245
(Or. 2002); Sharkey, supra note 18, at 374, 433–37 (citing sources and cases). Moreover, insofar as
split-recovery measures confer a financial interest on the state effectively controlled by and benefitting
government officials, who may stand to gain, even if indirectly, from the outcome of a case, the
mechanism implicates due process concerns. See Tumey v. Ohio, 273 U.S. 510, 523 (1927); see also
James A. Breslo, Comment, Taking the Punitive Damage Windfall Away from the Plaintiff: An Analysis,
86 NW. U. L. REV. 1130, 1144 (1992); Note, An Economic Analysis of the Plaintiff’s Windfall From
Other attempts to reform punitive damages target the multiple punishment problem by limiting punitive damages to a single award against a particular defendant to redress similar injuries to multiple plaintiffs arising from the same conduct. The single-award approach, while potentially mitigating the multiple punishment issue in limited circumstances, may run counter to the constitutional principles the Court expressed in *BMW* and *State Farm* precluding consideration of the full scope of the defendant’s misconduct. The measure also entails administrative and practical concerns, including establishing an appropriate amount to cover all the actual and potential injuries inflicted by the defendant’s conduct, identifying the potentially large number of legitimate claimants, and determining their individual entitlements before distributing the funds to those eligible.

B. PROCEDURAL REFORMS

A different attack on punitive damages entails procedural reforms. These measures generally follow two models: raising the standard of proof required to support the imposition of punitive damages from preponderance of the evidence to clear and convincing evidence, and bifurcating trials into liability and damages phases. These approaches create other problems. The higher level of proof may require presenting evidence of the defendant’s egregious conduct that is prejudicial to the extent it inflames the jury to award higher compensatory damages, thus potentially increasing the punitive liability amount. These concerns may be relieved by a procedural method that holds the greatest potential for addressing the full range of concerns associated with punitive damages: shifting from the jury to the court the determination of the amount of any punitive award after the jury has found liability and indicated that punitive damages apportionment in *Dardinger* required payment to the plaintiff of one-third of a $10 million punitive award plus attorney’s fees and the balance remitted into a court-controlled fund for distribution to charitable organizations. See *Dardinger*, 781 N.E.2d at 146. The scheme has been criticized as a raw and unprincipled “grotesque” act amounting to a “judicial gift.” Sharkey, supra note 18, at 437 n.354 (quoting Professor Richard Epstein) (citations omitted). Among the grounds for this criticism is that the split-recovery device essentially divests the punitive damages doctrine of its traditional structure and purposes. To the extent a significant portion of damage awards is diverted to the state to fund public services, the injury the victim suffered—perhaps the most critical pillar of punitive damages jurisprudence—becomes incidental, and the justification for the remedy shifts substantially from punishment and deterrence of a wrongdoer’s harmful conduct to raising revenue for the state. In fact, revenue-generation appears to be the purpose of some split-recovery statutes. See id. at 386.

195. Under one version of this scheme, in the first action that proceeds to trial, the jury determines punitive liability for the full range of the wrongdoer’s conduct and any award serves as a bar against penalties in subsequent actions based on the same offense. See, e.g., Colby, supra note 11, at 658–61. Another version, borrowing concepts from class action litigation, would create a fund into which the proceeds of the first punitive recovery are deposited. After payment of an amount to the plaintiff who obtained the judgment, the balance would be distributed to other victims who can establish a qualifying claim. See, e.g., Sharkey, supra note 18, at 410–12.

196. See, e.g., Owen, supra note 18, at 407–08.
damages are warranted. This improvement, endorsed by several scholars, would achieve several vital purposes.

First, the transfer of the function of determining the amount of punitive damages would address another disparity noted by empirical studies of punitive verdicts. Compared to judges, juries are more prone to award damages, both compensatory and punitive, and jury awards also account for the majority of outsized and disproportionate punitive awards giving rise to further litigation intended to reverse them. Second, shifting the responsibility for assessing the amount of punitive damages to the courts would bring the imposition of civil punishment in line with the functional division of duties that governs criminal proceedings, where the jury decides guilt and the judge imposes the punishment. This change would thus place the exercise of that authority in the hands of judicial officers possessing the legal knowledge, training, temperament, and experience essential to perform the task within the bounds of established precedent. Judges possess greater competence to distinguish among grades of wrongful conduct and thus to calibrate penalties that fit particular offenses. Finally, this reform would promote efficiency in the administration of justice. It enables determination of punitive damages in a separate proceeding, eliminating concerns about prejudicing jury verdicts with the introduction of evidence of aggravating circumstances that are relevant only for punishment and deterrence, thereby also minimizing the need for additional post-trial litigation to reduce punitive awards or for new trials.

The growing number of exceptions to the punitive damages doctrine raises a basic question: Given the substantial erosion of the remedy and what is left of it in its common law form, have punitive damages reached the point at which the doctrine’s variance from “history and ‘widely shared practice’ . . . so departs from an accepted norm” of fundamental fairness and rationality as to presumptively violate due process?

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197. See, e.g., id. at 411. Because the Seventh Amendment’s right to a jury in common lawsuits does not apply to the states, adoption of this reform would be governed by state law. See Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 217 (1916) (stating that “the Seventh Amendment applies only to proceedings in courts of the United States and does not in any manner whatever govern or regulate trials by jury in state courts or the standards which must be applied concerning the same”). One state has enacted legislation transferring from the jury to the judge the responsibility for determining the amount of punitive damages in products liability cases. See Conn. Gen. Stat. Ann. § 52-240b (West Supp. 1989).


199. See Joni Hersch and W. Kip Viscusi, Punitive Damages: How Judges and Juries Perform, 33 J. OF LEG. STUDIES 1, 2–3 (2004). According to this study, 95 percent of the large punitive damages awards reviewed were made by juries and 5 percent by judges. See id. at 2.

IV. ANTIDOTE

The inefficacy of reform measures to adequately address the many fundamental issues that the common law punitive damages doctrine presents returns this discussion to the essential questions posed above. Why and how have these efforts failed to correct the malfunctioning of the justice system as it relates to punitive damages? Why does the doctrine continue to produce judgments in substantial numbers of cases that do not withstand scrutiny under prevailing standards of fairness and efficiency required by due process? Several responses to these questions emerge from the preceding analysis.

The problems the punitive damages concept raises are multifaceted and interrelated. And because those concerns have many dimensions, an effective strategy to remedy them should examine their causes, effects, and potential solutions not in isolation, but as integral parts of a whole. However, the reform schemes advanced—whether formulated by the Supreme Court’s recent punitive damages jurisprudence, adopted through statutory means, or devised in scholarly theories—follow a narrow and flawed approach. Rather than viewing the essential concerns posed by the common law punitive damages remedy as a totality, the analysis and proposed improvements typically treat the problem piecemeal. In consequence, this method tends to disaggregate the relevant elements of the punitive damages doctrine and to address particular issues individually, as if they stood alone. Examining the various components and effects of punitive damages separately minimizes their total impact and ignores or overlooks the extent to which the model actually works as a whole to generate a substantial rate of erroneous verdicts, even if reviewing one element by itself may survive constitutional scrutiny. To understand why the remedy continues to yield perverse results, and to inform a normative and legal assessment of the doctrine, the essential elements of punitive damages should be viewed as structured together and functioning in concert.

Some of the Supreme Court’s punitive damages decisions illustrate the piecemeal mode that other courts and commentators also adopt in constitutional analysis of the doctrine. In each case, such constricted inquiry examines the absolute and relative magnitude of a particular aspect of punitive damages but then sidesteps or discounts the effects of other causes that in practice contribute to producing excessive punitive awards. Haslip presents an example. There, the Court, while acknowledging that it had expressed doubts on prior occasions about the constitutionality of certain punitive damages awards, nonetheless upheld a $1,040,000 punitive judgment that was 200 times the plaintiff’s out-of-pocket expenses and four times the amount of compensatory damages the plaintiff had requested. In doing so, the Court separately reviewed and rejected challenges to the verdict relating to several of the doctrinal components

201. See supra Sections II.A–II.H.
of punitive damages described above. In each instance, the Court’s examination drew support from what may be referred to as an “in itself” analysis. The Court first considered the question of the vicarious punitive liability of a corporation sued as a wrongdoer on a theory of respondeat superior for the harmful actions of an agent. In this case, the defendant company argued that it had no knowledge of and had not authorized its agent’s wrongful conduct that harmed the plaintiffs and that shifting the responsibility from the agent to the corporation unfairly contributed to the size and disproportionality of the punitive damages award assessed against it. Addressing this issue, the Court noted that “[i]mposing liability without independent fault . . . is not fundamentally unfair and does not in itself violate the Due Process Clause.” Independently, and similarly addressing a separate due process objection to the state’s vague jury procedures and unguided discretion in assessing punitive damages, the Court noted the ancient roots of the common law doctrine, stating that every court that had examined the question had determined that the traditional method of determining punitive damages did not “in itself” violate due process largely because the state had established post-trial procedures to review punitive awards. The Court responded similarly to constitutional issues that the punitive purposes of the doctrine implicate. The Court observed that under the common law of most states, punitive damages are imposed for the purposes of retribution and deterrence. It then remarked, without further elaboration or analysis, that although the remedy has been described as “quasi-criminal,” this characterization “in itself” does not answer the question of whether the punitive award imposed in this case violated the Due Process Clause of the Fourteenth Amendment.

Moreover, the Court noted concern over two other major aspects of the common law punitive damages doctrine that present substantial due process implications: the windfall and the jury’s discretion. The Court stated that windfall recovery “is likely to be both unpredictable and, at times, substantial.” It added that, because of their broad discretion, “juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused.” But, having noted the concerns, the Court neither resolved them nor recognized their causal relation to other elements of the doctrine that, working together, engender excessive punitive awards. Implicit in the opinion is a conclusion that “in itself” the magnitude of the punitive award and its disproportionality to the victim’s actual injury were not controlling of a

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203. See id. at 15, 17, 19.
204. See id. at 12–13, 15.
205. Id. at 14–15 (emphasis added).
206. Id. at 17.
207. See Haslip, 499 U.S. at 19.
208. Id.
209. Id. at 12 (quoting Newport v. Fact Concerts, Inc., 453 U.S. 247, 270–71 (1981)).
determination of a due process violation. Having found what it regarded as a satisfactorily limited basis to affirm the punitive verdict, the Court foreclosed a broader inquiry into how the other aspects of the common law doctrine, in combination, could have caused the jury’s large assessment of punitive damages.211

Even when the Court has invalidated a punitive award as unconstitutionally excessive, it narrowed the inquiry to the particular element of punitive damages that determined the size and proportionality of the punitive award. In adopting that approach, the Court’s doctrinal analysis ignored how the concept as a whole continues to generate constitutionally questionable judgments. In BMW, for example, the Court noted what likely produced an excessive enhancement of the punitive verdict in the trial court: the degree to which the jury’s assessment took into account punishing the defendant for causing out-of-state injuries.212 Although the Court recognized a major concern—extraterritorial multiple punishment embodied in a single punitive award—it did not consider that assessment of the wrongdoing to the plaintiff before the court would generate a magnified punishment even if it encompassed only total harm related to offenses and victims within the state.213 More significantly, the BMW Court endeavored to address the excessive punitive damages problem by formulating standards for courts to apply in postverdict judicial review, ignoring preventive measures and postponing correction of erroneous verdicts until after the parties’ further litigation.214 Neither BMW’s rejection of punitive awards that take into account injuries to victims in other jurisdictions, nor the three judicial review guideposts the Court prescribed, did anything to confront and reform other equally fundamental problems: state infliction of punishment through private law, the windfall, the jury’s vague instructions and virtually unfettered discretion in determining punitive liability and the amount of damages, and the inadequacy of judicial review as a saving grace for grossly excessive punitive verdicts.

Thus, the piecemeal method the Court has employed in reviewing the various elements of the punitive damages doctrine that tend to generate inequitable and inefficient verdicts has constrained fuller constitutional analysis of the doctrine. This observation invites several questions. Would the same legal or normative

211. To a similar effect, in TXO Prod. Corp. v. All. Res. Corp., though acknowledging that emphasis on the defendant’s wealth and nonresidence and ambiguous jury instructions could have increased the risk of prejudice in the jury’s $10 million punitive award in relation to $19,000 in compensatory damages, the Court affirmed the judgment and declined to review arguments about the effect those considerations may have had on the jury’s reckoning. 509 U.S. 443, 464 (1993). The Court’s plurality opinion provoked a vigorous dissent from Justice O’Connor, joined by Justices White and Souter, arguing that the Court should have conducted a more searching analysis of the extent to which the jury’s punitive damages assessment may have been improperly influenced by vague instructions or by indications in the trial record that bias and undue influence may have tainted the verdict because the defendant was a large, wealthy, out-of-state corporation. See id. at 472, 489–95.


214. See 517 U.S. at 574–75.
judgment prevail if the Court’s punitive damages inquiry encompassed the functioning of not just one independent component of the doctrine, but of its other major features combined to produce a constitutionally flawed cumulative effect? Applying a broader approach to the Court’s review in Haslip, for instance, might alter the constitutional analysis and the result. What if the Court, in making its categorical pronouncement that the common law method for assessing vicarious liability for punitive damages was not “so inherently unfair as to deny due process and be per se unconstitutional,” had examined the notion of inflicting punishment on a corporation, independent of fault, for the misconduct of an agent not in itself, but as one element of a larger doctrinal framework encompassing other causal components working in tandem? Specifically, what if in reality the remedy’s purposes of punishing and deterring extreme misconduct were rendered illusory because the defendant company carried liability insurance to protect itself from paying punitive damages, as many businesses do where permitted? And what if these considerations were added to the cumulative effects of double counting, multiple punishment, the windfall, vague instructions and unconstrained jury discretion, and the high rate of erroneous punitive damages awards?

Rather than conducting such a complete review, the Supreme Court’s punitive damages due process jurisprudence, as well as statutory and scholarly reform efforts, have been ineffective largely because they have been sidetracked by sensationally high punitive awards in particular instances. So distracted, the Court has concentrated due process analysis on devising formulas and ratios of relativeness as means to curtail excessive judgments, thus focusing narrowly on effects rather than on ingrained doctrinal causes of the problem. This dominant analytic approach misses the point. It is not the disproportionate size of some punitive awards alone that creates the central problem of fundamental unfairness and inefficiency, but rather the historically ingrained, flawed methods the traditional punitive damages doctrine embodies, compounded by ineffectual restraints on jury discretion.

Instructive analogies may be drawn from other circumstances in which the Supreme Court has counseled that proper constitutional review demands not piecemeal inquiry, but a broader approach. Regarding due process analysis, for instance, the Court has instructed that multiple related factors constituting total conduct that may amount to a denial of fundamental fairness should be exam-

216. See Redish & Mathews, supra note 19, at 13 (noting that, in BMW, “by focusing the constitutional inquiry on the substantive due process concern of an award’s possible excessiveness, the Court’s standard diverts attention from what should be considered the fundamental constitutional problem with all punitive damages awards, not merely those deemed excessive by the vagaries of some mysteriously derived formula of substantive due process. That fundamental problem, simply put, is that the award of punitive damages inherently violates the constitutional guarantee of procedural due process. This is not because a particular award is found to exceed some substantive standard of acceptability grasped from thin air, but rather because of the defectiveness of the procedures inherent in the award of punitive damages to private plaintiffs”).

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ined not in isolation from one another, but as a whole. In *Betts v. Brady*, the Court considered this issue and formulated a principle to govern substantive review of claims alleging denial of due process. It declared:

The phrase [due process of law] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.

Applying this principle to Fourth Amendment searches and seizures and adopting a comparable approach, the Court remarked that the “totality of the circumstances” standard should govern review of the reasonableness of law enforcement agents’ conduct when it involves multiple circumstances where evaluation of any one consideration, viewed independently, could yield a legal result different from the outcome produced by an examination of all the interrelated factors combined. This more holistic approach, as the Supreme Court explained, is designed to preclude a form of “divide-and-conquer analysis.”

218. *Id.*
219. *Id.*
220. Cf. *United States v. Arvizu*, 534 U.S. 266, 274 (2002) (reversing a determination that a police officer lacked reasonable suspicion to make an arrest, the Supreme Court noted that the appellate court’s evaluation considered various relevant factors “in isolation from each other [and] does not take into account the ‘totality of the circumstances’”). A similar concept applies in the context of environmental law to preclude segmentation of government actions subject to environmental impact assessment by dividing the review of a project which is physically, financially, and operationally interconnected into separate components. This practice could result in a determination that the specific part analyzed may produce no significant environmental impact warranting further study, while overlooking the cumulative effects implicated if the project were evaluated in its totality. See, e.g., *Del. Riverkeeper Network v. Fed. Energy Reg. Comm’n*, 753 F.3d 1304, 1313–14 (D.C. Cir. 2014).
221. *Arvizu*, 534 U.S. at 274. Much of the punitive damages literature suffers from the same constraining flaw. Although devising conceptual models to explain the purposes of punitive damages and doctrinally justify their assessment, the theories seek a satisfactory punitive damages rationale in the abstract. In this respect, the theorists essentially miss the point. They either ignore or are not concerned about most of the inherent defects in the common law punitive damages doctrine because they generally evaluate its components in isolation from one another. In many of the commentaries, there is little or no mention of the interrelated and profoundly consequential issues discussed above that, when viewed as a whole, produce disturbing arbitrary verdicts in so many cases. A point implicit—and in some views explicit—in this scholarship is that if a theoretical function of punitive damages were developed and universally accepted in the abstract, the grave concerns that the doctrine otherwise continues to generate somehow would be dispelled or become someone else’s problem to fix. This cramped view, for example, perceives and dismisses the plaintiff’s windfall as a mere “detail,” a legal consequence akin to the notion of collateral damage. Sharkey, *supra* note 18, at 370 n.65.
In contrast with the piecemeal analysis that the Supreme Court and many commentators employ in examining modern punitive damages awards, several state court decisions rendered over a century ago adopted a more holistic analysis. In each of those cases, after conducting a broad evaluation of various elements of the punitive damages remedy and its legal and practical implications, the courts rejected application of the concept, not on the basis of any one or more components working independently of the others, but on the operation of the various elemental parts of the common law punitive damages model and the multiple unfavorable effects they produced overall.

In *Fay v. Parker*, Justice Foster set aside a punitive verdict and “appl[ied] the knife” to the “pernicious doctrine” the court considered a “deformity” of the law. The court analyzed and based its decision not solely or even primarily on a formalistic distinction between private and public law, as most commentators on the case and the underlying doctrinal debate suggest, but on the full scope of conceptual and constitutional difficulties punitive damages raise. Specifically, the *Fay* court considered at length: blurring of the boundaries and purposes of private and public law; double counting some elements of damages in punitive and compensatory awards; twice placing defendants in jeopardy of punishment, in particular where the same conduct constitutes both a tort and a criminal offense; exercising the state’s coercive power to confer a substantial unwarranted benefit upon a private individual; plaintiff windfalls that are undeserved after the victim has been made whole with compensatory damages; the absence in civil cases of the various constitutional protections accorded to the defendant by the criminal law as safeguards against the state’s unwarranted infliction of punishment; the potential for a jury’s decision to be swayed by inflammatory circumstances or improper instructions; and the difficulty of apportioning the amount of a unitary verdict between compensation and punishment.

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222. 53 N.H. 342, 397 (1872).
223. *Id.*
224. *See id.* at 353–59, 379–97. Based on a similar review of the various legal and practical concerns associated with the punitive damages doctrine, the Supreme Court of Washington arrived at the same conclusion as the *Fay* court. *See Spokane Truck & Dray Co. v. Hoefer*, 25 P. 1072, 1074–76 (Wash. 1891) (remarking that “there are many valid objections to interjecting into a purely civil action the elements of a criminal trial, intermingling into a sort of a medley or legal jumble two distinct systems of judicial procedure”). Upon review of the full scope of those objections, the court concluded that “the doctrine of punitive damages is unsound in principle, and unfair and dangerous in practice.” *Id.* at 1075. In *Murphy v. Hobbs*, the court reached the same result after reviewing the distinctions between civil and criminal proceedings and concluded that the differences are undermined by various considerations, including “[t]he impropriety of judicially recognizing as criminal that which is not so by statute or at common law; the incongruity and confusion arising from trial and punishments under the rules of evidence, pleading, and practice controlling in civil actions; the injustice of denying defendant the benefit of principles and procedure maintained in criminal prosecutions; the manifest iniquity of awarding plaintiff something to which he is not entitled.” 5 P. 119, 125 (Colo. 1884). The contrast between the principled fundamental fairness objections to the punitive damages doctrine expressed by critics like Greenleaf and Justice Foster, as opposed to the historical acquiescence and extreme tolerance of legal asymmetries and inequities conveyed by supporters of the doctrine, prompted the
Fundamentally, the analytic approaches these courts adopted share a common quality. They focus on the entire range of issues with punitive damages—each relating to a distinct element or effect of fundamental unfairness and inefficiency attributable to punitive awards, and each implicating various constitutional concerns even if the components were considered separately. But in rejecting application of the doctrine, the courts viewed its adverse effects as a whole as incompatible with the fundamental fairness and efficiency principles that due process and other constitutional protections embody.

CONCLUSION

The history and evolution of punitive damages demonstrate that the doctrine was fundamentally flawed from the outset and that its deficiencies have persisted to this day to produce outsized awards in many cases. As formulated in the common law model centuries ago, the remedy embodied elements that engender inherent unfairness and inefficiency in numerous ways. Although there is broad recognition among courts, legislatures, and scholars that punitive awards give rise to many troublesome contradictions, as well to profound normative and constitutional issues, efforts to address these fundamental concerns have fallen short. This failure may be a result of the piecemeal and constrained approach that underlies analysis of the punitive damages problem and that limits many efforts to reform the doctrine. Those endeavors, both theoretical and practical, focus predominantly on the effects of punitive damages awards when they are excessive, rather than on the central causes that give rise to those erroneous judgments in the first place and that derive from the way the remedy is administered by courts and juries. Comprehensive inquiries that examine the totality of various forms of unfairness and inefficiency in punitive damages judgments, and their combined effect on the justice system, may offer a more productive approach to devising solutions. Most vital to this end is to shift the function of determining the amount of punitive damages, but not liability, from the jury to the court.

Chief Justice of the Wisconsin Supreme Court to declare that “[i]n the controversy between Prof. Greenleaf and Mr. Sedgwick, I cannot but think that the former was right in principle, though the weight of authority may be with the latter,” though for no better reason than because the rule “was adopted as long ago as 1854 . . . and has been repeatedly affirmed since.” Bass v. Chi. & Nw. Ry., 42 Wis. 654, 672–73 (1877) (Ryan, C.J.); see also Colby, supra note 11, at 643–44.