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I. INTRODUCTION

The doctrine of punitive damages truly is an ancient legal concept that inexplicably has evaded commitment to the archives of history. Irrespective of the questionable validity of the doctrine at early common law, the simple fact remains that none of the historical justifications supports the punitive damage theory in today's tort reparations system. The quest to bestow increasing compensation no longer can justify punitive damage awards because actual damages currently recoverable compensate plaintiffs more than adequately for every conceivable element of physical, emotional, or imagined injury. The desire to inflict punishment, likewise, represents an insupportable basis for awarding quasi-criminal fines in a civil context, and is inconsistent with ancient and modern jurisprudence because the civil law historically has been premised upon the concept of compensation and not penal retribution. Deterrence is an equally unsound basis upon which to establish a civil remedy. Unfortunately, theoretical arguments mask the archaic and destructive nature of the punitive damages doctrine. Considering that an award of punitive damages is actually counterproductive to the bases which originally provided credibility for its existence, the severe economic impact of mind boggling and unprecedented recent awards of punitive damages, and the potential for even more catastrophic economic consequences in the future, it is time to relegate this doctrine to its rightful niche in the annals of law.

Part II of this Article traces the evolution of the punitive damage theory, including ancient origins and current status. Part III explores the various justifications theorized in support of the doctrine's present viability. Part IV analyzes the patchwork applications and conflicting standards that measure conduct warranting an award of punitive damages, the treatment of vicariously liable corporate defendants, and other factors that affect the doctrine. This part emphasizes that punitive damages are awarded on the basis of highly questionable rationale and in an absurdly confusing

and noticeably destructive manner. Part V argues for the complete abolition of the punitive damage concept: *ratio potest allegari deficiente lege.* In the absence of complete abolition of punitive damages, part VI asserts the urgent need for immediate stringent limitations on a doctrine that currently operates as an undisciplined and unfettered juggernaut of destruction in the civil tort system. Responsible jurisprudence, however, argues forcefully in favor of relegating this legal dinosaur to an era that long since has passed.

II. The Evolution of Punitive Damages

A. *Ancient Origins and Early Common Law*

The precursor of modern punitive damages was the statutory remedy of multiple awards, a practice that, like punitive damages, provided for awards in excess of actual harm.[1] One of the earliest systems of law to utilize civil punitive damages was the Code of Hammurabi in 2000 B.C.[2] Punitory forms of damages also appeared in the Hittite law in 1400 B.C. and in the Hindu Code of Manu in 200 B.C.[3] Even the Bible contains several examples of multiple damage remedies that Mosaic law provided for offenses such as stealing.[4] Commentators disagree over whether Roman civil law ever actually recognized the concept of punitive damages.[5] English courts before the eighteenth century, however, upheld jury verdicts that exceeded the plaintiff's actual physical harm,[6] and an

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1. K. Redden, Punitive Damages § 2.2(A)(1)(1980).

2. *See, e.g., id.*; G. Driver & J. Miles, The Babylonian Laws 500-01 (1952); Sales, *The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on the Citadel*, 14 St. Mary's L.J. 351, 351 n.1 (1983); Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 Vand. L. Rev. 573, 691 (1983).

3. K. Redden, *supra* note 1, § 2.2(A)(1).

4. *See, e.g., Exodus* 22:1 (King James) ("If a man shall steal an ox, or a sheep, and kill it, or sell it, he shall restore five oxen for an ox, and four sheep for a sheep."); *Exodus* 22.9 (King James) ("For all manner of trespass, whether it be for ox, for ass, for sheep, for raiment, or for any manner of lost thing, which another challengeth to be his, the cause of both parties shall come before the judges; and whom the judges shall condemn, he shall pay double unto his neighbour."). Mosaic law also provided for recovery of multiple damages for adultery and usury. *See* K. Redden, *supra* note 1, § 2.2(A)(1).

5. *See*, Sales, *supra* note 2, at 353 (Roman civil law recognized punitive damages) (citing Walther & Plein, *Punitive Damages: A Critical Analysis: Kirk v. Combs*, 49 Marq. L. Rev. 369, 369 (1965)); *see also* W. Buckland & A. McNair, Roman Law and Common Law 344-45 (2d ed. 1952) (asserting that the basis of Roman civil law was punitive in nature); K. Redden, *supra* note 1, § 2.2(A)(1) (Roman law provided for multiple damage awards for injurious acts characterized by wanton willfulness or conscious deliberation);

6. K. Redden, *supra* note 1, § 2.2(A)(2).

English court initially employed the term "exemplary damages" in 1763 in *Huckle v. Money*[7] to recognize that a jury legitimately could return a verdict for excessive monetary awards.[8]

Courts and commentators have proferred a variety of historical justifications for the development of punitive damages.[9] One theory postulates that courts used the concept of punitive damages to justify otherwise excessive jury verdicts.[10] Early English common-law juries consisted of local townspeople who knew more about the facts of cases than did the judges, and under the reign of Henry II the knights who acted as jurors also provided the only testimony at the trial.[11] Primitive English courts, therefore, only reluctantly interfered with the ostensibly knowledgeable decisions reached by English juries,[12] and the concept that damages pos-

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7. 95 Eng. Rep. 768 (C.P. 1763).

8. *Id.* at 769. The plaintiff in *Huckle* sued the King's officers for illegal searches and seizures, assault, and false imprisonment under a "nameless warrant," and the court upheld an award of 300 pounds for "exemplary damages" even though actual damages were only 20 pounds. *Id.* In the related case of Wilkes v. Wood, 98 Eng. Rep. 489 (C.P. 1763), Lord Chief Justice Pratt stated that:

> [A] jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.

Id. at 498-99.

9. *See generally* J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE § 1.02 (1984); Cooter, *Economic Analysis of Punitive Damages*, 56 S. CAL. L. REV. 79, 90 (1982); Duffy, *Punitive Damages: A Doctrine Which Should Be Abolished, reprinted in* DEFENSE RESEARCH INSTITUTE: THE CASE AGAINST PUNITIVE DAMAGES (D. Hirsch & J. Pouros eds. 1969); Owen, *Civil Punishment and the Public Good*, 56 S. CAL. L. REV. 103, 108 (1982); Sales, *supra* note 2, at 353-55.

10. Duffy, *supra* note 9, at 4; Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 12-13 (1982); Sales, *supra* note 2, at 353-54. A number of early cases in which defendants attempted to persuade courts to overturn arguably excessive jury verdicts furnished support for adoption of the punitive damage concept. *See* Ash v. Ash, 90 Eng. Rep. 526 (K.B. 1701) (court set aside a daughter's 2000 pound judgment against her mother because the "jury were very shy of giving a reason of their verdict"); Wood v. Gimston, 82 Eng. Rep. 867 (Banc. Sup. 1655)(the "Supreme Bench," which had replaced the King's Bench during the Interregnum, agreed that the court could overturn an excessive jury verdict in a slander suit and ordered a new trial); Hawkins v. Sciet, 81 Eng. Rep. 1099 (K.B. 1622)(first case to implicitly recognize the courts' power to set aside jury verdicts, although court allowed instant verdict to stand); *see also* Ellis, *supra*, at 12-15. *Contra*, Townsend v. Hughes, 86 Eng. Rep. 994 (C.P. 1649)(court held that it could not interfere with the jury's power to determine damage awards and sustained plaintiff's judgment of 4000 pounds).

11. K. REDDEN, *supra* note 1, § 2.2(A)(2).

12. Appellate courts in medieval England generally could not review a jury award of damages. Instead, a litigant oppressed by an allegedly excessive award of damages could pursue his grievance directly against the jury by means of a writ of attaint. If the court determined the damages excessive pursuant to its writ, the jury members were punishable

sessed a proper, albeit punitive quality, simply served to justify these purportedly excessive jury awards.

This attitude first may have manifested itself in American legal jurisprudence in *Earl v. Tupper*,[13] an early Vermont case in which the court announced that it would not grant a new trial for reason of excessive damage awards if the defendant's malice, oppression, or gross fraud contributed to the plaintiff's injury.[14] As the jury system continued its evolution and juries began to base their verdicts on the testimony of others, however, courts began exercising more control over the monetary amount of jury awards.[15] Consequently, jury determinations alone as justification for tolerating punitive damages as an integral element of the remedy in a tort reparations system began losing much, if not all, of their significance.[16]

Another theory espoused to justify the use of punitive damages views punitory damages as compensation for plaintiffs' ethereal injuries such as hurt feelings, humiliation, wounded dignity, mental anguish, and embarrassment, which the courts during the formative stages of the common law were reluctant to recognize as compensable injuries.[17] Punitive damages, therefore, performed the task of compensating plaintiffs for elements of personal harm that otherwise were unrecoverable.[18] In the early New Hampshire case

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under its provisions. Sales, *supra* note 2, at 354. Such punishment could be so severe that the jurors should " 'become forever infamous; should forfeit their goods and the profits of their land; should themselves be imprisoned, and their wives and children thrown out of doors; should have their houses razed, their trees extirpated, and their meadows ploughed . . .' " K. REDDEN, *supra* note 1, § 2.2(A)(2) (quoting 3 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 402 (1836)).

13. 45 Vt. 275 (1873).

14. *Id.* at 286.

15. K. REDDEN, *supra* note 1, § 2.2(A)(2).

16. *See* Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 530-33 (1957). Professor Ellis indicates that appellate courts today are more willing to use remittitur to reduce excessive punitive damage awards. Iowa may be the only state that does not allow remittitur of such verdicts. The availability of remittitur in other states does not lead to any more certainty or consistency in punitive damage theory, however; increased availability just makes it more probable that state courts will refuse to uphold extremely large awards. Ellis, *supra* note 10, at 55 (citing K. REDDEN, *supra* note 1, § 10.5).

17. J. GHIARDI & J. KIRCHER, *supra* note 9, § 1.02 4; K. REDDEN, *supra* note 1, § 2.2(C); Duffy, *supra* note 9, at 5; Sales, *supra* note 2, at 354.

18. Sales, *supra* note 2, at 354 (citing Stuart v. Western Union Tel. Co., 66 Tex. 580, 18 S.W. 351 (1885)). The Texas Supreme Court in *Stuart* allowed recovery for mental anguish when the defendant failed to deliver a death message. The court stated that "the whole doctrine of punitory or exemplary damages has its foundation 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." *Stuart*, 66 Tex. at 586, 18 S.W. at

of *Fay v. Parker*,[19] the court discussed *Huckle v. Money*[20] and stated that the English decision "said no more, in substance, than that for the outrage and indignity heaped upon the plaintiff by the insolence, oppression, and tyranny of the defendant, a jury might give the plaintiff liberal damages."[21] Likewise, other early English courts allowed intangible injuries to serve as the basis for punitive damage awards. In *Merest v. Harvey*,[22] plaintiff instituted a trespass action because defendant intruded on plaintiff's land, fired several times at game, and used extremely intemperate language. The appellate court upheld a jury verdict of 500 pounds and queried,

> [I]n a case where a man disregards every principle which actuates the conduct of a gentleman, what is to restrain him except damages? To be sure, one can hardly conceive worse conduct than this. What would be said to a person in a low situation in life, who should behave himself in this manner?[23]

The English court then refused to establish a principle that juries justifiably could award only "the absolute pecuniary damage that the plaintiff may sustain."[24] Similarly, the court in *Tullidge v. Wade*[25] emphasized offensive behavior while discussing guidelines for awarding damages. The *Tullidge* court stated, "In actions [involving seduction] . . . the circumstances of time and place, when and where the insult is given, require different damages; as it is a greater insult to be beaten upon the Royal Exchange than in a private room."[26]

The ambit of compensatory damages has expanded rapidly over recent years to include an entire spectrum of actual and ethereal injuries, including mental anguish, physical pain, loss of society, loss of consortium, emotional trauma, and other metaphysical injuries.[27] The legal rationale that punitive damages serve a compensatory function, therefore, has ceased to exist. Critics argue that the lack of a viable compensatory rationale makes punitive damages an anachronism that is no longer necessary or justifia-

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353.

19. 53 N.H. 342 (1873).
20. *See supra* note 7 and accompanying text.
21. Fay v. Parker, 53 N.H. at 364.
22. 128 Eng. Rep. 761 (C.P. 1814).
23. *Id.*
24. *Id.*
25. 95 Eng. Rep. 909 (C.P. 1769).
26. *Id.* at 910.
27. *See* K. REDDEN, *supra* note 1, § 7.5(D). "The availability of actual damages in tort for mental anguish, wounded feelings, indignity and embarrassment have made the awarding of exemplary damages on such bases redundant." *Id.* § 2.3(A).

ble.[28] As the court forcefully stated in *Fay v. Parker*,[29] the idea of punitive damages "is wrong, . . . is a monstrous heresy," and "is an unsightly and unhealthy excrescence, deforming the symmetry and body of the law."[30] At a minimum, and contrary to the philosophical theorem of civil tort reparations, this doctrine reflects a discomforting antibusiness bias.

A final justification urged in support of the punitive damage concept is that quasi-criminal fines satisfy a void allegedly created by the inequitable chasm between severe criminal penalties for wrongs concerning property losses and, in too many instances, lesser criminal penalties for more severe invasions of personal rights.[31] Civil courts, therefore, allegedly can utilize punitive damages to punish more severely the egregious torts that cause personal harm,[32] and a number of courts have expressed the rationale that citizens are more likely to institute suits to protect their rights and enforce the civil law if punitive damages provide an economic incentive to litigate.[33] Once again, however, because the concept of compensatory damages currently embraces every conceivable element of tangible and intangible injury,[34] essentially unlimited compensatory damages serve as a more than adequate economic incentive for initiating civil litigation. By purpose and definition, the civil law historically has evolved to compensate and not to punish,[35] and in today's tort reparations system, compensatory dam-

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28. *Id.* § 7.5(D); Coccia & Morrissey, *Punitive Damages in Products Liability Cases Should Not Be Allowed*, 22 TRIAL LAW. GUIDE 46, 64-65 (1978); *see infra* notes 153-66 and accompanying text.

29. 53 N.H. 342 (1873).

30. *Id.* at 382.

31. K. REDDEN, *supra* note 1, § 2.2(E) (citing Freifield, *The Rationale of Punitive Damages*, 1 OHIO ST. L.J. 5, 9 (1935)); Sales, *supra* note 2, at 355.

32. K. REDDEN, *supra* note 1, § 2.2(E); Sales, *supra* note 2, at 355.

33. Special Project, *supra* note 2, at 694.

34. *See Duffy*, *supra* note 8, at 5; *supra* note 27 and accompanying text.

35. *Defense Research Institute: The Case Against Punitive Damages*, 6-7 (D. Hirsch & J. Pouros eds. 1969); K. REDDEN, *supra* note 1, § 7.5(B). Dean Prosser stated:

> A crime is an offense against the public at large, for which the state, as the representative of the public, will bring proceedings in the form of a criminal prosecution. The purpose of such a proceeding is to protect and vindicate the interests of the public as a whole, by punishing the offender or eliminating him from society, either permanently or for a limited time, by reforming him or teaching him not to repeat the offense, and by deterring others from imitating him . . . .
>
> The civil action for tort, on the other hand, is commenced and maintained by the injured person himself, and its purpose is to compensate him for the damage he has suffered, at the expense of the wrongdoer.

W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 7 (4th ed. 1971) (footnote omitted). Professors Lafave and Scott have observed:

ages more than adequately fulfill this mission of total and complete reparations. This last justification for the punitive damage concept within the tort reparations system, therefore, not only is suspect, but more importantly, is inherently flawed.

B. Status of Punitive Damages Today

The first American enunciation of the theory of punitive damages occurred in 1791 when a New Jersey court charged the jury in *Coryell v. Colbaugh*[36] that "they were not to estimate the damages by any particular proof of suffering or actual loss" but, instead, should "give damages for *example's* sake, to prevent such offenses in future."[37] The *Coryell* court also stated that the damages should be "such a sum as would mark their disapprobation, and be an example to others."[38] Despite this clear characterization of the purpose of the punitive damages as deterrence, some historical confusion existed concerning the ultimate reasoning that lay at the root of punitive awards.[39] Whatever justification may be advanced to support the punitive damage concept, however, most commentators today acknowledge that the modern bases undergirding the theory in the United States are punishment and deterrence.[40] The status of the punitive damage doctrine in today's tort environment, however, remains remarkably unsettled. Jurisdictions disagree over the applicability of punitive damages in civil actions, and even those states embracing the punitive damages concept differ as to application.[41]

The majority of jurisdictions endorse punitive damages as a

> Criminal law and the law of torts . . . are related branches of the law; yet in a sense they are two quite different matters. The aim of the criminal law . . . is to protect the public against harm, by punishing harmful results of conduct or at least situations . . . which are likely to result in harm if allowed to proceed further. The function of tort law is to compensate someone who is injured for the harm he has suffered.

W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 3, at 11 (1972).

36. 1 N.J.L. 77 (1791).

37. *Id.* at 77 (emphasis in original).

38. *Id.* at 78.

39. *See* K. REDDEN, *supra* note 1, § 2.3(B).

40. *Id.* § 2.3(A); Ellis, *supra* note 10, at 11-12; Sales, *supra* note 2, at 355. Some disagreement, however, exists over whether the modern justification for punitive damages in England is compensation or punishment and deterrence. *Compare* Duffy, *supra* note 9, at 5 (citing Walther & Plein, *Punitive Damages: A Critical Analysis: Kirk v. Combs*, 49 MARQ. L. REV. 369, 371 (1965))(theory that punitive damages are "compensation" for incompensable injuries has remained the modern English justification) *with* J. GHIARDI & J. KIRCHER, *supra* note 9, § 1.03, at 7 (citing Rookes v. Barnard, [1964] 1 All E.R. 367, 407)(despite early confusion, current purpose of punitive damages in English law is "to punish and deter").

41. J. GHIARDI & J. KIRCHER, *supra* note 9, § 4.01-.16; Sales, *supra* note 2, at 363.

component of the common law.[42] A minority of jurisdictions, nevertheless, prohibit the recovery of punitive damages under the common law.[43] Two of these jurisdictions allow punitive damages only in the narrow context of statutorily authorized situations.[44] At least three jurisdictions either totally or partially proscribe the use of punitive damages in all civil cases.[45] Additionally, four jurisdictions, despite judicial declarations that punitive damages constitute an integral part of the common law, so severely limit the scope and application of the doctrine that, in essence, punitive damages have been reduced to nothing more than compensatory damages.[46]

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42. *See* J. GHIARDI & J. KIRCHER, *supra* note 9, at table 4.1 (46 states and the District of Columbia allow punitive damages at common law); Duffy, *supra* note 9, at 6.

43. Louisiana, Massachusetts, Nebraska, and Washington constitute this minority. *See, e.g.*, McCoy v. Arkansas Natural Gas Co., 175 La. 487, 143 So. 383 (1932); City of Lowell v. Massachusetts Bonding & Ins. Co., 313 Mass. 257, 47 N.E.2d 265 (1943); Abel v. Conover, 170 Neb. 926, 104 N.W.2d 684 (1960); Kammerer v. Western Gear Corp., 96 Wash. 2d 416, 635 P.2d 708 (1981).

44. These jurisdictions are Louisiana and Massachusetts. No authority exists in Louisiana law for imposing punitive damages in any case "unless it be for some particular wrong for which a statute expressly authorizes the imposition of some such penalty." McCoy v. Arkansas Natural Gas Co., 175 La. at 497, 143 So. at 386; *see* Killebrew v. Abbott Laboratories, 359 So. 2d 1275 (La. 1978). Massachusetts similarly disallows punitive damages in the absence of specific statutory authorization. City of Lowell v. Massachusetts Bonding & Ins. Co., 313 Mass. at 269-70, 47 N.E.2d at 272; *see* Caperci v. Huntoon, 397 F.2d 799, 801 (1st Cir.), *cert. denied*, 393 U.S. 940 (1968). Statutorily allowed punitive damages in Massachusetts include situations in which the defendant is guilty of unfair or deceptive insurance trade practices, MASS. GEN. LAWS ANN. ch. 176D, § 7 (West Supp. 1983-1984)(up to 25% of underlying claim), and illegal willful dissemination of the criminal record of an offender, MASS. GEN. LAWS. ANN. ch. 6, § 177 (West 1976)(minimum $100 to maximum $1000); *see* Barr v. Interbay Citizens Bank, 96 Wash. 2d. 409, 635 P.2d 441 (1981)(punitive damages allowed only under express statutory authorization).

45. These jurisdictions include Indiana, Nebraska, and Washington. *See, e.g.*, Glissman v. Rutt, 175 Ind. App. 493, 494, 372 N.E.2d 1188, 1189 (1978)(criminal prosecution bars imposition of punitive damages); Abel v. Conover, 170 Neb. 926, 929, 104 N.W.2d 684, 688 (1960)(court stated unequivocally that "punitive, vindictive, or exemplary damages will not be allowed, and that the measure of recovery in all civil cases is compensation for the injury sustained"); Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 53, 25 P. 1072, 1074 (1891)(Washington will allow only compensatory damages because they now cover all possible injuries and to allow punitive damages in addition would be akin to "exacting the pound of flesh"); *accord* Kammerer v. Western Gear Corp., 96 Wash. 2d 416, 635 P.2d 708 (1981); Barr v. Interbay Citizens Bank, 96 Wash. 2d. 409, 635 P.2d 441 (1981).

46. These states are Connecticut, Georgia, Michigan, and New Hampshire. *See, e.g.*, Collens v. New Canaan Water Co., 155 Conn. 477, 488-89, 234 A.2d 825, 831-32 (1967)(punitive damages actually have a compensatory nature and may not exceed the amount of plaintiff's expenses of litigation, less taxable costs); Westview Cemetery, Inc. v. Blanchard, 234 Ga. 540, 543-46, 216 S.E.2d 776, 778-81 (1975)(recovery under § 105-2003 for injury "to the peace, happiness, or feelings of the plaintiff" may include punitive damages and, therefore, precludes the recovery of punitive damages under § 105-2002); Wise v. Daniel, 221 Mich. 229, 233-34, 190 N.W. 746, 747 (1922)(factfinder may not award exemplary damages as a separate amount for example or punishment, although compensatory damages may be in-

III. Basis for Applying the Punitive Damage Doctrine

The generally accepted bases for punitive damages in those jurisdictions that have adopted the concept are punishment and deterrence.[47] Some jurisdictions adopt only one or the other of these rationales, while others adopt the dual rationales. Some jurisdictions still view punitive damages as an additional award to allowable compensatory sums—to compensate for perceived gaps in reparations, as was practiced during the colonial era.

A. Punishment and Deterrence

The great majority of jurisdictions that currently authorize the recovery of noncompensatory, punitive damages adopt the dual rationales of punishment and deterrence as justification for their position.[48] One commentator offered seven legal theories in support of the punitive damage concept.[49] He acknowledged, however, that any legal doctrine that is predicated on such a disparate variety of grounds "may reasonably be suspected of resting on no very firm basis in policy."[50] Consequently, he reduced these seven rationale to two fundamental tenets: wrong-doers deserve punishment beyond that which compensatory damages provide, and the judicial system needs punitive damages to deter socially harmful, loss creating conduct by defendants.[51] A number of recent cases echo these incantations to justify the use of punitive measures.[52]

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creased); Vratsenes v. New Hampshire Auto, Inc., 112 N.H. 71, 73, 289 A.2d 66, 68 (1972)(punitive award not allowable, but compensatory damages may be increased to compensate plaintiff in cases of wanton, malicious, or oppressive conduct).

47. *See supra* note 40 and accompanying text. The states that recognize punishment and deterrence as the rationales for punitive damages obviously do not include the four states that employ the punitive nomenclature in designating essentially compensatory awards. *See supra* note 46 and accompanying text.

48. J. Ghiardi & J. Kircher, *supra* note 9, § 4.14 & n.1 (citing cases and statutes from 36 states and the District of Columbia).

49. Ellis, *supra* note 10, at 3. Professor Ellis offered as possible justifications: (1) punishment of the defendant; (2) specific deterrence of the defendant; (3) general deterrence of others from acting in a similar manner; (4) preservation of the peace; (5) inducement of private law enforcement; (6) compensation of victims for otherwise uncompensable losses; and (7) payment of plaintiffs' attorneys' fees. *Id.*

50. *Id.* at 3 n.10 (quoting T. Baty, Vicarious Liability 148 (1916)).

51. Ellis, *supra* note 10, at 11.

52. *See, e.g.*, Moran v. Johns-Manville Sales Corp., 691 F.2d 811, 815 (6th Cir. 1982)(failure to warn would support punitive award if such failure manifested a flagrant indifference to the risk of harm); Neal v. Farmers Ins. Exch., 21 Cal. 3d 910, 928 n.13, 582 P.2d 980, 990 n.13, 148 Cal. Rptr. 389, 399 n.13 (1978)("purpose of punitive damages is to punish wrongdoers and thereby deter commission of wrongful acts"); Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727, 741 (Minn.), *cert. denied*, 449 U.S. 921 (1980)(court allowed

Courts generally are quick to assert that they fully control the extent of punishment meted out by punitive damages.[53] An exception to this rule, and one that has created much controversy because of the absence of any responsible theoretical foundations coupled with its fundamental inequities,[54] is the award of punitive damages based on vicarious liability.[55]

Courts are less than clear in defining and identifying the entities sought to be deterred by the effects of punitive damages.[56] For example, Iowa, Mississippi, North Carolina, Ohio, Texas, Virginia, and West Virginia intend to deter persons *other than the defendant* from committing acts similar to those that prompted the punitive damage award.[57] Other jurisdictions that have adopted punitive damages observe that it is their policy to deter *both* the defendant and *other* potential wrongdoers.[58] Arizona and New Jersey, however, hold that the deterrent effect of punitive damages should be directed only at the particular tortfeasor before the court,[59] while Minnesota is nnclear concerning whom it intends to

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punitive damages, even though manufacturer had ceased production of dangerous product, for purpose of deterring future misconduct and "to punish past misconduct"); Leimgruber v. Claridge Assocs., 73 N.J. 450, 454, 375 A.2d 652, 654 (1977)(theory of punitive damages is to punisb the defendant for aggravated misconduct and deter such conduct in the future); Sandler v. Lawn-A-Mat Chem. & Equip. Corp., 141 N.J. Super. 436, 448, 358 A.2d 805, 811 (1976)(punitive damages are intended to punish the tertfeasor and prevent him from repeating such misconduct).

53. J. GHIARDI & J. KIRCHER, *supra* note 9, § 5.39.

54. *See infra* notes 101-07 & 188-201 and accompanying text.

55. J. GHIARDI & J. KIRCHER, *supra* note 9, § 4.14.

56. *Id.*

57. *See, e.g.*, Pringle Tax Serv., Inc. v. Knoblauch, 282 N.W.2d 151, 154 (Iowa 1979); Standard Life Ins. Co. v. Veal, 354 So. 2d 239, 247 (Miss. 1977); Newton V. Standard Fire Ins. Co., 291 N.C. 105, 114, 229 S.E.2d 297, 302 (1976); Detling v. Chockley, 70 Ohio St. 2d 134, 136, 436 N.E.2d 208, 209 (1982); City Nat'l. Bank v. Haynes, 614 S.W.2d 605, 609 (Tex. 1981); FBC Stores, Inc., v. Duncan, 214 Va. 246, 251, 198 S.E.2d 595, 599 (1973); Spencer v. Steinbrecher, 152 W. Va. 490, 500, 164, S.E.2d 710, 717 (1968). North Carolina consistently has allowed punitive damages solely on the basis of its policy to punish intentional wrongdoing and to deter *others* from similar behavior. *See, e.g.*, Newton v. Standard Fire Ins. Co., 291 N.C. 105 at 114, 229 S.E.2d 297, 302 (1976).

58. *See, e.g.*, Kerr v. First Commodity Corp. of Boston, 735 F.2d 281, 289 (5th Cir. 1984)(applying Missouri law); Ray Dodge, Inc. v. Moore, 251 Ark. 1036, 1044, 479 S.W.2d 518, 523 (1972); Frick v. Abell, 198 Colo. 508, 511, 602 P.2d 852, 853 (Colo. 1979); Gent v. Collinsville Volkswagen, Inc., 116 Ill. App. 3d 496, ____, 451 N.E.2d 1385, 1391 (1983); Taylor v. Wachter, 227 Kan. 221, 224, 607 P.2d 1094, 1098 (1980); Bisset v. Goss, 481 S.W.2d 71, 74 (Ky. 1972); Wedeman v. City Chevrolet Co., 278 Md. 524, 531, 366 A.2d 7, 12 (1976); Miller v. Watkins, 653 P.2d 126, 133 (Mont. 1982); Fahrenberg v. Tengel, 96 Wis. 2d 211, 222, 291 N.W.2d 516 (1980).

59. *See, e.g.*, Acheson v. Shafter, 107 Ariz. 576, 578, 490 P.2d 832, 834 (1971)(punitive damages are meant to punish the wrongdoer and to act as a deterrent to further wrongdoing); Sandler v. Lawn-A-Mat Chem. & Equip. Co., 141 N.J. Super. 436, 448, 358 A.2d 805,

deter with punitive damages.[60]

B. Punishment Only

Delaware is the only state that has adopted punishment as the sole purpose for the imposition of punitive damages.[61] The Delaware Supreme Court has stated that it will allow punitive damages only as punishment to the tortfeasor for willfully and wantonly committed wrongfnl acts.[62] Wisconsin, similarly, recognizes the punishment rationale as a sufficient, if not sole, basis for imposing punitive damages.[63]

C. Deterrence Only

Deterrence represents the singular basis for authorizing pimitive damages in Alaska, Georgia, Idaho, Maine, Oregon, Rhode Island, and Utah.[64] Many of these jurisdictions, however, do not specifically hold deterrence as the sole rationale for awarding punitive damages, but merely imply this basis.[65] The Idaho Supreme Court, in discussing the policy of deterrence, observed:

> We prefer to accentuate those cases which define the purpose of exemplary damages as a deterrent to the defendant and others from engaging in similar conduct in the future. We concede that any exemplary damages assessed against a defendant will appear to him to be punishment. However, we feel

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811 (1976)(punitive damages "are intended to punish the tortfeasor and prevent him from repeating such conduct").

60. *See, e.g.*, Jensen v. Peterson, 264 N.W.2d 139, 144 (Minn. 1978)(punitive damages deter particularly egregious conduct, but court does not indicate by whom); Kircbhaum v. Lowrey, 165 Minn. 233, 236, 206 N.W. 171, 173 (1925)(punitive damages deter willful, wanton, or malicious wrongs, but court does not specify by whom).

61. *See* Malcom v. Little, 295 A.2d 711, 714 (Del. 1972); Riegel v. Aastad, 272 A.2d 715, 718 (Del. 1970).

62. Malcom v. Little, 295 A.2d at 714 (Del. 1972); Riegel v. Aastad, 272 A.2d at 718 (Del. 1970).

63. *See* Hofer v. Lavender, No. C-2552 (Tex. July 11, 1984) (either deterrence or punishment, or both are now recognized as valid). *Compare* Wussow v. Commercial Mechanisms, Inc., 97 Wis. 2d 136, 155-56, 293 N.W.2d 897, 907 (1980)(punishment of past conduct is a sufficient basis for assessing punitive damages, even though they can also serve to deter future outrageous conduct) *with* John Mohr & Sons v. Jahnke, 55 Wis. 2d 402, 411, 198 N.W.2d 363, 368 (1972)(punitive damages act to punish and deter).

64. J. GHIARDI & J. KIRCHER, *supra* note 9, § 4.15 at 17.

65. Maine, Oregon, and Utah are among those states that specifically state that deterrence is the only proper basis of punitive damages. *See, e.g.*, Foss v. Maine Turnpike Auth., 309 A.2d 339, 345 (Me. 1973)(deterrence is the proper justification for exemplary damages); Lewis v. Devils Lake Rock Crushing Co., 274 Or. 293, 300, 545 P.2d 1374, 1378 (1976)(deterrence is only proper basis for imposing punitive damages); Nash v. Craigco, Inc., 585 P.2d 775, 778 (Utah 1978)(punitive damages teach the defendant not to repeat and warn others not to participate in such conduct).

> that the courts in these civil cases should be motivated primarily by a purpose of deterrence and not by a purpose of punishment. In other words, the assessment of exemplary damages should be prompted by the court's or jury's desire to assure, to the extent possible via the imposition of a monetary penalty, that similar conduct does not occur in the future. Punishment, per se, should be left to the criminal law.[66]

Also, as in those jurisdictions that recognize both punishment and deterrence as the rationales for punitive damages,[67] the jurisdictions that recognize only a deterrence rationale fail to clarify the entities sought to be deterred by the award of punitive damages.[68] This lack of uniformity in policy and application reflects the inherent weakness in a doctrine that, rather than advancing the best interests of society, actually threatens society's economic underpinnings.

Texas recently has announced that either deterrence or punishment, separately and independently, constitute an appropriate rationale for the assessment of punitive damages.[69] Therefore, the plaintiff may elect to seek punitive damages based on only the deterrence rationale, on only the punishment rationale, or both.[70] This judicial aberration reflects not only the lack of legal soundness of the doctrine, but also demonstrates the court's acceptance of the notion that punitive damages can serve as a windfall for plaintiffs.

D. Award of Additional Damages

Several jurisdictions view punitive damages as mere monetary awards that complement compensatory damages.[71] Punitive dam-

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66. Jolley v. Puregro Co., 94 Idaho 702, 708-09, 496 P.2d 939, 945-46 (1972).

67. *See supra* notes 56-60 and accompanying text. At least one jurisdiction, California, has suggested that punitive damages may he levied against a product supplier te deter the entire industry of which the defendant is a member. *See* Schleininger v. Questor Corp., 200 Cal. Rptr. 634 (1984). The extra penalty of monetary awards based on alleged wanton and reckless conduct by all members of an industry is an unwarranted extension of an already flawed concept.

68. *See* J. GHIARDI & J.KIRCHER, *supra* note 9, § 4.15, at 18.

69. Hofer v. Lavender No. C-2552 (Tex. July 11, 1984).

70. In a strongly worded dissent Justice Spears noted that

> [t]he punitive and deterrant aims of exemplary damages are not separable. The general deterrent effect of an award can not be considered in isolation, because to a large extent general deterrence depends on punishment. Specifically, members of the public are deterred from sunilar misconduct because they witnessed the wrongdoers conduct. . . .

Id.

71. *See* Collens v. New Canaan Water Co., 155 Conn. 477, 234 A.2d 825 (1967); Westview Cemetery, Inc. v. Blanchard, 234 Ga. 540, 216 S.E.2d 776 (1975); McLaren v. Zeilinger, 103 Mich. App. 22, 302 N.W.2d 583 (1981); Perry v. Melton, 299 S.E.2d 8 (W. Va. 1982).

ages, in these jurisdictions, serve to provide remuneration for intangible injuries such as hurt feelings, loss of companionship, wounded dignity, grief, embarrassment,[72] mental anguish,[73] or litigation expenses.[74] These jurisdictions predicate their philosophy on the outdated theorem that such injuries were not compensable under early common law.[75] Common sense and the current availability of expanded, if not unlimited, compensatory damages in all tort actions expose the fallacy of this rationale.[76]

IV. Application of the Punitive Damage Doctrine in Today's Context

A. *Standards of Conduct That Warrant Punitive Damages*

The *ratio decidendi* that courts employ when imposing punitive damages vary in almost indecipherable, yet extremely important, degrees. The disparate innuendos and connotations that accompany the legal bases articulated to support punitive damage liability precipitate subtle shifts in jury interpretations, in understandings of the law, and in burdens of proof. For this reason, the jurisdiction in which a plaintiff institutes suit profoundly affects the outcome of his case. Generally, most jurisdictions focus on the defendant's conduct, rather than the nature or extent of the harm sustained by the plaintiff.[77] This restricted approach lends itself to anything but consistency. Although a broad standard is necessarily imprecise, most commentators acknowledge that the imposition of punitive damages requires more than a mere tortious act—the defendant's conduct must be aggravated or outrageous, or characterized by some positive element of conscious wrongdoing.[78]

But, as noted in Ratner v. Sioux Natural Gas Corp., 719 F.2d 801, 804 (5th Cir. 1983), "[t]he award of punitive damages is unconcerned with compensation; it is intended to punish the wrongdoer and deter the commission of similar offenses in the future."

72. Sales, *supra* note 2, at 354; *see* Hink v. Sherman, 164 Mich. 352, 357, 129 N.W. 732, 734 (1911); Fay v. Parker, 53 N.H. 342, 380 (1873).

73. *See* Stuart v. Western Union Tel. Co., 66 Tex. 530, 18 S.W. 351 (1885).

74. Duffy, *supra* note 9, at 11; *see also* Reinah Dev. Corp. v. Kaaterskill Hotel, 86 A.D.2d 50, 448 N.Y.S.2d 686 (1982), *rev'd on other grounds*, 465 N.Y.2d 482, 452 N.E.2d 1238 (1983).

75. *See supra* notes 17-29 and accompanying text.

76. *See infra* notes 213-20 and accompanying text.

77. *See generally* J. Ghiardi & J. Kircher, *supra* note 9, § 5.01, at 2; Sales, *supra* note 2, at 364-65; Special Project, *supra* note 2, at 695.

78. As an example, Dean Prosser has noted:

> Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or "malice," or a fraudulent or evil motive on the part of the defendent, or such a con-

1. Standard of Intentional Conduct

Those jurisdictions and commentators who recognize the validity of the punitive damage doctrine envision recovery when the defendant's actions either are or are deemed to be intentional.[79] Most of these courts and commentators adopt this proposition

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scious and deliberate disregard of the interests of others that his conduct may be called willful or wanton. Lacking this element, there is general agreement that mere negligence is not enough, even though it is so extreme in degree as to be characterized as "gross," an unhappy term of ill-defined content, which occasionally, in a few jurisdictions, has been stretched te include the element of conscious indifference to consequences, and so to justify punitive damages. Still less, of course, can such damages be charged against one who acts under an innocent mistake in engaging in conduct that nevertheless constitutes a tort.

W. PROSSER, *supra* note 34, § 2, at 9-10. Similarly, Professor McCormick has suggested:

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

McCORMICK, HANDBOOK OF THE LAW OF DAMAGES § 79, at 280-82 (1935). For the sake of simplicity, this Article adopts the broad terms of "intentional," "reckless," and "negligent" to describe and refer to the standards of conduct that govern the imposition of punitive damages. "Intentional" refers to that conduct which is characterized by willfulness or malice, whether express, implied in fact, or implied in law. "Reckless" refers to that conduct which, although not intentional, is marked by various degrees of indifference or wantonness. "Negligent" includes that nebulous area of careless action which courts generally have viewed as insufficient for the imposition of punitive damages. The circular and overlapping characteristics of these three categories reflect the ambiguity and lack of definition inherent in the punitive damage environment. See Ellis, *supra* note 9, at 34-37, for another attempt to deal with this confusion.

79. *See generally* J. GHIARDI & J. KIRCHER, *supra* note 9, § 5.02. (The authors give numerous examples of the imposition of punitive damages for the intentional tort of assault and battery.) Some state legislatures have dictated that punitive damages are permissible for intentional or quasi-intentional conduct. *See, e.g.*, MINN. STAT. ANN. § 549.20(1)(1984) (requiring "clear and convincing evidence that the acts of the defendant show a willful indifference to the rights or safety or others"); MONT. CODE ANN. § 27-1-221 (1983) (where the defendant has been "guilty of oppression, fraud, or malice, actual or presumed"); NEV. REV. STAT. § 42.010(1)(1981) (where the defendant has "been guilty of oppression, fraud or malice, express or implied"); N.D. CENT. CODE § 32-03-07 (Supp. 1983) ("when the defendant has been guilty of oppression, fraud, or malice, actual or presumed"); OKLA. STAT. ANN. tit. 23, § 9 (1955) ("where the defendant has been guilty of oppression, fraud or malice, actual or presumed"); S.D. CODIFIED LAWS ANN. § 21-3-2 (1979) ("where the defendant has been guilty of oppression, fraud, or malice, actual or presnmed"). One state legislature has mandated a reckless standard for awarding punitive damages. *See* COLO. REV. STAT. § 13-21-102 (1973) ("the injury complained of is attended by circumstances of fraud, malice or insult, or a wanton and reckless disregard of the injured party's rights and feelings").

without hesitation and endeavor to expand the punitive damage concept to situations that concern more imprecise conduct.[80] It is in this area of marginally intentional conduct that the judicial standards for imposing punitive damages first become muddled and legally irrational. Some states, therefore, have espoused very strong standards of appellate review. In Rhode Island the courts will approve punitive awards only "upon evidence of such willfulness, recklessness or wickedness, on the part of the party at fault, as amounted to criminality."[81] New Jersey, similarly, requires the plaintiff to prove "actual malice, which is nothing more or less than intentional wrongdoing—an evil-minded act . . . or an act accompanied by a wanton and willful disregard of the rights of another."[82] Other jurisdictions have couched the standard in slightly different, yet equally strong, language. California requires that "the defendant must be guilty of oppression, fraud or malice. . . . He must act with the intention to vex, injure or annoy, or with a conscious disregard of the plaintiff's rights."[83] In Vermont the plaintiff must show "that there was actual malice . . . conduct

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80. *See* Ellis, *supra* note 10, at 21-22 (when a defendant purposefully injures someone, then characterization of that action as the commission of a wrongful act with a culpable mental state that deserves punishment is relatively easy). The principal problems in justifying punitive damages from a just desserts standpoint arise when the defendant's conduct may not be characterized as purposeful harm. Much of the disagreement among the jurisdictions centers on expanding the punitive damage concept to embrace merely reckless conduct. *Id.*; *see also* Addair v. Huffman, 195 S.E.2d 739, 744 (W. Va. 1973) (intentional disregard of a law that protects the public from a particular abuse, thereby resulting in injury, gives rise to the imposition of punitive damages).

81. Sherman v. McDermott, 114 R.I. 107, 109, 329 A.2d 195, 196 (1974)(quoting Adams v. Lorraine Mfg. Co., 29 R.I. 333, 338, 71 A. 180, 182 (1908)).

82. Sandler v. Lawn-A-Mat Chem. & Equip. Corp., 141 N.J. Super. 437, 448, 358 A.2d 805, 811 (1976)(quoting La Bruno v. Lawrence, 64 N.J. Super. 570, 575, 166 A.2d 822, 824 (1960), *cert. denied*, 34 N.J. 323, 168 A.2d 694 (1961); *see* Kocse v. Liberty Mut. Ins. Co., 152 N.J. Super. 371, 375-76, 377 A.2d 1234, 1236 (1977). Idaho applies a similar standard. *See* Cheney v. Palos Verdes Inv. Corp., 104 Idaho 897, 905, 665 P.2d 661, 669 (1983); Linscott v. Ranier Nat'l Life Ins. Co., 100 Idaho 854, 858, 606 P.2d 958, 962 (1980)(punitive damages are appropriate if defendant's act is an "extreme deviation from reasonable standards of conduct" and if defendant acted "with an understanding of or a disregard for its likely consequences"). Texas also arguably falls within this category. In Ogle v. Craig, 464 S.W.2d 95 (Tex. 1971), the Texas Supreme Court stated that the "act complained of not only must be unlawful but also must partake of a wanton and malicious nature, or, as sometimes stated, somewhat of a criminal or wanton nature." *Id.* at 97 (quoting Deunis v. Dial Fin. & Thrift Co., 401 S.W.2d 803, 805 (Tex. 1966)). Texas, however, also allows recovery of punitive damages for grossly negligent conduct. *See* Schwartz v. Sears, Roebuck & Co., 669 F.2d 1091, 1093 (5th Cir. 1982); Burk Royalty Co. v. Walls, 616 S.W.2d 911, 920 (Tex. 1981); Houston Lighting & Power Co. v. Sue, 644 S.W.2d 835, 839 (Tex. Civ. App. 1982).

83. Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 462, 521 P.2d 1103, 1110, 113 Cal. Rptr. 711, 718 (1974); *see* Colonial Life & Accident Ins. Co. v. Superior Court, 31 Cal. 3d 785, 792, 647 P.2d 86, 90, 183 Cal. Rptr. 810, 814 (1982).

manifesting personal ill will or carried out under circumstances evidencing insult or oppression, or even by conduct showing a reckless or wanton disregard of one's rights."[84] Other states employ weaker characterizations of the intentional conduct standard. New York requires that "the wrong [be] aggravated by evil or a wrongful motive or that there [be] willful and intentional misdoing, or a reckless indifference equivalent thereto."[85] Alabama possesses one

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84. Shortle v. Central Vt. Pub. Serv. Corp., 137 Vt. 32, 33, 399 A.2d 517, 518 (1979). Other jurisdictions follow similar standards. *See* Freeman v. Anderson, 279 Ark. 282, 286-87, 651 S.W.2d 450, 452 (1983); Dalrymple v. Fields, 276 Ark. 185, 188, 633 S.W.2d 362, 363 (1982)(must be shown that "in the absence of proof of malice or willfulness there was a wanton and conscious disregard for the rights and safety of others"); Satterfield v. Rebsamen Ford, Inc., 253 Ark. 181, 185, 485 S.W.2d 192, 195 (1972)("when the defendant acts with malice, . . . or with willfulness, wantonness, or conscious indifference to consequences from which malice may be inferred")(citations omitted); Sere v. Group Hospitalization, Inc., 443 A.2d 33, 37 (D.C. 1982)("defendant's tortious conduct must have been outrageous, characterized by malice, wantonness, gross fraud, recklessness, or willful disregard of the plaintiff's rights"); Riggs Nat'l Bank v. Price, 359 A.2d 25, 28 (D.C. 1976)("for outrageous conduct such as maliciousness, wantonness, gross fraud, recklessness and willful disregard of another's rights"); Toyota Motor Co. v. Moll, 438 So. 2d 192 (Fla. Dist. Ct. App. 1983)("for actions or inactions amounting to willfulness, wantonness, maliciousness, recklessness, oppression, or outrageous conduct"); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 186, 384 N.E.2d 353, 359 (1978)("committed with fraud, actual malice, deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others"); Gent v. Collinsville Volkswagen, Inc., 116 Ill. App. 3d 496, 451 N.E.2d 1385 (1983); General Motors Corp. v. Piskor, 277 Md. 165, 175, 352 A.2d 810, 817 (1976)("only when there is an element of fraud, malice, evil intent or oppression which enters into and forms a part of the wrongful act"); Nelson v. Jacobsen, 669 P.2d 1207, 1219 (Utah 1983)(requiring a higher standard of proof than "willful and malicious" for punitive awards in an alienation of affections case); Kesler v. Rogers, 542 P.2d 354, 359 (Utah 1974)("for particnlarly grievous injury caused by conduct which is not only wrongful, but which is willful and malicious so that it seems to one's sense of justice that mere recompense for actual loss is inadequate").

85. Jones v. Hospital for Joint Diseases and Medical Center, 96 A.D.2d 498, 499, 465 N.Y.S.2d 517, 517 (1982); *see* Le Mistral, Inc. v. Columbia Broadcasting Sys., 61 A.D.2d 491, 494, 402 N.Y.S.2d 815, 817 (1978)("based upon tortious acts which involve ingredients of malice, fraud, oppression, insult, wanton or reckless disregard of the plaintiff's rights, or other circumstances of aggravation"). For other weak standard formulations, see Alyeska Pipeline Serv. Co. v. O'Kelley, 645 P.2d 767, 774 (Alaska 1982)("characterized as outrageous, such as acts done with malice or bad motives or reckless indifference to the interests of another")(quoting Bridges v. Alaska Hous. Auth., 375 P.2d 696, 702 (Alaska 1962)); Sturm, Ruger & Co. v. Day, 594 P.2d 38, 46 (Alaska 1979); Malcolm v. Little, 295 A.2d 711, 714 (Del. 1972)("when [the defendant's] wrongful act was committed willfully or wantonly")(quoting Riegel v. Aastad, 272 A.2d 715, 718 (Del. 1970)); Meyer v. Nottger, 241 N.W.2d 911, 922 (Iowa 1976)("where defendant acts maliciously . . . where the nature of the illegal act is such as to negative any inference of feeling toward the person injured")(quoting Amos v. Prom, 115 F. Supp. 127, 136-37 (N.D. Iowa 1953)); McKinnon v. Tibbetts, 440 A.2d 1028, 1031 (Me. 1982)("malicious, gross or wanton"); Foss v. Main Turnpike Auth., 309 A.2d 339, 345 (Me. 1973)("the conduct of the defendant is found to be deliberate, malicious or grossly negligent"); Addair v. Huffman, 156 W. Va. 592, 599, 195 S.E.2d 739, 743 (1973)("where there is an intentional wrong, or where there are circum-

of the weaker intentional conduct standards in that the courts only require "some circumstances of aggravation, such as willfulness, wantonness, maliciousness, gross negligence or recklessness, oppression, outrageous conduct, indignity and contumely, insult, or fraud or gross fraud."[86]

The standards of intentional conduct sufficient to warrant punitive awards vary in degrees, both from each other and from the reckless and negligent standards that many jurisdictions apply. Significantly, one legal scholar has proposed that courts should limit punitive damages to cases concerning intentional faults.[87] Another well-known scholar, who formerly enthusiastically supported a rather unrestricted approach to punitive damages,[88] after viewing the results of an unfettered application of punitive damages over a mere seven year period, now recognizes the importance of limiting punitive damages to intentional and quasi-intentional situations.[89]

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stances which warrant an inference of malice, willfulness, or wanton disregard of the rights of others"); Petsch v. Florom, 538 P.2d 1011, 1013 (Wyo. 1975)("the act of the defendant was committed maliciously, willfully or wantonly").

86. *Ex parte* Smith, 412 So. 2d 1222, 1223 (Ala. 1982); *see* Ford Motor Credit Co. v. Washington, 420 So. 2d 14 (Ala. 1982); *Ex parte* Lewis, 416 So. 2d 410 (Ala. 1982).

87. Cooter, *supra* note 9, at 80. Professor Cooter suggests that because most potential wrongdoers find it economically cheaper to comply with the law, noncompliance is usually unintentional. If the wrongdoer's actions are unintentional, then punitive damages are unnecessary for deterrence and underserved for punishment. Professor Cooter, however, also argues that some individuals intontionally cause harm, and that courts should impose punitive damages against these purposeful wrongdoers to offset either their illicit pleasure in noncompliance or the exceptional cost of compliance that instigates their noncompliance. *Id.* at 79-80. If, however, such deterrent or punitory measures are still necessary in light of the present expanded compensatory damage remedy, those effects should be achieved through the criminal processes, or at a minimum, restructured to preclude a windfall to an already fully compensated plaintiff.

88. *See* Owen, *Punitive Damages in Product Liability Litigation*, 74 MICH. L. REV. 1258 (1976).

89. Owen, *supra* note 9, at 106-07. Professor Owen asserts that the assessment of punitive damages in "deliberate" situations—those concerning conduct intended to cause harm for no good reason—"generally would be regarded as appropriato without much argument about either fairness or efficiency." Accordingly, punitive damages properly would lie in "evaluative" situations—those in which the defendant evaluates the circumstances and decides that he will benefit enough from the act to justify its occurrence—but only if the defendant's choice is wrong (immoral) and the defendant knows or recklessly fails to discover its wrongfulness before acting. Professor Owen, however, now draws the line at "inadvertent" acts—those that show no real thought by the defendant concerning the wrongfulness or implications of the act—because a failure to think usually does not call for punishment. *Id.* This shift is understandable because an objective view of the courts' indiscriminato use of punitive damages would dampen the enthusiasm of even the doctrine's most ardent supporters.

2. Standard of Reckless Conduct

The broad area of reckless or wanton conduct is an ill-defined, often fluctuating category. The courts ostensibly have articulated a clearly defined and legally meaningful standard to evaluate potential liability for punitive damages. Any analysis of the cases, however, reveals an unintelligible, linguistic exercise in legalese, the significance of which doubtlessly is lost upon many legal scholars and, more importantly, most jurors. Generally, the cases delineate a continuum of antisocial conduct. The upper, aggravated end of this continuum approaches intentional conduct, and therefore, courts are more likely to authorize the imposition of punitive damages for this type of conduct. The lower, more passive end of the continuum consists of conduct that is simply improper or ill-conceived, but is not of such egregious quality that it warrants punitory measures. Between these two extremes is conduct that varies in often imperceptible, but extremely important degrees for the application of the punitive damage concept.

A review of the cases employing "the reckless or wanton" standard discloses a disturbing overlap between this standard and the intentional conduct standard. The distinctions between the two standards often are too imperceptible to allow absolute categorization. Some courts proclaim that the standard for the imposition of punitive damages is "actual malice, which is nothing more or less than intentional wrongdoing—an evil-minded act"[90], or "an evil intent deserving of punishment or of something in the nature of special ill will."[91] Some courts repudiate the necessity of demonstrating actual malice in favor or a standard of "legal malice," which

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90. Sandler v. Lawn-A-Mat Chem. & Equip. Co., 141 N.J. Super. 437, 448, 358 A.2d 805, 811 (1976). The court also refers to conduct that evinces a "wanton and willful disregard of the rights of another." *Id.* Actual malice, likewise, reflects the Iowa and Maryland standards. *See* Feeney v. Scott County, 290 N.W.2d 885, 892 (Iowa 1980); *see also* West Des Moines State Bank v. Hawkeye Bancorp., 722 F.2d 411, 414 (8th Cir. 1983); Savol v. BL Ltd., 710 F.2d 1027, 1033 (4th Cir. 1983). South Carolina and Virginia also use similar formulations. *See* King v. Allstate Ins. Co., 272 S.C. 259, 263, 251 S.E.2d 194, 196 (1979)("must be malice, ill will, a conscious indifference to the rights of others, or a reckless disregard thereof")(quoting Cox v. Coleman, 189 S.C. 218, 221, 200 S.E. 762, 764 (1939)); Peacock Buick, Inc. v. Durkin, 221 Va. 1133, 1136-37, 277 S.E.2d 225, 227 (1981)(actual malice or malice in fact); Jordan v. Sauve, 219 Va. 448, 452, 247 S.E.2d 739, 741 (1978)("only where there is misconduct or actual malice").

91. Anderson v. Continental Ins. Co., 85 Wis. 2d 675, 697, 271 N.W.2d 368, 379 (1978); *see* Franklin Music Co. v. American Broadcasting Co., 616 F.2d 528, 542 (3d Cir. 1979)(Pennsylvania law requires bad motive or reckless indifference); Amish v. Walnut Creek Dev., Inc., 631 S.W.2d 866, 876 (Mo. App. 1982)(bad motive or evil intent).

appears to differ little from intentional conduct.[92] Others refer to "conscious disregard of [the plaintiff's] rights" and award punitive damages when the evidence demonstrates that the defendant acted willfull and maliciously.[93] Other courts denominate reckless or wanton conduct as "gross negligence" which then is defined as an "entire want of care" that raises an inference of "conscious indifference" to the rights of others.[94] Still other jurisdictions judge the defendant's conduct against a standard of reckless or wanton conduct, oppression, fraud, or malice under which the wrongdoer must act with the intent to vex, injure or annoy,[95] or act out of a maliciousness or recklessness that evidences an utter disregard of the consequences.[96] At least one court has judicially formulated a standard of reckless, wanton, or oppressive conduct that requires spite, ill will, or reckless indifference by the defendant.[97] Tennessee has

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92. Under Missouri law, legal malice and not actual malice governs an award for punitive damages. Armstrong v. Republic Realty Mortgage Corp., 631 F.2d 1344, 1352 (8th Cir. 1980)(applying Missouri law); Pollock v. Brown, 569 S.W.2d 724, 732 (Mo. 1978). As noted by the court in Crues v. KFC Corp., 729 F.2d 1145, 1153 (8th Cir. 1984)(citing Beggs v. Universal C.I.T. Credit Corp., 409 S.W.2d 719 (Mo. 1966)), legal malice is defined to mean "whether the defendant did a wrongful act intentionally and without just cause or excuse . . . [meaning] that defendant not only intended to do the act which is ascertained to be wrongful but that he knew it was wrongful when he did it." *Accord* Pollock v. Brown, 569 S.W.2d at 724.

93. Gulf Atl. Life Ins. Co. v. Barnes, 405 So. 2d 916 (Ala. 1981); Randall v. Ganz, 96 Idaho 785, 787, 537 P.2d 65, 67 (1975); Petsch v. Florom, 538 P.2d 1011, 1013 (Wyo. 1975).

94. Burk Royalty Co., v. Walls, 616 S.W.2d 911, 920 (Tex. 1981); Jeffers v. Nysse, 98 Wis. 2d 543, 297 N.W.2d 495 (1980).

95. Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 462, 521 P.2d 1103, 1110, 113 Cal. Rptr. 711, 718 (1974); Shortle v. Central Vt. Pub. Serv. Corp., 137 Vt. 32, 33, 399 A.2d 517, 518 (1974); *see* Newton v. Standard Fire Ins. Co., 291 N.C. 105, 112, 229 S.E.2d 297, 301 (1976)(" 'fraud, malice, such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, willfullness' ")(quoting Baker v. Winslow, 184 N.C. 1, 113 S.E. 570 (1922)); Henry v. Deen, 61 N.C. App. 189, 195, 300 S.E.2d 707, 711 (1983)("based on aggravated, intentional, wanton or grossly negligent conduct"), *rev'd on other grounds,* 310 N.C. 75, 310 S.E.2d 327 (1984); Rubeck v. Huffman, 54 Ohio St. 2d 20, 23, 374 N.E.2d 411, 413 (1978)("caused by intentional, reckless, wanton, willful and gross acts or by malice inferred from conduct and surrounding circumstances").

96. McClellan v. Highland Sales & Inv. Co., 484 S.W.2d 239, 242 (Mo. 1972). Under this approach, some element of wantonness or bad motive must exist. *Id.*; *see also* Kline v. Multi-Media Cablevision, Inc., 233 Kan. 188, 666 P.2d 711 (1983); Loucks v. Albuquerque Nat'l Bank, 76 N.M. 735, 747, 418 P.2d 191, 199 (1966)("only when the conduct of the wrongdoer may be said to be maliciously intentional, fraudulent, oppressive, or committed recklessly or with a wanton disregard of the plaintiffs' rights").

97. Salt River Valley Water Users' Ass'n. v. Giglio, 113 Ariz. 190, 202, 549 P.2d 162, 174 (1976). The court, however, did not impose punitive damages because of plaintiffs' failure to demonstrate the requisite degree of wanton or reckless disregard. *Id.* at 203, 549 P.2d at 175; *see* Nienstedt v. Wetzel, 133 Ariz. 348, 357, 651 P.2d 876, 885 (1982)("where the conduct of the wrongdoer is wanton, reckless or shows spite or ill will"); Currie v. Dooley, 132 Ariz. 584, 589, 647 P.2d 1182, 1187 (1982) (where the defendant's conduct "is wanton,

attempted to amalgamate all of the various characterizations of the reckless standard into one sentence. Tennessee courts will allow punitive damages

> in cases involving fraud, malice, gross negligence or oppression, . . . or where a wrongful act is done with a bad motive or so recklessly as to imply a disregard of social obligation, . . . or where there is such willful misconduct or entire want of care as to raise a presumption of conscious indifference to consequences.[98]

The standards for measuring reckless or wanton conduct are confusing and devoid of any effective definition. Scholars universally have acknowledged the absence of any meaningful characterization.[99] Jurors motivated by the noble desire to render a fair verdict simply cannot fathom the intricacies in meaning and subtle connotations that characterize the different standards for measur-

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reckless or shows spite or ill will").

98. Richardson v. Gihalski, 625 S.W.2d 715, 717 (Tenn. Ct. App. 1979)(quoting Inland Container Corp. v. March, 529 S.W.2d 43, 45 (Tenn. 1975)). A similar amalgamated standard prevails in Montana. In the recent case of Kuiper v. Goodyear Tire & Rubber Co., 673 P.2d 1208 (Montana 1983), relying on Graham v. Clarks Fork Nat'l Bank, 631 P.2d 718 (Montana 1981), the court defined the wrongful act as "characterized by some such circumstances of aggravation, as willfulness, wantonness, malice, oppression, brutality, insult, recklessness, gross negligence, or gross fraud on the part of the defendant." 673 P.2d at 1213-14.

99. See *supra* note 78, for Dean Prosser's and Professor McCormick's standards for justifying the imposition of punitive damages. Some commentators have elected to divide antisocial conduct into two categories: (1) that conduct which indicates that the defendant desired to cause the harm that the plaintiff sustained, or at least believed that the harm was substantially certain to follow from the conduct; and (2) situations in which the defendant knew, or should have had reason to know, not only that his conduct created an unreasonable risk of harm, but also that a strong probability—although not a substantial certainty—existed that the harm would result but, nevertheless, he proceeded with his conduct in reckless or conscious disregard of the consequences. J. GHIARDI & J. KIRCHER, *supra* note 9, § 5.01 at 8-9. These categories, however, appear to be the equivalent of the intentional and reckless or wanton categories. This characterization provides little illumination and even less meaningful guidance in applying the standard. This strained effort to characterize conduct warranting punitive damages merely dramatizes the total unsuitability of the punitive damage concept in the arena of civil torts reparations.

Unquestionably, there exists an inherent and unintelligible confusion in this area of the law. One commentator defined the recklessness category as conduct that does not suggest that the actor desired to hurt anyone and in which the actor's means of achieving his objective, rather than the objective itself, is scrutinized. This commentator emphasized the subtle differences in connotation of such terms as "conscious indifference,""reckless disregard," "recklessness," and "wantonness." *See* Ellis, *supra* note 10, at 35.

Other commentators simply have labeled the basic types of conduct that warrant the imposition of punitive damages and have failed to analyze the standards by which such labeled conduct can be judged. *See, e.g.*, Duffy, *supra* note 9, at 7 (majority of jurisdictions allow punitive damages if the defendant's actions were wanton, malicious, or oppressive)(citing Great Atl. & Pac. Tea Co., v. Smith, 218 Ky. 583, 136 S.W.2d 759 (1940) and 22 AM. JUR. 2D *Damages* § 236 (1965)); Special Project, *supra* note 2, at 695 (most states require that the defendant act with gross negligence, willfulness, or wantonness).

ing reckless or wanton conduct.[100] Because of the absence of any understandable standards of measurement and the inevitably inconsistent interpretations by juries, every defendant increasingly is subject to the vagaries of individual jurisdictions and an uninformed jury.

3. Standard of Negligent Conduct

Most courts refuse to impose punitive damages for "negligent" conduct.[101] Some states purport, however, to recognize a distinction between mere negligence and gross negligence, and they invariably authorize punitive damages only for the latter.[102] At least one court has held that gross negligence, in and of itself, is not sufficient to support an award of punitive damages.[103]

B. The Corporate Defendant and Punitive Damages

The doctrine of vicarious liability provides a further avenue for courts to impose punitive damages on parties other than the actual wrongdoer.[104] A large number of jurisdictions adhere to the *respondeat superior* rule that an employer is subject to punitive

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100. As one commentator has observed, jury instructions on the standards for assessing punitive damages are unilluminating and, although judges usually tell the jurors that they can award punitive damages if the defendant acted with maliciousness, willfulness, wantonness, or in reckless disregard of the plaintiff's rights, most courts provide little if any meaningful guidelines. Ellis, *supra* note 10, at 38. A dramatic example of judicial ratification of the application of punitive damages despite judicial acknowledgement of the complete lack of any guiding standards for the jury is found in a recent Montana case. *See* First Bank (N.A.) - Billings v. TransAmerica Ins. Co., 679 P.2d 1217, 1222 (Mont. 1984).

101. W. PROSSER, *supra* noto 34, § 2, at 10; Ellis, *supra* note 10, at 36.

102. W. PROSSER, *supra* note 34, § 2, at 10; Ellis, *supra* note 10, at 36-37 (but the definition of gross negligence is unclear); *see* Maxey v. Freightliner Corp., 665 F.2d 1367 (5th Cir. 1982) (en banc); *Ex parte* Smith, 412 So. 2d 1222, 1223 (Ala. 1982); Stinson v. Feminist Women's Health Center, Inc., 416 So. 2d 1183, 1185 (Fla. Dist. Ct. App. 1982); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 186, 384, N.E.2d 353, 359 (1978); Hibschman Pontiac, Inc. v. Batchelor, 266 Ind. 310, 314, 362 N.E.2d 845, 847 (1977); Sebastian v. Wood, 246 Iowa 94, 66 N.W.2d 841 (1954); Newton v. Hornblower, Inc., 224 Kan. 506, 524-25, 582 P.2d 1136, 1150 (1978); Foss v. Maine Turnpike Auth., 309 A.2d 339, 345 (Me. 1973); Seals v. St. Regis Paper Co., 236 So. 2d 388, 392 (Miss. 1970); Burk Royalty Co. v. Walls, 616 S.W.2d 911 (Tex. 1981); Texas Pac. Coal & Oil Co. v. Robertson, 125 Tex. 4, 79 S.W.2d 830 (1935).

103. *See* Wolf v. Nordstrom, Inc., 291 Ore. 828, 637 P.2d 1280 (1981); Chamberlain v. Jim Fisher Motors, Inc., 282 Ore. 229, 578 P.2d 1225 (1978).

104. W. PROSSER, *supra* note 34, § 2, at 12. The imposition of punitive damages based on a theory of vicarious liability is probably the most controversial use of the doctrine. *Id.* The incongruous nature of vicarious punitive damages clearly is highlighted in the case of Martin v. Johns-Manville Corp., 469 A.2d 655 (Pa. Super. 1983), in which the court held that punitive damages are recoverable against a successor corporation for the vicarious liability of its predecessor even though the successor corporation was not responsible for the alleged defective product marketed by its predecessor.

damages when an employee, while operating within the scope of his employment, commits tortious acts that further the employer's interests. The imposition of punitive damages vicariously on another is incongruous with the objective of deterrence. Punishing the employer or corporation for the acts of the servant simply metes out punishment based not on opprobrious conduct but on the mere legal relationship between the offending individual and his employer. A number of other jurisdictions, however, adopt the more conservative "complicity rule."[105] The complicity rule limits the imposition of vicarious liability for punitive damages to situations in which a managerial agent of the employer either commits the egregious act,[106] specifically authorizes the act,[107] or ratifies the

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105. The *Restatement (Second) of Torts* contains this formulation of the complicity rule:

> Punitive damages can properly by awarded against a master or other principal because of an act by an agent if, but only if, (a) the principal authorized the doing and the manner of the act, or (b) the agent was unfit and the principal was reckless in employing him, or (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or (d) the principal or a managerial agent of the principal ratified or approved the act.

RESTATEMENT (SECOND) OF TORTS § 909 (1979). The *Restatement (Second) of Agency* adopts this rule verbatim. RESTATEMENT (SECOND) OF AGENCY § 217C (1958). This rule represents the conservative view, and a number of jurisdictions either have adopted it expressly, adopted it without mentioning it, or adopted parts of it. *See, e.g.*, Martin v. Texaco, Inc., 726 F.2d. 207 (5th Cir. 1984) (applying Texas law); Briner v. Hystop, 337 N.W.2d 858 (Iowa 1983). Dean Prosser has suggested that the majority of the jurisdictions have adopted the more liberal *respondeat superior* rule. W. PROSSER, *supra* note 34, § 2, at 12. It has been observed, however, that Dean Prosser cites an equal number of authorities for the *respondeat superior* and complicity rules. Ellis, *supra* note 10, at 63 n.266. Professor Ellis has asserted that half of the states follow each rule. *Id.* at 63. Professor Ellis does recognize that "Prosser's misleading statement may be on its way to becoming a self-fulfilling prophecy." *Id.* at 63 n.266.

106. The drafters of the *Restatement (Second) of Torts* justify this liability because it "serves as a deterrent to the employment of unfit persons for important positions." RESTATEMENT (SECOND) OF TORTS § 909(c) comment b, at 468 (1979). The *Restatement* provides no clear definition of who constitutes a managerial agent. Jurisdictions that have adopted the complicity rule include the District of Columbia, Texas, New York, California, and Kansas. *See* Jordan v. Medley, 711 F.2d 211 (D.C. App. 1983) (landlord's passive participation while his son brandished a gun at tenants could coustitute ratification of the employee's acts); Egan v. Mutual of Omaha Ins. Co., 63 Cal. App. 3d 659, 133 Cal. Rptr. 899 (1976)(claims adjuster held to be managerial agent despite title of his position); Kline v. Multi-Media Cablevision, Inc., 233 Kan. 988, 666 P.2d 711 (1983)(punitive damages not allowed for mere employee gross negligence in removing a manhole cover and then failing to erect a protective barrier); Gill v. Montgomery Ward & Co., 284 A.D. 36, 129 N.Y.S.2d 288 (1954)(head of "protective department" of defendant held to be managerial agent of defendant in action for false imprisonment); Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627 (Tex. 1967)(punitive damages allowed when parties stipulated that offender was the "manager" of the club).

107. *See* RESTATEMENT (SECOND) OF TORTS § 909(a)(1979).

act[108] or when an unfit employee recklessly hired by the employer commits the act.[109] At least under the complicity rule, the employer or corporation has undertaken an affirmative, conscious act in hiring an unfit employee or authorizing the egregious act of the employee.

Courts also impose punitive damages on corporations under the recently formulated concept of strict tort liability.[110] A recent opinion by the United States Court of Appeals for the Tenth Circuit demonstrates the extent to which courts have expanded the award of punitive damages in strict liability situations. In *Saupitty v. Yazoo Manufacturing Co.*[111] the court affirmed awards of $560,000 in compensatory damages and $440,000 in punitive damages when the plaintiff's left hand and arm were injured by a riding lawnmower the defendant had manufactured. The court sanctioned the punitive award even though the plaintiff substantially had altered the product by removing both the belt guard and the brakes of the mower.[112] A vigorous dissent asserted that under applicable strict tort liability doctrine either of these material alterations to the mower should have constituted grounds for a directed verdict for the defendant.[113] The dissent also emphasized that even if the court elected to impose strict liability under such meager evidence, no evidence existed in the record to justify an award of

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108. *See id.* § 909(d).

109. *See id.* § 909(b).

110. *See, e.g.*, Maxey v. Freightliner Corp., 665 F.2d 1367 (5th Cir. 1982)(jury awarded $150,000 compensatory and $10,000,000 punitive damages); Sturm, Ruger & Co. v. Day, 594 P.2d 38 (Alaska 1979), *on rehearing*, 615 P.2d 621 (Alaska 1980)(a jury awarded in excess of $2,000,000 in punitive damages under strict tort liability cause of action involving defective gun); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981)(jury awarded $125,000,000 in punitive damages, which Court of Appeals reduced to $3,000,000, in Pinto rear-end case); Leichtamer v. American Motors Corp., 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981)(court allowed actual and punitive damages against manufacturer in jeep roll-over case); Rawlings Sporting Goods Co. v. Daniels, 619 S.W.2d 435 (Tex. Civ. App. 1981) (affirming imposition of $750,000 in punitive damages).

111. 726 F.2d 657 (10th Cir. 1984).

112. The court acknowledged that Oklahoma courts would refuse to hold a manufacturer liable if an unforeseeable subsequent modification caused the plaintiff's injuries. *Id.* at 659 (citing Texas Metal Fabricating Co. v. Northern Gas Prods. Corp., 404 F.2d 921 (10th Cir. 1968)). The court, however, chose to ignore factual evidence that the brakes could have averted the accident, and that the plaintiff's injuries resulted from his fingers being caught between the exposed belt and its pulley rather than from the mower blades. *Saupitty*, 726 F.2d at 660-61 (Seth, C.J., dissenting). Instead, the majority stated that "construing all of the evidence and the inferences therefrom in the light most favorable to the plaintiff, we cannot conclude that the removal of either the mower's brakes or its belt guard constituted a superseding, intervening cause of plaintiff's injury as a matter of law." *Id.* at 659-60.

113. *Saupitty*, 726 F.2d at 660 (Setb, C.J., dissenting).

punitive damages.[114]

The imposition of punitive damages in the strict liability context also has been assailed on the grounds that punitive damages traditionally are awarded in tort actions in which the compensatory damages are premised on *conduct*, while compensatory damages in strict tort liability actions are based solely on the *condition* of the product.[115] Strict tort liability rests entirely on the socioeconomic policy of risk distribution. Following this rationale, the product supplier is essentially blameless. Liability is visited upon the product supplier on the theoretical basis that the supplier is the entity best able to absorb the loss suffered by a product user simply by distributing the added cost to the marketing public and by purchasing additional insurance. Consequently, courts in strict liability cases award compensatory damages because of the condition of the product, not the conduct of the product supplier. Punitive damages in a strict tort liability context, therefore, would seem to be plainly illogical because neither punishment nor deterrence of conduct is at issue.[116]

An equally compelling argument against punitive damages in a strict liability context is that such awards in product liability cases produce economically and socially undesirable results.[117] The gravest danger in products liability is that an aggregate of punitive awards can bankrupt or financially cripple a business.[118] One commentator has observed that the recent trend toward more substantial punitive damage verdicts has reached the point at which the

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114. *Id.* at 661 (Seth, C.J., dissenting).

115. Piper Aircraft Corp. v. Coulter, 426 So. 2d 1108, 1109 (Fla. Dist. Ct. App. 1983); Phipps v. General Motors Corp., 278 Md. 337, 343, 363 A.2d 955, 958 (1976); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 265-66, 294 N.W.2d 437, 441 (1980).

116. *See* Sales, *supra* note 2, at 380, 389-90. Several courts have rejected the application of punitive damages in strict tort liability actions. Gold v. Johns-Manville Sales Corp., 553 F. Supp. 482 (D.N.J. 1982); Butcher v. Robertshaw Controls Co., 550 F. Supp. 692 (D. Md. 1981); Walbrun v. Berkel, Inc., 433 F. Supp. 384 (E.D. Wis. 1976).

117. The defendant unsuccessfully argued this in Wangen v. Ford Motor Co., 97 Wis. 2d 260, 288, 294 N.W.2d 437, 453. Another argument against punitive damages in this area holds that manufacturers do not demonstrate the requisite degree of malice or quasi-criminal intent. *See, e.g.*, Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981); Leichtamer v. American Motors Co., 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981).

118. K. REDDEN, *supra* note 1, at 118-19 (discussing excessive awards that cripple a corporate defendant); Special Project, *supra* note 2, at 806-45 (discussing recent bankruptcies). This possibility and other compelling concerns are delineated clearly by the dissent of Justice Rovira in Palmer v. A. H. Robins Co., 684 P.2d 187 (Colo. 1984). The *Palmer* majority rather glibly glosses over the siguificant issues that present philosophical impediments to the imposition of punitive damages in product liability actions. *Id.* at 228 (Rovira, J., dissenting).

question must be posed whether the goal of punitive damages is "punishment of the defendant or actually his annihilation."[119] Courts, however, increasingly ignore or only superficially address these arguments in their affirmation of punitive damage awards against manufacturers in a strict tort liability context.[120] The situation in strict tort liability is exacerbated by the fact that liability may be predicated on an alleged defective design or a defective warning on the product. Products are marketed in certain design lines and literally millions of identically designed or marketed products may exist. If punitive damages may be awarded repeatedly for the same design or marketing deficiency, then indeed, the punitive damage doctrine may be utilized to punish a product supplier to the point of economic destruction.[121] Several recent deci-

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119. K. REDDEN, *supra* note 1, at 714.

120. *See* Acosta v. Honda Motor Co., 717 F.2d 828 (3d Cir. 1983); Moran v. Johns-Manville Sales Corp., 691 F.2d 811 (6th Cir. 1982); Campus Sweater & Sportswear v. M.B. Kahn Constr., 515 F. Supp. 64 (D.S.C. 1979), *aff'd*, 644 F.2d 877 (4th Cir. 1981); Sturm, Ryer & Co. v. Day, 594 P.2d 38 (Alaska 1979), *cert. denied*, 454 U.S. 894 (1981); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981); Clorohen Chem. Corp. v. Comegys, 464 A.2d 887 (Del. Super. Ct. 1983); Piper Aircraft Corp. v. Coulter, 426 So. 2d 1108 (Fla. Dist. Ct. App. 1983); Froud v. Celotex Corp., 107 Ill. App. 3d 654, 437 N.E.2d 910 (1982) *rev'd on other grounds*, 98 Ill. 2d 1324, 456 N.E.2d 131 (1983); Grye v. Dayton-Hudson Corp., 297 N.W.2d 727 (Minn. 1980), *cert. denied*, 449 U.S. 921 (1980); Rinker v. Ford Motor Co., 567 S.W.2d 655 (Mo. Ct. App. 1978); Leichtamer v. American Motorist Corp., 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981); Thiry v. Armstrong World Indus., 661 P.2d 515 (Okla. 1983); Rawlings Sporting Goods Co. v Daniels, 619 S.W.2d 435 (Tex. Civ. App. 1981); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437 (1980); Some courts have acknowledged the obvious—that punitive damages are incompatahle with the theory of strict tort liability. Gold v. Johns-Manville Sales Corp., 553 F. Supp. 482 (D. N.J. 1982); Butcher v. Robershaw Controls Co., 550 F. Supp. 692, 705 (D. Md. 1981).

121. Some courts eschew this concern based on tbe absence of confirmed empirical data and conclude, therefore, that tbe potential for serious harm is of no moment. *See* Acosta v. Honda Motor Co., 717 F.2d 828 (3d Cir. 1983). The court did note, however, tbat "[i]t is, of course, possible that a sufficiently egregious error as to one product could result in the demise of its manufacturer." *Id.* at 838. In Moran v. Johns-Manville Sales Corp., 691 F.2d 811, 817 (6th Cir. 1982), the court simply suggested that if punitive damages pose a real threat, then the federal or state legislature should provide the relief. In Campus Sweater & Sportwear Co. v. M. B. Kahn Constr. Co., 515 F. Supp. 64, 107 (D.S.C. 1979), *aff'd*, 644 F.2d 877 (4th Cir. 1981), the threat of multiple punitive awards purportedly "forces a prudent manufacturer intent on maximizing profits to hesitate before marketing a known defective or an untested product." Most recently, in Fischer v. Johns-Manville Corp., 193 N.J. Super. 113, 472 A.2d 577, (1984), the court failed the business commmity of this coimtry and strongly endorsed the precept tbat "it is only tbe threat of punitive damages which ultimately can induce tbese entrepreneurs and otbers to act with a reasonable *modicum* of responsibility." *Id.* at 125, 472 A.2d at 584 (emphasis added). These attitudes strongly suggest the urgent necessity for the more thougbtful, rational, and dispassionate legislative process to address this significant and continually escalatmg problem in tbe tort reparation system. *See* Sturm, Ruger & Co. v. Day, 594 P.2d 38, 47 (Alaska 1979); Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727, 741 (Minn.) *cert. denied*, 449 U.S. 921 (1980); State

sions, unmindful of the concern for the continued economic viability of product suppliers, have acknowledged that the bankruptcy or other form of annihilation of a product supplier by the repeated imposition of punitive damage awards could be justified and judicially sanctioned.[122]

The Fifth Circuit recently recognized the serious problem of supplier annihilation in *Jackson v. Johns-Manville Sales Corp.*[123] and elected to reject the punitive damages concept in the area of industry-wide asbestos related litigation. The Fifth Circuit recognized that economic loss distribution represented the primary objective of strict tort liability[124] and noted that one court had suggested that "the demise of the manufacturer in such circumstances is not a 'necessarily untenable' result."[125] The Fifth Circuit, however, refused to accept this draconian result and stated that "[a]t the point where awards of punitive damages destroy the viability of the enterprises necessary to accomplish loss distribution, the remedy of punitive damages becomes incompatible with the strict liability cause of action."[126] The court's major rationale was the

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ex rel. Young v. Crookham, 290 Or. 61, 618 P.2d 1268 (1980); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 285-86, 294 N.W.2d 437, 451 (1980). Unfortunately, punitive damages also are awarded for conduct less egregious than marketing a known defective product. *See, e.g.*, Worderson v. Ortho Pharmaceutical Corp., 681 P.2d 1038 (Kan. 1984); Willis v. Floyd Brace Co. [1983-1984 Transfer Binder] PROD. LIAB. REP. (CCH) ¶ 9862 (S.C. Nov. 14, 1983).

122. For example in Acosta v. Honda Motor Co., 717 F.2d 828, 838 (3d Cir. 1983), the Third Circuit observed that, "[i]t is, of course, possible that 'a sufficiently egregious error as to one product' could result in the demise of its manufacturer, but such a result is not inevitable." In a supporting footnote, the court further observed, "[N]or is such a result necessarily untenable." More recently, in Martin v. Johns-Manville Corp., 469 A.2d 655, 665 (Pa. Super. 1983), *appeal filed*, Apr. 2, 1984, the court, in an equally off-handed manner, commented that, "if the defendant's conduct was so reckless and injured so many people, that the effect of the damages awarded against it is bankruptey, we are hard pressed to understand why that defendant should not be required to live with the consequences of its actions." A similar view has been expressed by the Oregon court in State *ex. rel.* Young v. Crookham, 290 Or. 61, 618 P.2d 1268 (1980). In Fischer v. Johns-Manville Corp., 193 N.J. Super. 113, 472 A.2d 577, (1984), the state court echoed, in less than moderate tones, the importance of exacting a pound of flesh from reckless defendants in its statement demanding "the ultimate protection which punitive damages afford." *Id.* at 127, 472 A.2d at 585. The courts likewise have rejected application of the double jeopardy principle to foreclose repeated punitive damage awards for identical product design defects. *See* Hansen v. Johns-Manville Corp., 734 F.2d 1036 (5th Cir. 1984).

123. 727 F.2d 506 (5th Cir. 1984) (rehearing en banc granted).

124. *Id.* at 525.

125. *Id.* at 528 (citing Acosta v. Honda Motor Co., 717 F.2d at 838, n.15).

126. Jackson v. Johns-Manville Sales Corp., 727 F.2d 506, 526 (5th Cir.) *reh'g en banc granted*, ____ F.2d ____ (5th Cir. 1984). The court stated:

> We do not reach the issue whether Mississippi would find punitive damages inherently incompatible with the theory of strict liability in all cases. Our holding today is limited to the extraordinary circumstances of this litigation, where the allowance of

continued financial viability of manufacturers, which would insure compensation for the projected future thousands of asbestosis claimants. The judges expressed a reluctance to provide a windfall to the current plaintiffs at the expense of future claimants who conceivably would be foreclosed from recovering even compensatory damages if repeated punitive awards continue to bankrupt manufacturers. Of course, the court did consider, in rejecting the punitive damages award, that the continued viability of product suppliers is the very essence of society's continued economic existence.

The Fifth Circuit's decision in *Jackson* is an implicit recognition of a problem that must concern the courts: should the judiciary determine whether businesses which constitute the underpinning of this society's economy continue to exist and remain viable as the producer of products necessary to service society and as the employer of the millions of individuals composing society? The avowed purpose of the punitive damage doctrine never has been and never should be the economic destruction of business entities. If such decisions should be imposed, they should emanate from a duly elected and representative legislative body. The destruction of businesses, the loss of thousands of jobs, the repeated trauma to the American economy, and the significantly increased product costs to consumers should not be the objective of any system. The current antibusiness attitude reflected in the multitude of recent decisions is troubling. Such judicially mandated, economically adverse consequences exceed society's tolerance of judicial activism, and punitive sentences of death for corporations should no longer

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punitive damages carries the manifest portent of undoing the strict liability remedy for present and prospective claimants and where the purposes of punitive damages are otherwise served.

We cannot predict, of course, whether other jurisdictions would subscribe to our approach in this litigation. From that perspective, our efforts to preserve the viability of strict liability compensation may be infected with an element of futility. The alternative, however, appears to be no solution at all, but mere resignation to defeat of the purposes of both strict liability and punitive damages. A fully satisfactory solution would require properly crafted federal legislation. Since that has not come to pass, we must proceed with fundamental justice as our guide.

The disallowance of punitive damages in this situation expresses this court's central concern for the continued viability of the strict liability cause of action for present and future claimants. Where strict liability for compensatory damages imposes adequate punishment as it does in this type of case, we decline to cleave to a judge-made remedy of punitive damages that would both fail in its own purpose and obstruct the broader objectives of the underlying cause of action which the plaintiff has chosen to pursue.

Id. at 529-30.

be permitted under the guise of a civil tort compensation system.

C. Other Factors Affecting Punitive Damage Awards

Most jurisdictions adhere to the rule that actual or compensatory damages are a prerequisite to an award of punitive damages.[127] The amount of actual or compensatory damages required are not specifically defined and, generally, nominal actual damages suffice.[128]

Perhaps the two factors that most significantly affect the amount of punitive damages awarded are the ratio rule and evidence of the defendant's financial condition. The ratio rule is a mechanism that allows an appellate court either to overturn a punitive damage award or to order remittitur if the court concludes that a reasonable relation does not exist between the compensatory and punitive damages awarded the plaintiff.[129] Most jurisdictions mandate that punitive awards bear a "reasonable relationship" to the amount of compensatory damages,[130] but no court ever has es-

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127. *See, e.g.*, Williams v. Carr, 263 Ark. 326, 565 S.W.2d 400 (1978); American Motorcycle Inst., Inc. v. Mitchell, 380 So. 2d 452 (Fla. Dist. Ct. App. 1980); Pringle Tax Servs., Inc. v. Knoblauch, 282 N.W.2d 151 (Iowa 1979); Traylor v. Wachter, 227 Kan. 221, 607 P.2d 1094 (1980); Robison v. Katz, 94 N.M. 314, 610 P.2d 201 (1980); Fort Worth Elevators Co. v. Russell, 123 Tex. 128, 70 S.W.2d 397 (1934); Cates v. Barb, 650 P.2d 1159 (Wyo. 1982).

128. W. PROSSER, *supra* note 34, § 2, at 13-14; *see, e.g.*, Nelson v. Hartman, 648 P.2d 1176, 1178 (Mont. 1982) (no error in failing to admit defendant's driving record for punitive damages purposes because no punitive damages can exist without actual liability entitling the plaintiff to actual damages); Fort Worth Elevators Co. v. Russell, 123 Tex. 128, 149-50, 70 S.W. 2d 397, 409 (1934) (proof of actual damage prerequisite to punitive award); *see generally* Duffy, *supra* note 9, at 8; Ellis, *supra* note 10, at 54 (citing COMMITTEE ON STANDARD JURY INSTRUCTIONS, CIVIL, OF THE SUPERIOR COURT OF LOS ANGELES, CALIFORNIA JURY INSTRUCTIONS: CIVIL § 14.71 (Supp. 1981)); Sales, *supra* note 2, at 365; Note, 70 HARV. L. REV. 517, 528-29 (1957).

129. K. REDDEN, *supra* note 1, at 63.

130. Ellis, *supra* note 10, at 58 (citing D. DOBBS, HANDBOOK OF THE LAW OF REMEDIES § 3.9, at 210-11 (1973) and W. PROSSER, *supra* note 34, § 2, at 14)); Sales, *supra* note 2, at 366; Special Project, *supra* note 2, at 696. Some states, however, require no relationship whatever between punitive and compensatory awards. *See, e.g.*, Pinckard v. Dunnavant, 206 So. 2d 340, 344 (Ala. 1968) (exemplary award need not be mathematically related to compensatory award); Ray Dodge, Inc. v. Moore, 251 Ark. 1036, 1046, 479 S.W.2d 518, 524 (1972) (factors other than ratio of punitive damages and actual damages to be considered); Lassitter v. International Union of Operating Eng'rs, 349 So. 2d 622, 626 (Fla. 1976) (punitive damages not required to be proportionate to compensatory damages); Southwestern Inv. Co. v. Neeley, 452 S.W.2d 705 (Tex. 1970) (punitive damages need only be reasonably proportional to actual damages); *see generally* Leimgruber v. Claridge Assocs., 73 N.J. 450, 457-59, 375 A.2d 652, 656-57 (1977) (discussing split among jurisdictions regarding "ratio" rule). Some courts have stated that an award which is extremely disproportional indicates that the jury acted with passion or prejudice. Dearmore v. Gold, 400 F.2d 887, 888 (5th Cir. 1968) (a ratio of 11 to 1 was too disproportional); Alley v. Gubser Dev. Co., 569 F. Supp. 36, 40 (D. Colo. 1983) (a ratio of 17 to 1 was too disproportional). In contrast, in Moore v.

tablished a fixed or precise ratio.[131] The rule, consequently, is anything but precise, and as one commentator has noted, its singular value is to serve as a "rough device to allow a court to pare down an excessive award of punitive damages."[132] In an effort to instill some element of certainty into the ratio rule, some courts have suggested that fact finders may consider certain factors in determining the issue of excessiveness of punitive awards: (1) the nature of the wrong; (2) the character of the conduct at issue; (3) the degree of the wrongdoer's culpability; (4) the situation and sensibilities of the concerned parties; and (5) the extent to which the conduct offends the public sense of justice and propriety.[133] Despite

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American United Life Ins. Co., 150 Cal. App. 3d 610, 636, 197 Cal. Rptr. 878, 894-95 (1984), a ratio of 83 to 1 was approved (citing Wetherbee v. United Ins. Co. of Am., 18 Cal. App. 3d 266, 95 Cal. Rptr. 678 (1971) (approving a punitive award ratio of 200 to 1)); *accord* Kerr v. Fruit Commodity Corp. of Boston, 735 F.2d 281 (8th Cir. 1984) (citing Price v. Ford Motor Credit Co., 530 S.W.2d 249 (Mo. App. 1975) (that Missouri has approved a 40 to 1 ratio)); Robison v. Lescrenier, 721 F.2d 1101, 1113 (7th Cir. 1983) (applying Wisconsin law); Palmer v. A.H. Robins Co., No. 81SA149 (Colo. June 4, 1984) (en banc) (approving a ratio of 10.3 to 1 when the basic compensatory damage award was $600,000, resulting in a punitive damage award of $6,200,000).

131. Wetherbee v. United Ins. Co. of Am., 18 Cal. App. 3d 266, 95 Cal. Rptr. 678 (1971); K. REDDEN, *supra* note 1, at 63-64 (citing Malcolm v. Little, 295 A.2d 711 (Del. 1972)). The imprecise nature of the rule is exemplified by the charge of the trial court that was approved on appeal by the Fifth Circuit in Martin v. Texaco, Inc., 726 F.2d 207 (5th Cir. 1984). The trial court, in instructing the jury on the standard for measuring punitive awards under Texas law, stated:

> The appropriate ratio will vary from case to case, depending on such factors as the character of the wrongful conduct, the extent to which the defendant is involved in the conduct and the extent to which that conduct offends a public sense of justice and propriety. A very recent court decision, last week as a matter of fact, listed five relevant factors for reviewing a jury's award of punitive damages, as follows: (1) The nature of the wrong; (2) The character of the conduct involved; (3) The degree of culpability of the wrongdoer; (4) The situation and sensibility of the parties; (5) The extent to which defendant's conduct offends a public sense of justice and propriety. Clearly, ladies and gentlemen, this is not an exact science, but is a concept that is very well dealt with by a jury. Now, for your further guidance, I have a few additional instructions. If you find liability in this case, then the decision is solely yours; consider the five guidelines that I gave you and find exemplary damages that you find appropriate in this case.

Id. at 213-14.

132. K. REDDEN, *supra* note 1, at 64.

133. *See* Maxey v. Freightliner Corp., 665 F.2d 1367, 1377-78 (5th Cir. 1982) (Fifth Circuit adopted the factors set forth in Alamo Nat'l Bank v. Kraus 616 S.W.2d 908 (Tex. 1981), but found that the defendant's behavior did not justify an award of $10,000,000 in punitive damages based on a compensatory award of $150,000); *Alamo*, 616 S.W. 2d at 910 (court held that appellate court's review of these factors was not an erroneous standard, and allowed $500,000 in punitive damages and $12,900 in compensatory damages to stand); *see also* Leimgruber v. Claridge Assocs., 73 N.J. 450, 456-61, 375 A.2d 652, 655-58 (1977) (court upheld award of $16,500 in punitive and $1700 in compensatory damages because the awards did not "give rise to the inference of mistake, passion, prejudice, or partiality," "shock the conscience," or "result in a manifest denial of justice"). The *Leimgruber* court

these efforts, one scholar critically noted that "[t]his test is probably more often a rationalization of results than a means of obtaining them. The proper ratio between actual damages is placed at a figure which supports the judge's view of the verdict. . . ."[134] Another commentator has argued for more effective appellate review by asserting that "it is becoming increasingly clear that it is preferable for the court to have the simple right to set aside an award as excessive."[135] To permit punitive damages in the absence of a severely limiting ratio of punitive to actual damages simply invites disaster.

Many jurisdictions authorize the fact finder to consider the defendant's wealth in assessing punitive damages.[136] In these jurisdictions, the wealthier the defendant, the larger the permissible assessment of a punitory award.[137] The rule is premised on the rationale that the function of deterrence will not be served if the defendant can absorb the penalty with little or no discomfort because of existent wealth.[138] One court has sought to justify evidence of a defendant's financial wealth by stating that "what would be 'smart money' to a poor man would not be, and would not serve as a deterrent, to a rich man."[139]

Several significant problems arise when courts allow juries to

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alluded to the following factors: (1) the nature of wrongdoing; (2) the extent of harm; (3) the intent of party committing the act; (4) the wealth of the perpetrator; and (5) any mitigating circumstance that may reduce damages. *Id.* at 456, 375 A.2d at 656-57. The court in Alley v. Gubser Dev. Co., 569 F. Supp. 36, 40 (D. Colo. 1983), articulated a similar standard of analysis. Another variant of this approach is reflected in Cates v. Eddy, 669 P.2d 912, 921 (Wyo. 1983). California predicates an award for punitive damages on a combination of three factors: the nature of defendant's acts; the amount of compensatory damages awarded; and the wealth of the defendant. *See* Professional Seminar Consultants v. Sino Am. Tech. Exch. Council, 727 F.2d 1470, 1473 (9th Cir. 1984) (applying California law); Neal v. Farmer's Ins. Exch., 21 Cal. 3d 910, 582 P.2d 980, 148 Cal. Rptr. 389 (1978); *see also* Comment, *Punitive Damages and the Reasonable Relation Rule: A Study in Frustration of Purpose*, 9 PAC. L.J. 823 (1978).

134. Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1180 (1931).

135. K. REDDEN, *supra* note 1, at 43.

136. *See* K. REDDEN, *supra* note 1, at 61; Ellis, *supra* note 10, at 54; Special Project, *supra* note 2, at 695-96. Three states, Alabama, Kentucky, and Texas, do not allow consideration of the defendant's wealth. Special Project, *supra* note 2, at 696 n.753; *see also* RESTATEMENT (SECOND) OF TORTS § 908 (1979) (trier of fact may consider defendant's wealth in assessing punitive awards).

137. Ellis, *supra* note 10, at 61.

138. Neal v. Farmers Ins. Exch. 21 Cal. 3d 910, 929, 582 P.2d 980, 991, 148 Cal. Rptr. 389, 400 (1978) (award of $740,000 in punitive damages proper when it amounts to less than a week's worth of defendant's net income); Moore v. American United Life Ins. Co., 150 Cal. App. 3d 610, ____, 197 Cal. Rptr. 878, 899 (1984) (amount equal to 3.4 weeks of company's net annual income is appropriate).

139. Hall v. Montgomery Ward & Co., 252 N.W.2d 421, 424 (Iowa 1977).

consider the defendant's wealth. First, ill informed juries generally overreact to the emotion provoking nature of evidence of a defendant's wealth. One commentator observed that:

> It is a good guess that rich men do not fare well before juries, and the more emphasis placed on their riches, the less well they fare. Such evidence may do more harm than good; jurymen may be more interested in divesting vested interests than in attempting to fix penalties which will make for effective working of the admonitory function.[140]

Second, evidence of the defendant's wealth undoubtedly influences juries to award punitive damages in excess of any rational amount.[141] As an unintended consequence, financially poor codefendants are prejudiced unfairly if they are jointly and severally liable for a punitive damages award that the jury has inflated because of the other defendant's wealth.[142] Fortunately, not all jurisdictions adhere to this rationale.[143] Permitting the fact finder to consider evidence of a wrongdoer's wealtb is really nothing more tban a camouflaged mechanism designed to encourage large punitive assessments. In essence, it is a procedural device that promotes the redistribution of wealth in society.

D. Additional Patchwork Applications of the Punitive Damage Concept Among the Various Jurisdictions

Some jurisdictions have imposed certain limitations on the punitive damage doctrine that regrettably often serve to further muddy the water for practitioners and jurors. Some states, under a strict products liability theory, disallow punitive damages for property damage because the interests concerned in actions for property damage do not warrant the extension of this controversial doctrine.[144] Courts do not universally prohibit punitive awards for property damage, however, and such awards have occurred in aggravated circumstances of trespass, conversion, infringement of common law copyright, nuisance, and seizure of property by a secured party.[145]

Many jurisdictions restrict punitive damages by refusing to

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140. Morris, *supra* note 133, at 1191.

141. K. REDDEN, *supra* note 1, at 61-62.

142. *Id.* at 62.

143. *See, e.g.*, Texas Pub. Utils. Corp. v. Edwards, 99 S.W.2d 420, 427 (Tex. Civ. App. 1936) (improper for plaintiff's counsel to argue to jury that it should assess large punitive damages because defendant could afford to pay them).

144. *See, e.g.*, Eisert v. Greenberg Roofing & Sheet Metal Co., 314 N.W.2d 226, 228-29 (Minn. 1982).

145. K. REDDEN, *supra* note 1, at 101-09.

permit such awards for breach of contract.[146] As might be expected, however, other jurisdictions authorize punitive awards for mere contract breaches.[147] In addition, even jurisdictions that generally exclude punitive awards for breaches of contract have formulated exceptions to the general rule. For example, an intentional breach of contract to marry[148] and a breach of contract by carriers or public servants[149] constitute exceptions in some jurisdictions. The basis of these punitive awards, however, usually lies not in the contractural breach itself, but in some tortious element of the defendant's conduct to which the fact finder links the award.[150]

Another area of nonuniform application is the applicability of punitive damages in wrongful death and survival actions. A significant number of jurisdictions prohibit punitive damages in wrongful death actions because these statutory causes of action specifically serve a compensatory purpose.[151] The Seventh Circuit recently dis-

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146. The *Restatement of Contracts* provides that, "Punitive damages are not recoverable for breach of contract." RESTATEMENT OF CONTRACTS § 342 (1932); *see* Note, *supra* note 16, at 531. The author emphasizes, however, that courts will allow punitive damages in many modern torts that are closely related to breach of contract, such as inducing another to breach a contract and wrongful termination of services by a public utility. *Id.*; *see* Royal Typewriter Co. v. Xerographic Supplies Corp., 719 F.2d 1092, 1106 (11th Cir. 1983) (Florida does not allow punitive damages awards for breach of warranty claims under the Uniform Commercial Code); Saval v. BL Ltd., 710 F.2d 1027, 1033 (4th Cir. 1983) (Maryland does not permit punitive damages for contract breaches absent malice); Superior Trucks, Inc. v. Allen, 664 S.W.2d 136 (Tex. Ct. App. 1983) (exemplary damages not allowed for breach of warranty); Ryan Mortgage Investors v. Fleming-Wood, 650 S.W.2d 928, 937 (Tex. Ct. App. 1983) (exemplary damages not permitted for breach of contract).

147. *See, e.g.*, Canada Dry Corp. v. Nehi Beverage Co., 723 F.2d 512, 524 (7th Cir. 1983) (applying Indiana law); Henderson v. United States Fidelity & Guaranty Co., 620 F.2d 530 (5th Cir. 1980) (applying Mississippi law), *cert. denied*, 449 U.S. 1034 (1980); Robison v. Katz, 94 N.M. 314, 610 P.2d 201 (1980).

148. *See, e.g.*, Smith v. Hawkins, 120 Kan. 518, 243 P. 1018 (1926); Baumle v. Verde, 33 Okla. 243, 124 P. 1083 (1912); *see also* K. REDDEN, *supra* note 1, at 41.

149. *See, e.g.*, Birmingham Water Works Co. v. Keiley, 2 Ala. App. 629, 56 So. 838 (1911); Kohler v. Kansas Power & Light Co., 192 Kan. 226, 387 P.2d 149 (1963); Southwestern Gas & Elec. Co. v. Stanley, 45 S.W.2d 671 (Tex. Civ. App. 1931), *aff'd*, 123 Tex. 157, 70 S.W.2d 413 (1934); *see also* K. REDDEN, *supra* note 1, at 41.

150. K. REDDEN, *supra* note 1, at 41; *see* Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change*, 61 MINN. L. REV. 207 (1977). For a discussion of the allowance of punitive damages for tortious breach of contractual duties when a fidiciary duty exists, when an independent tort accompanies the breach of contract, when the defendant's conduct is also fraudulent, and when the defendant failed to deal fairly and in good faith, see K. REDDEN, *supra* note 1, at 52-53.

151. Comment, *Disallowing Punitive Damages for Wrongful Death While Allowing Them for Personal Injury and Property Damage Held To Be a Denial of Equal Protection*, 8 CUM. L. REV. 567, 574-76 (1977). The author indicates that only 18 states allow recovery of punitive damages in wrongful death actions. *Id.* at 574-75. Alabama occupies the unique position of allowing only punitive damages in wrongful death actions. Eich v. Town of Gulf

missed the punitive damages claims in wrongful death actions in several states that arose from a catastrophic airplane crash.[152] The court concluded that it should resolve the conflict of laws questions in the case in favor of federal regulation of airline tort liability, which prohibits punitive damages, because of the interests of passengers, airline corporations, airplane manufacturers, and state and federal governments.[153] Other jurisdictions, nonetheless, hold that punitive damages are appropriate in wrongful death actions.[154]

Contrary to the prohibition of punitive damages in wrongful death actions, many jurisdictions authorize the recovery of punitive damages in survival actions.[155] Numerous jurisdictions, however, refuse to permit punitive damage claims against the estates of deceased wrongdoers[156] because the punishment and deterrence rationales no longer are viable once the wrongdoer is deceased.[157]

Shores, 293 Ala. 95, 300 So. 2d 354 (1974); *see also* Rosenfeld v. Isaacs, 79 A.D.2d 630, 631, 433 N.Y.S.2d 623, 624 (1980).

152. *In re* Air Crash Disaster Near Chicago, 644 F.2d 594 (7th Cir. *cert. denied,* 454 U.S. 878 (1981).

153. *Id.* at 632-33; *accord, In re* Paris Air Crash, 622 F.2d 1315 (9th Cir.), *cert. denied,* 449 U.S. 976 (1980); Eisert v. Greenberg Roofing & Sheet Metal Co., 314 N.W.2d 226 (Minn. 1982).

154. *See* Boies v. Cole, 99 Ariz. 198, 407 P.2d 917 (1965); Gavica v. Hanson, 101 Idaho 58, 608 P.2d 861 (1980); Heil Co. v. Grant, 534 S.W.2d 916, 926 (Tex. Civ. App. 1976); Behrens v. Raleigh Hills Hosp. Inc., 675 P.2d 1179 (Utah 1983).

155. *See, e.g.,* Tarasoff v. Regents of the University of California, 17 Cal. 3d 425, 450, 551 P.2d 334, 353, 131 Cal. Rptr. 14, 33, (1976) (allowance of punitive damages in tort actions generally is applicable only to survival actions and not to wrongful death actions); ILL. REV. STAT. ch. 111 ⅔, § 77 (1966 & Supp. 1984-1985) (permits punitive damages in survival actions under the express provisions of the Public Utilities Act).

156. *See, e.g.,* Barnes v. Smith, 305 F.2d 226 (10th Cir. 1962); Sullivan v. Associated Billposters and Distribs. of United States and Canada, 6 F.2d 1000 (2nd Cir. 1925); Sanchez v. Marguez, 457 F. Supp. 359 (D. Colo. 1978) (statutory prohibition); Paul v. Milburn, 275 F. Supp. 105 (W.D. Tenn. 1967); Ford Motor Credit Co. v. Hill, 245 F. Supp. 796 (W.D. Mo. 1965); Amos v. Prom, 115 F. Supp. 127 (N.D. Iowa 1953); Holm Timber Indus. v. Plywood corp. of Am., 242 Cal. App. 2d 492, 51 Cal. Rptr. 597 (1966); Simone v. McKee, 142 Cal. App. 2d 307, 298 P.2d 667 (1956); Rowen v. LeMars Mut. Ins. Co., 282 N.W.2d 639 (Iowa 1979); Wolder v. Rahm, 249 N.W.2d 630 (Iowa 1977); Stevenson v. Stoufer, 237 Iowa 513, 21 N.W.2d 287 (1946); Thompson v. Estate of Petroff, 319 N.W.2d 400 (Minn. 1982); Mervis v. Wolverton, 211 So. 2d 847 (Miss. 1968) (statutory prohibition); Summa Corp. v. Greenspun, 96 Nev. 247, 607 P.2d 569 (1980) *modified,* 98 Nev. Adv. Ops. 157, 655 P.2d 513 (1982); Allen v. Anderson, 93 Nev. 204, 562 P.2d 487 (1977); Gordon v. Nathan, 43 A.D.2d 917, 352 N.Y.S.2d 464 (1974) (statutory prohibition); Thorpe v. Wilson, 58 N.C. App. 292, 293 S.E.2d 675 (1982); McAdams v. Blue, 3 N.C. App. 169, 164 S.E.2d 490 (1968); Morriss v. Barton, 200 Okla. 4, 190 P.2d 451 (1947); Pearson v. Galvin, 253 Or. 331, 454 P.2d 638 (1969); Ashcraft v. Saunders, 251 Or. 139, 444 P.2d 924 (1968); Hayes v. Gill, 216 Tenn. 39, 390 S.W.2d 213 (1965); Dalton v. Johnson, 204 Va. 102, 129 S.E.2d 647 (1963).

157. Allen v. Anderson, 562 P.2d at 489-90. The *Restatement (Second) of Torts* also adopts this view:

> Under statutes providing for the survival or revival of tort actions, the damages for

Florida, Illinois, West Virginia, and Texas, however, have adopted a contrary rule.[158] Permitting a punitive award in the case of a deceased defendant truly exposes the fallacy of the punitive damage doctrine.

A particularly controversial area of punitive damage is successor liability. Under the successor liability theory, "a corporation acquiring all or substantially all of another corporation's assets, may 'inherit' the tort liability of the selling corporation."[159] Some courts have prohibited recovery of punitive damages from successor corporations.[160] Other courts, concerned with the ease with which succeeding legal entities can merge or consolidate, have authorized the imposition of punitive damages against successor cor-

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a tort not involving death for which the tortfeasor is responsible are not affected by the death of either party before or during trial, except that . . . the death of the tortfeasor terminates liability for punitive damages.

RESTATEMENT (SECOND) OF TORTS § 926(b)(1979).

158. Johnson v. Rinesmith, 238 So.2d 659 (Fla. App. 1969); National Bank of Bloomington v. Norfolk & Western Railway Co., 73 Ill. App. 2d 160, 383 N.E.2d 919 (1978); Perry v. Melton, 299 S.E.2d 8 (W. Va. 1982); Hofer v. Lavender, No. C-2552 (Tex. July 11, 1984).

159. Special Project, *supra* note 2, at 830. Traditionally, the mere sale of a corporation does not impose liability on the successor for the tort liabilities of the predecessor. *See* Travis v. Harris Corp., 565 F.2d 443 (7th Cir. 1977); Knapp v. North Am. Rockwell Corp., 506 F.2d 361 (3d Cir. 1974), *cert. denied*, 421 U.S. 965 (1975); Cyr. v. B. Offen & Co., 501 F.2d 1145 (1st Cir. 1974); Shane v. Hobam, Inc., 332 F. Supp. 526 (E.D. Pa. 1971); Kloberdanz v. Joy Mfg. Co., 288 F. Supp. 817 (D. Colo. 1968). There are four generally recognized exceptions in which liability may be imposed on the successor: contractual assumption of the tort liabilities of the predecessor; a transaction that is tantamount to a merger of the predecessor with the successor corporation; the operation of the predecessor as a mere continuation of itself through the successor corporation; and the fraudulent transfer of assets in an effort by the predecessor to escape liability. *See* Leannais v. Cincinnati, Inc., 565 F.2d 437 (7th Cir. 1977); R. G. Enstrom Corp. v. Interceptor Corp., 555 F.2d 277, 278 (10th Cir. 1977); Knapp v. North Am. Rockwell, 506 F.2d 361 (3d Cir.) *cert. denied*, 421 U.S. 965 (1974); Bonee v. L & M Const. Co., 518 F. Supp. 375 (M.D. Tenn. 1981); Menacho v. Adamson United Co., 420 F. Supp. 128 (D. N.J. 1976); Hernandez v. Johnson Press Corp., 70 Ill. App. 3d 664, 388 N.E.2d 778 (1979). Recently, some jurisdictions have rejected the general rule that precluded successor liability in favor of "product line" liability based on the socio-economic policy of risk distribution. *See* Amader v. Johns-Manville Corp., 541 F. Supp. 1384 (E.D. Pa. 1982); Ray v. Alad Corp., 19 Cal. 3d 22, 560 P.2d 3 (1977); Ramirez v. Amsted Indus., Inc., 86 N.J. 332, 431 A.2d 811 (1981). More recent decisions have categorically rejected the product line concept of liability. Weaver v. Nasli Int'l, Inc., 562 F. Supp. 860 (S.D. Iowa 1983); Cowan v. Harris Corp., PROD. LIAB. REP. (CCH) ¶ 9667 (D. Kan. Dec. 7, 1982); Gonzalez v. Rock Wool Eng'g & Equip. Co., 117 Ill. App. 3d 435, 453 N.E.2d 792 (1983); Fenton Area Public Schools v. Sorensen-Gross Constr. Co., 124 Mich. App. 631, 335 N.W.2d 221 (1983). Punitive damages could not be imposed on a successor corporation under the standard that requires the vicariously liable entity to have authorized its employees or agents to engage in the intentional, wanton, or willful conduct at the time of the product's design and marketing. *See supra* notes 105-09 and accompanying text.

160. Special Project, *supra* note 2, at 832-33.

porations.[161] The courts authorizing recovery of punitive awards against successor entities appear to be result oriented. These courts seemingly are concerned with providing a "deep pocket" for the plaintiff, whatever the successor corporation's relationship to its predecessor. Obviously, the successor corporation neither designed, manufactured, nor sold the product that caused the injury. Consequently, neither punishment nor deterrence are served by the imposition of punitive damages for a predecessor's defective product—unless retribution against innocent parties is contemplated under the punitive damage doctrine.

Some jurisdictions authorize punitive damages in loss of consortium actions.[162] These courts predicate their decisions on the compensatory, rather than the punitive, purpose of the actions. Other jurisdictions reject recovery of punitive damages for loss of

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161. *See, e.g.,* Neal v. Carey Canadian Mines, Ltd., 548 F. Supp. 357, 391 (E.D. Pa. 1982) (successor corporation liable for punitive damages arising from tort that predecessor corporation committed because "successor is essentially identical to that of the predecessor corporation"). Recently, in Martin v. Johns-Manville Corp., 469 A.2d 655 (Pa. Super. 1983), *appeal filed,* Apr. 2, 1984, the Pennsylvania Superior Court authorized the award of punitive damages from a successor corporation as the result of the plaintiffs sustaining bronchogenic carcinoma from exposure to asbestos supplied by defendant's predecessor corporation. Relying on Campus Sweater & Sportwear Co. v. M. B. Kahn Constr. Co., 515 F. Supp. 64, 107 (D.S.C. 1979), *aff'd,* 644 F.2d 877 (4th Cir. 1981), Sturm, Ruger & Co. v. Day, 594 P.2d 38, 47 (Alaska 1979) *cert. denied* 454 U.S. 894 (1981) and Gryc v. Dayton-Hudson Corp. 297 N.W.2d 727, 741 (Minn. 1979), *cert. denied,* 449 U.S. 921 (1980), the *Martin* court held that punitive damages constituted a deterrent against manufacturers maximizing profits by marketing defective products. The court also addressed the issue of imposing punitive damages on a successor corporation not responsible for manufacturing and marketing the defective product. The court declared:

> We believe, however, that in some circumstances a successor should be held accountable for the recklessness of its predecessor. This will be so when the goals that underlie the imposition of punitive damages—punishment and deterrence—will be advanced . . . . The fact that the successor does not continue the product line recklessly marketed by the predecessor, or cures the defect, will not necessarily preclude punitive damages . . . . We therefore hold that punitive damages are recoverable against a successor corporation when the plaintiff has shown such a degree of identity of the successor with its predecessor as to justify the conclusion that those responsible for the reckless conduct of the predecessor will be punished, and the successor will be deterred from similar conduct.

469 A.2d at 667. The extension of punitive damages to an innocent successor corporate entity demonstrates the blind commitment of courts to this archaic doctrine and a certain naïveté as to the economic effects of the imposition of punitive damages.

162. *See, e.g.,* Sheats v. Bowen, 318 F. Supp. 640 (D.C. Del. 1970); Kohl v. Graham, 202 F. Supp 895 (D.C. Colo. 1962); Atlanta Life Ins. Co. v. Stanley, 276 Ala. 642, 165 So. 2d 731, 738 (1964) (when husband can prove loss of society because of wife's injuries, "the assessment of reasonable *compensation* therefore must necessarily be left to the sound discretion of the jury") (emphasis added).

consortium.[163] Understandably, permitting a punitory award in this context is difficult to justify under any of the rationale espoused by jurisdictions that recognize punitive awards.

Another patchwork application plaguing the punitive damage concept is the applicability of insurance coverage to such awards. Assuming that punitive awards are intended as punishment and deterrence, it is an insupportable contradiction to permit the wrongdoer to insure against wrongful acts that merit punitory deterrence. A majority of jurisdictions conclude that public policy forecloses the application of insurance coverage for punitive awards.[164] Essentially, these decisions conclude that permitting the wrongdoer to shift the financial burden would detract from the deterrent effect of the punitive award. Moreover, extending insurance coverage would, in effect, transfer the burden of the punitive award to the innocent consuming public through increased premium payments. Other jurisdictions hold that insurance coverage is a matter of private contract between the insurance company and the insured and, therefore, requires no public policy considerations.[165] These jurisdictions ostensibly ignore the very policy that undergirds the punitive damage concept—punishment and deterrence against future wrongdoing—and permit the wrongdoer to insure against liability for such awards. The result, of course, is to permit a windfall to the plaintiff at the expense of innocent consumers who must pay increased premium rates for their insurance policies. The dichotomy in attitude among the various jurisdictions regarding the public policy of sanctioning insurance coverage

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163. *See, e.g.*, Fireman's Fund Am. Ins. Co. v. Coleman, 394 So. 2d 334, 341 (Ala. 1980) (only damages for loss of services allowed in derivative actions by spouses); Moran v. Stephens, 265 So. 2d 379, 380 (Fla. Dist. Ct. App. 1972) (husband cannot recover punitive damages in derivative action to his wife's action for dog attack injuries); Hammond v. North Am. Asbestosis Corp., 105 Ill. App. 3d 1033, 435 N.E.2d 540 (1982), *aff'd*, 454 N.E.2d 210 (Ill. 1983); Hughey v. Ausborn, 249 S.C. 470, 154 S.E.2d 839, 842 (1967)(the intentional wrong is not committed against the spouse).

164. Dorsey v. Continental Casualty Co., 730 F.2d 675 (1984); Northwestern Nat'l Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962); City of Products Corp. v. Globe Indem. Co., 88 Cal. App. 3d 31, 151 Cal. Rptr. 494 (1979); Hartford Accident & Indem. Co. v. United States Concrete Pipe Co., 369 So. 2d 451 (Fla. Dist. Ct. App. 1979); Brown v. Western Casualty & Sur. Co., 484 P.2d 1252 (Colo. App. 1971); Guaranty Abstract and Title Co. v. Interstate Fire and Casualty Co., 228 Kan. 532, 618 P.2d 1195 (1980).

165. *See* Price v. Hartford Accident & Indemnity Co., 108 Ariz. 485, 502 P.2d 522 (1972); City of Cedar Rapids v. Northwestern Nat'l Ins. Co., 304 N.W.2d 228 (Iowa 1981); First Nat'l Bank of St. Mary's v. Fidelity & Deposit Co., 283 Md. 228, 389 A.2d 359 (1978); Anthony v. Frith, 394 So. 2d 867 (Miss. 1981); Harrell v. Travelers Indem. Co., 279 Or. 199, 567 P.2d 1013 (1977); Lazenby v. Universal Underwriters Ins. Co., 214 Tenn. 639, 383 S.W.2d 1 (1964); Hensley v. Erie Ins. Co., 283 S.E.2d 227 (W. Va. 1981).

against punitive damage awards lends further credence to the conclusion that the punitive damage concept represents an archaic doctrine that serves no useful public policy, but which continues only to enhance the largesse dispensed to the plaintiff.

The flawed nature of the punitive damage doctrine is clearly evident in the total absence of any uniformity of application. The legal rationale formulated to justify the concept is fraught with contradictions and is totally unpredictable in its effect. The anachronistic nature of the doctrine bespeaks the imperative need to relegate the doctrine to its rightful place in the archives of history. Most importantly, not only does the punitive damage doctrine not achieve the ordained objectives of punishment and deterrence, but rather, it presents an unfettered destructive force that erodes the economic stability of society. Surely, a doctrine possessing such questionable credentials and engendering such disquieting consequences should sound its own death knell.

V. Rationale for Abolishing Punitive Damages

A. The Adverse Economic Results of Punitive Damages

Because juries possess essentially limitless discretion in awarding punitive damages,[166] the amount of punitive damages awarded in recent years, as if feeding upon itself, has escalated to astronomical figures that boggle the mind.[167] Judge Friendly forecast this problem: "The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering. . . . We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the

166. Duffy, *supra* note 9, at 8; Ellis, *supra* note 10, at 20; Special Project, *supra* note 2, at 695.

167. *See, e.g.*, Maxey v. Freightliner Corp., 665 F.2d 1367, 1369 (5th Cir. 1982) *aff'd*, 722 F.2d 1238, 1242 (5th Cir. 1984) (court found evidence inadequate to support jury verdict of $10,000,000 in punitive damages, but on appeal following remand affirmed the trial court's remittitur of the award to $450,000); Dorsey v. Honda Motor Co., 655 F.2d 650, 654-58 (5th Cir. 1981) ($5,000,000 verdict upheld), *modified*, 670 F.2d 21, *cert. denied*, 459 U.S. 880 (1982); Airco, Inc. v. Simmons First Nat'l Bank, 276 Ark. 486, 492, 638 S.W.2d 660, 663 (1982) (upholding award of $3,000,000 as vindictive damages); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 821-24, 174 Cal. Rptr. 348, 389-91 (1981) (affirming trial court decision to reduce $125,000,000 jury verdict to $3,500,000); Palmer v. A.H. Robins Co., No. 81SA149 (Colo. June 4, 1984) (en banc) (approving $6,200,000 in punitive damages compared to an award of $600,000 in compensatory damages); Toyota Motor Co. v. Moll, 438 So. 2d 192 (Fla. Dist. Ct. App. 1983) (approving $3,000,000 punitive damages award); Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727, 741 (Minn. 1980) (affirming punitive damages in amount of $1,000,000) *cert. denied*, 449 U.S. 921 (1980).

nation can be so administered as to avoid overkill."[168] Several commentators have expressed concern over the possible severe economic effects precipitated by huge punitive damage awards.[169] Although some commentators and courts have indicated that punitive damages have not yet produced the prophesied doom,[170] one recent scholarly article has cited the severe economic consequences of asbestos litigation that forced several formerly large and viable companies into the bankruptcy courts.[171] Fear of bankruptcy earlier this year prompted the Fifth Circuit to declare a universal abolition of punitive awards in industry-wide asbestosis litigation within its jurisdiction.[172] Although the Fifth Circuit did not extend its moratorium on exemplary damages beyond the realm of asbestos related litigation, the court's decision represents a gargantuan step toward the intelligent and overdue recognition of the inappropriateness and inherent destructiveness of the punitive damage concept in the modern tort reparations system.

Even Professor Owen, who formerly supported the award of punitive damages with few limitations,[173] has recently come to recognize the folly of continued and unbridled awards of exemplary damages. Professor Owen recently foreshadowed the Fifth Circuit's opinion in *Jackson* when he observed that "[l]arge assessments of punitive damages may not yet be a major threat to the continued viability of most manufacturing concerns, but the increasing number and size of such awards may fairly raise concern for the future

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168. Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967). Another jurist noted that the destructive economic effects of punitive damages awards will impact "upon business and professional persons, firms and corporations, as well as upon ordinary persons when engaged in a wide variety of activities." Harrell v. Travelers Indem. Co., 279 Or. 199, 209-10, 567 P.2d 1013, 1018 (1977). As an example, see Ratner v. Sioux Natural Gas Corp., 719 F.2d 801, 805 (5th cir. 1983), acknowledging that allowance of an award of punitive damages against a bankrupt corporation would deprive legitimate creditors of any recovery and "would be overkill."

169. Ellis, *supra* note 10, at 33-63; Owen, *supra* note 9, at 119-21; Sales, *supra* note 2, at 380-81.

170. *See* Sales, *supra* note 2, at 380. The Court in Moore v. Remington Arms Co., 100 Ill. App. 3d 1102, 1111, 427 N.E.2d 608, 616-17 (1981), however, noted: "The tide has since turned; judgments for punitive damages are now routinely entered across the nation, and staggering sums have been awarded."

171. Special Project, *supra* note 2, at 806-45. Manville Corp., Unarco, and Amatex Corp. have declared bankruptcy under Chapter 11 of the Bankruptcy Reform Act of 1978 because of litigation expenses, and compensatory and punitive damage awards related to asbestos cases. *Id.* at 808.

172. *See* Jackson v. Johns-Manville Sales Corp., 727 F.2d 506 (5th Cir.), *reh'g en banc granted*, ___ F.2d ___ (5th Cir. 1984) (discussed *supra* notes 123-26 and accompanying text).

173. Owen, *supra* note 88, at 1257.

stability of American industry."[174] Professor Owen also has noted with alarm that courts increasingly have abdicated their traditional responsibility to control highly questionable punitive awards.[175] He has suggested several possibilities for establishing upper limits for future punitive damage awards.[176]

A byproduct of the continued success that plaintiffs have experienced in obtaining large punitive damage awards is the now universal practice of plaintiffs alleging and demanding punitive damages in an effort to increase the ultimate recovery from juries,[177] and to compel defendants to settle meritless cases because of the fear that a jury will return an outrageous punitive damage award.[178] Because of the discretionary nature of jury verdicts, a "verdict will not be disturbed as excessive unless it is so clearly so as to indicate that it was the result of passion, prejudice, partiality, or corruption; or that it was manifestly the result of disregard of the evidence or applicable rules of law."[179] Although some courts have overturned large punitive awards that shock the judicial conscience or are manifestly unjust,[180] the simple fact is that most huge punitive awards are affirmed.[181] This trend is creating a sig-

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174. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 6 (1981); *see* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 841 (1967) (the impracticality of imposing an effective ceiling on punitive awards in hundreds of cases against a single manufacturer, when added to large compensatory damages, could lead to catastrophic awards).

175. Owen, *supra* note 174, at 57.

176. Owen, *supra* note 9, at 119 (suggesting upper limit of greater of (1) double the compensatory damages, or (2) litigation costs plus $10,000); Owen, *supra* note 174, at 48 (suggesting possible upper limit on punitive damages of $1,000,00 per plaintiff).

177. Duffy, *supra* note 9, at 11 (trial tactics now are geared to exploit the punitive damages doctrine).

178. Special Project, *supra* note 2, at 840 (five asbestos manufacturers formed an alliance to reduce the risk of any defendant "settling out" on the others).

179. Riegel v. Aastad, 272 A.2d 715, 717-18 (Del. 1970). One reason that appellate courts find it difficult to overturn punitive damage awards is because the standards of review by which courts evaluate the excessiveness of these awards are extremely unclear. *See, e.g.*, Professional Seminar Consultants v. Sino Am. Technology Exch. Council, Inc., 727 F.2d 1470, 1473 (9th Cir. 1984). The Ninth Circuit recognized in *Professional Seminar Consultants* that the standard of review for punitive damages in California is unclear. *Compare* Cher v. Forum Int'l, Ltd., 692 F.2d 634, 640 (9th Cir. 1982) (clearly erroneous standard), *cert. denied* 103 S. Ct. 3089 (1983) *with* Hasson v. Ford Motor Co., 32 Cal. 3d 388, 650 P.2d 1171, 185 Cal. Rptr. 654 (1982) (substantial evidence standard), *cert. dismissed*, 103 S. Ct. 1167 (1983). Judicial failure within a particular jurisdiction to provide even a consistent standard of review to prevent punitive damages from getting completely out of hand is disconcerting.

180. Riegel v. Aastad, 272 A.2d at 718.

181. *See, e.g.*, Dorsey v. Honda Motor Co., 655 F.2d 650, 657 (5th Cir. 1981), *cert. denied*, 103 S. Ct. 177, *modified*, 670 F.2d 21 (5th Cir. 1982) (actual damages of $750,000

nificant threat to the stability of our economy. It is now time for courts and legislatures to reconsider the propriety of the punitive damages concept before it creates even more havoc and places our economy at risk. The punitive damage concept, if it ever possessed legitimacy in the civil tort system, surely is an anachronism whose time for service long since has passed and whose insatiable appetite no longer can be afforded.

The current availability of the punitive damage doctrine imposes excessively oppressive and burdensome discovery on defendants. Adhering to the philosophy of liberal discovery, courts ostensibly have concluded that the mere claim for punitive damages entitles the plaintiff to demand the production of interminable reams of documentary and other information potentially related to the issue of punitive damages.[182] For example, an increasing number of products liability plaintiffs incorporate an allegation for punitive damages, and concomitantly, the breadth and scope of court ordered discovery has expanded with this additional claim. Rampant abuse in the discovery process is economically ruinous to defendants, disruptive of the orderly administration of justice, and an unsightly blemish on the tort reparations system. Predictably the public perceives the unfettered discovery process as an unacceptable misuse of the legal system. Consequently, the defendant must choose between the Scylla of economically devastating discovery costs that can transform a favorable verdict into a pyrhhic economic victory and the Charybdis of outrageous and unwar-

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and punitive damages of $5,000,000 affirmed); Airco, Inc. v. Simmons First Nat'l Bank, 276 Ark. 486, 638 S.W.2d 660 (1982) (actual damages of $1,070,000 and punitive damages of $3,000,000 affirmed); Vossler v. Richards Mfg. Co., 143 Cal. App. 3d 952, 192 Cal. Rptr. 219 (1983) (actual damages of $25,000 and punitive damages of $500,000 affirmed); Palmer v. A.H. Rohins Co., No. 81SA149 (Colo. June 4, 1984) (en banc) (actual damages of $600,000 and punitive damages of $6,200,000 approved as reasonable); Ford Motor Co. v. Nowak, 638 S.W.2d 582, 585 (Tex. Ct. App. 1982) (actual damages of $400,000 and punitive damages of $4,000,000 affirmed).

182. For example, in Jampole v. Touchy, 673 S.W.2d 569 (Tex. 1984), tbe Texas Supreme Court authorized virtually unlimited discovery and noted, "The documents showing GMC's knowledge of alternative designs are relevant to show conscious indifference in support of Jampole's claim of gross negligence." *Id.* at 573. Similarly, in General Motors Corporation v. Lawrence, 651 S.W.2d 732 (Tex. 1983), Justice Ray, in a concurring opinion relating to a discovery order, commented: "The scope of discovery in product defect cases may be permissibly wider, especially when the plaintiff is alleging grounds for the award of exemplary damages." *Id.* at 734. Similarly, the inclination to expand discovery for punitive allegations is reflected in other jurisdictions. *See, e.g.*, Vollert v. Summa Corp., 389 F. Supp. 1348 (D.C. Hawaii 1975); Hughes v. Graves, 47 F.R.D 52 (W.D. Mo. 1969); Coy v. Superior Court of Contra Costa County, 23 Cal. Rptr. 393, 373 P.2d 457 (1962); Kuiper v. District Court of Eighth Judicial District, 632 P.2d 694, 702 (Mont. 1981).

ranted monetary settlements.[183]

B. *Punishment and Deterrence Are Not Viable Theories for the Imposition of Punitive Damages*

The purpose of the civil law historically has been to provide a remedy to compensate individuals injured by the wrongful conduct of others.[184] Even disinterested commentators such as Dean Prosser have noted the dichotomy of authorizing punishment under the aegis of the civil law,[185] and one court perceptively has observed:

> 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 whose behalf he is punished.[186]

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183. An example of the public's concern with the effect of unwarranted settlements is reflected in an editorial appearing in the Houston Post, September 3, 1984. Commenting on a lawsuit that was tried in the District Court in San Antonio, Texas and then settled with General Motors, the editorial stated:

> A lawsuit settled out of court last week in San Antonio is an example of how far downhill our legal system has tumbled.
>
> The passenger in a Pontiac TransAm sued General Motors for $50,000,000 after he was seriously injured in an accident. Testimony indicated the driver was drunk and traveling at 90 miles per hour.
>
> But instead of suing the driver, the injured passenger sued GM, alleging the auto maker's advertising of the TransAm made the driver believe it was a stunt vehicle that could perform beyond the limits of a normal production car.
>
> To any reasonable person, three errors are obvious in the story. First, the wrong party was sued. The driver was at fault, not General Motors. It seems no one these days is willing to take responsibility for his own actions. It's always someone else's fault. However, it doesn't take too much imagination to figure out why GM was sued instead of the driver: GM is richer.
>
> Second, GM should not have settled. This is perhaps more understandable; GM wanted to avoid a long trial and the publicity.
>
> Third, and the most obvious of all, the court should have thrown the lawsuit out at the first hearing. Judges and prosecutors repeatedly tell us dockets are overcrowded, but it is hard to empathize when frivolous lawsuits like this one are allowed to proceed."

Houston Post, Sept. 3, 1984, at 13, col. 1.

184. *See* Western Union Tel. Co. v. Guard, 283 Ky. 187, 197, 139 S.W.2d 722, 727 (1940); *see also* W. PROSSER, *supra* note 34, § 2, at 7.

185. Dean Prosser referred to punitive damages as an "anomalous respect" in which "the ideas underlying the criminal law have invaded the field of torts." W. PROSSER, *supra* note 35, § 2, at 9.

186. Bass v. Chicago & N.W. Ry., 42 Wis. 654, 672 (1877). Interestingly enough, the *Bass* opinion went on to accept the theory of punitive damages because of stare decisis. Wisconsin recently continued this inexplicable adherence to an outdated doctrine in Wangen v. Ford Motor Co., 97 Wis. 2d 260, 279-80, 294 N.W.2d 437, 448 (1980):

> Although controversy continues to surround the doctrine of punitive damages in the twentieth century, and although some have questioned whether tort law—which is

Another court, ever more emphatically, queried:

> 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, exceptional, unjust, unscientific, not to say absurd and ridiculous, when classed among civil remedies? What kind of a civil remedy for the plaintiff is the punishment of the defendant?[187]

As one commentator has observed, juries possessing neither expertise in deciding what constitutes just punishment nor skill in determining who should be punished are inflicting large punitive damage awards even though society has not deemed it appropriate to declare the offending conduct criminal.[188] Parties to civil litigation are subject to quasi-criminal fines, and courts are enforcing these penalties without the safeguards afforded even society's worst criminals.[189]

A particularly egregious aspect of the punitive damage doctrine as punishment is its application within the vicarious liability field.[190] Not only are courts inappropriately using punishment in a civil context, but by imposing on employers and principals liability for the punitive damages otherwise assessable against their employees and agents, the courts have diverted punishment from the wrongdoers to innocent parties.[191] One commentator has noted

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designed to compensate an injured plaintiff—should also serve the function of the criminal law, *i.e.*, to punish a defendant for the purpose of deterring him and others from further offenses, this court has consistently and frequently said that punishment and deterrence are important considerations in the law of torts in Wisconsin.

187. Fay v. Parker, 53 N.H. 342, 382 (1873). Unlike Wisconsin, *see supra* note 186 and accompanying text, New Hampshire followed its instincts and limited punitive damages to a compensatory nature.

188. Duffy, *supra* note 9, at 10.

189. For example, juries have unlimited discretion in determining the amounts of punitive awards, whereas criminal fines must be fixed, and the burden of proof of civil punitive damage liability is established by a preponderance of the evidence and not evidence beyond a reasonable doubt. Likewise, civil defendants do not receive the protection against double jeopardy and, therefore, are subject to civil punitive damages and criminal fines for the same act. Similarly, civil defendants are subject to punitive awards on behalf of innumerable plaintiffs, thereby making any upper limit of liability nonexistent. Also, most crimes require a guilty intent. Finally, civil defendants subject to exemplary damages do not enjoy the protection against self-incrimination. *See* W. PROSSER, *supra* note 35, § 2, at 11; Duffy, *supra* note 9, at 9; Sales, *supra* note 2, at 363-64; *see also* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (punitive damages could amount to tens of millions of dollars while the maximum criminal penalty would be three years imprisonment and a $10,000 fine for each of 12 violations).

190. *See* K. REDDEN, *supra* note 1, at 630 ("The imposition of punitive damages is particularly offensive in the field of vicarious liability . . . .").

191. One scholar has stated:

> If the purpose of awarding punitive damages is to compensate, the normal public policy reason for imposing vicarious liability would appear applicable. But if the pur-

critically that "it is beyond reason to fathom why an innocent employer should be held liable for more than compensation of the plaintiff's injuries."[192] Punishment and deterrence of the innocent does not comport with a system dedicated to the administration of justice.

Courts have long used the "deep pocket" rationale to justify the vicarious liability of employers and principals for compensatory damages.[193] Although this theory arguably possesses merit for compensatory damages, its use to extend punishment against employers and principals is insupportable under the guise of any theory or rationale.[194] For example, even though punitive damages against individual wrongdoers may be awarded in a section 1983 action,[195] neither the municipal nor the local government can be held vicariously liable for its employees' wanton and malicious conduct.[196] Irrespective of the care that employers exercise, they possess no means to identify and prevent each and every employee from engaging in antisocial acts.[197] Therefore, employers should not suffer punishment for conduct that they cannot prevent.

When an employer has attempted to screen employees during the hiring process, in an effort to hire the best available workers for business reasons, the imposition of punitive damages for a "hiring mistake" lacks any deterrent effect.[198] One expert has criticized

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pose of punitive damages is to deter, as it is in the vast majority of jurisdictions today, the penalty is certainly of questionable effectiveness and justice if not imposed on the employee. The inequity is especially acute in the case of corporations where innocent stockholders ultimately bear the punitive burden.

K. REDDEN, *supra* note 1, at 35.

192. *Id.* at 631.

193. The "deep pocket" theory rests upon "the desire to insure that victims of tortious injury can reach a defendant with sufficient wealth to provide adequate compensation." Ellis, *supra* note 10, at 64. Employers generally are better able to meet this compensatory burden. *Id.* at 64-65.

194. *See* Duffy, *supra* note 9, at 12-13. The concerns of the "deep pocket" rationale for uncompensated plaintiffs obviously do not apply to punitive damages, which theoretically perform direct punitive and deterrent functions. Ellis, *supra* note 10, at 65.

195. 42 U.S.C. § 1983 (1982); *see* Smith v. Wade, 103 S. Ct. 1625 (1983) (defendant's conduct must be motivated by evil motive or intent).

196. *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) (municipality may be held vicariously liable for acts of its employees).

197. Duffy, *supra* note 9, at 12-13.

198. *Id.* Many courts accept deterrence as one of the bases for punitive damages. *See supra* notes 47-60 & 64-70 and accompanying text. Deterrence can be specific—of the individual defendant—or general—of other possible defendants. The strongest deterrrence argument for punitive damages is specific deterrence. Some doubt exists as to whether exemplary awards accomplish this specific goal, and no empirical studies exist. Duffy, *supra* note 9, at 10-11. This uncertainty is especially strong when the individual defendant to be de-

the "make-weight argument" that punitive awards will result in better hiring practices and asserts that the "absurdity" of this rationale should be "apparent to anyone who has ever been in the position of offering employment—there simply is no way to gauge whether a potential employee will become violent when irritated, just as there is no method of determining with certainty whether he will be a good worker."[199] Another commentator also has observed, while discussing the lack of meaningful standards or limits on the amounts of punitive damages which a jury awards, that "[f]rom a deterrence standpoint, it confounds understanding to permit such vast uncertainty as to the level of the expected penalty."[200] Another scholar has asserted that high compensatory damages will have a sufficient deterrent effect, anyway; and if they do not, then the plaintiff can seek injunctive relief, the violation of which will subject the defendant to contempt proceedings and fines or jail.[201]

In addition, imposing vicarious liability for punitive damages creates the anomalous situation that the consumers or taxpayers in a community, who are the intended beneficiaries of the punishment administered to the wrongdoer, actually absorb the conse-

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terred is a corporate entity. The imposition of a punitive award cannot deter an employer if the employee's act is intentional. Conversely, the employee will not be deterred when the employer is made to pay a punitive award. Ellis, *supra* note 10, at 68-69. Moreover, the best selection and supervision methods available do not, and cannot, prevent occasional impulsive behavior by employees, and the larger the employer the less any possible deterrent effect because the large employer simply lacks that degree of total control and supervision of employees. J. GHIARDI & J. KIRCHER, *supra* note 9, § 2.08, at 19-21.

The general deterrent effect of punitive damages, likewise, is highly doubtful. Several noted authors term it "highly unlikely" that the civil law imposition of punitive damages will achieve the same goal of deterrence associated with the criminal law because: most people do not know what punitive damages are; those people who generally know what punitive damages are, do not know enough to appreciate the intended deterrent effect; and even sophisticated members of the public are compelled to make "judgment calls" regarding the type of conduct that will be subject to punitive damages. *Id.* § 2.09, at 23-24; *see* K. REDDEN, *supra* note 1, at 116 ("there is really nothing for which the employer can be punished, and . . . punitive liability is unlikely to encourage employers to use more care in screening or training their employees").

199. K. REDDEN, *supra* note 1, at 631.

200. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133, 141 (1982) (discussing the decision in Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981), in which the appellate court affirmed the trial judge's reduction of punitive award from $125,000,000 to $3,500,000, but implied that it would have affirmed the trial court's acceptance of the $125,000,000 award or a reduction to $1,000,000).

201. Duffy, *supra* note 9, at 10; *see* Rogimsky v. Richardson-Merrell, Inc., 378 F.2d at 841 (compensatory awards have punitive elements, which would be more pronounced if punitive damages were eliminated).

quences of the punishment. Ultimately, it is the innocent consumer and taxpayer who bears the burden of paying for the punitive award imposed upon a vicariously liable employer, corporate entity, or governmental body.[202] "The fact of the matter is that the liberal rules governing vicarious liability for punitive damages allow the wrong person or entity to be punished."[203] If an employer's hiring practices are so outrageous that society should punish them, the most appropriate forum is the criminal justice system, which metes out punishment according to predetermined rules and only against the party guilty of wrongdoing.

Not only is the punishment rationale of punitive damages decidedly inappropriate in a civil law context and the effect of the deterrence rationale minimal at best and unlikely at worst, but any redeeming value these rationales might have dwindles in the face of the ratio rule and the application of liability insurance. The ratio rule generally mandates a reasonable relationship between the amount of compensatory and punitive damages.[204] A majority of jurisdictions currently rejects any precise ratio rule.[205] Commentators have criticized the current approach to the ratio rule because the judicial refusal to establish a predetermined ratio creates uncertainty in assessing quasi-criminal fines;[206] and when courts apply a ratio, whether on an ad hoc basis or subject to some generalized ratio guidelines,[207] the concept of gearing the size of the

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202. Realistically, employees of an employer or corporate entity seldom, if ever, indemnify the vicariously liable employer. Consequently, the ultimate "punishment" administered by the punitive damage doctrine is assessed in the form of higher insurance premiums, higher prices for services, and higher product costs that are spread across the entire section of innocent consumers or taxpayers. Roginsky v. Richardson-Merrell, Inc., 378 F.2d at 841. Likewise, creditors, sellers, suppliers, and distributors ultimately may pay the cost of the punishment meted out by the punitive damage doctrine without ever having committed a wrongful act. Ellis, *supra* note 10, at 66; *see* K. REDDEN, *supra* note 1, at 116 (losses will fall not on the employer, but on the public through price increases, or on innocent shareholders who never receive any benefit from the torts of corporate employees).

203. J. GHIARDI & J. KIRCHER, *supra* note 9, § 2.04, at 12.

204. *See supra* notes 127-35 and accompanying text.

205. *See supra* note 131 and accompanying text.

206. Duffy, *supra* note 9, at 8; Sales, *supra* note 2, at 367 & n.82.

207. As noted by the court in Leimgruber v. Claridge Assoc., 73 N.J. 450, 375 A.2d 652, 656 (1977):

> The major difficulty in establishing the amount of the punitive damage recovery is the absence of any defeinitive [sic] standard or criterion to guide the trier of fact in determining the proper amount.
>
> . . . .
>
> One major objection to the "ratio" rule is that it collides with the rationale for imposing punitive damages which are awarded, as noted, on a theory of punishment and deterrence. . . .

punitive award to the compensatory award simply does not mesh with the punishment rationale of punitive damages.[208] The applicability of liability insurance to cover punitive damage awards totally vitiates the punishment and deterrence rationales. A majority of jurisdictions has judicially declared that punitive damages are insurable.[209] The courts that refuse to allow insurance coverage on public policy grounds recognize that insurance negates the objectives purportedly served by punitive damages.[210] The allowance of insurance reduces the punishment of the wrongdoer while simultaneously imposing the effects of the punishment on all other policy holders through the vehicle of increased premiums. Permitting punitive damage insurance likewise conflicts with the deterrence objective by reducing the incentive to avoid loss-creating conduct.[211] This incongruous situation recently prompted one court to acknowledge that the punitive damage doctrine, as applied today, does not deter tortfeasors and, because of the unpredictable manner in which fact finders impose damages to punish, insurance should be permitted to provide coverage against exemplary damages.[212] More importantly, however, liability insurance for exemplary damages makes necessary the assessment of larger awards to achieve punishment and deterrence, which in turn causes insur-

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208. If courts intend punitive damages to punish the defendant, then the wrongdoer's conduct constitutes a more important consideration than the amount of damage the plaintiff suffers, although compensatory damages represent the basis against which the punitive damages are compared. Leimgruber v. Claridge Assoc., 73 N.J. 450, 375 A.2d, 656 (1977); *see generally* Ellis, *supra* note 10, at 58-59. Professor Ellis asserts that, although one can form arguments that will theoretically justify the ratio rule, in reality "it invites juries to engage in wealth redistribution and exacerbates the perverse incentives already created by uncertain standards of punitive damage liability and the lack of functional criteria for the magnitude of assessments." *Id.* at 62-63.

209. These courts adopt the position of Lazenby v. Universal Underwriters Ins. Co., 214 Tenn. 639, 383 S.W.2d 1 (1964) (public policy not violated by allowance of insurance coverage for punitive damages). Almost all courts allow insurance coverage for vicarious punitive damage liability. Ellis, *supra* note 10, at 71 (citing Dayton Hudson Corp. v. American Mut. Liab. Ins. Co., 621 P.2d 1155, 1160 (Okla. 1980)); Morrissey, *Punitive Damages—Insurability*, 25 TRIAL LAW. GUIDE 257 (1981); Owen, *supra* note 88, at 1313 n.276 (1976).

210. *See*, Ellis, *supra* note 10, at 71 (citing Northwestern Nat'l Casualty Co. v. McNulty, 307 F.2d 432, 441-42 (5th Cir. 1962)). Recently, in United States Concrete Pipe Co. v. Bould, 437 So. 2d 1061 (Fla. 1983), the Florida Supreme Court determined that insurance coverage would apply to punitive damage liability of an entity deemed vicariously liable, but would not apply to the individual responsible for the egregious conduct.

211. Ellis, *supra* note 10, at 74.

212. First Bank v. Transamerica Ins. Co., ____ F. Supp. ____ (D.Mont. 1984) (implicit in the court's analysis is recognition of the fact that punitive damages serve as nothing more than windfalls for plaintiffs).

ance costs and coverages to rise, which will, in turn, necessitate even larger punitive awards.[213] This circularity epitomizes the illogical nature of punitive awards.

Neither the punishment nor the deterrence rationale is appropriate in a civil law context. The entire concept of punitive damages today in civil actions is a wrong idea at the wrong time.[214]

C. *Compensation Is Not a Viable Theory for the Imposition of Punitive Damages*

The usual rationale for punitive damages is punishment and deterrence.[215] A few jurisdictions, however, continue to view punitive damages as a form of compensatory award for intangible injuries.[216] Irrespective of the viability of this rationale in earlier times,[217] the concept simply no longer is relevant. Compensatory awards currently provide recovery of all costs for physical injuries, disfigurement, physical impairment, loss of earnings and earning capacity, past and future medical expenses, past and future pain and suffering, past and future mental anguish, loss of society and companionship, and every conceivable intangible and imagined injury such as emotional distress[218] and insult.[219] Additionally, third parties such as spouses, children, and parents increasingly can recover compensatory awards for the intangible harms of loss of consortium, loss of parentage, loss of society, and loss of companion-

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213. Ellis, *supra* note 10, at 75-76. The Second Circuit has noted another dilemma that liability insurance raises. If courts allow liability insurance for punitive damages, then the cost of providing arguably needless deterrence rests on the consuming public. If courts do not allow such insurance, then a sufficient egregious mistake can destroy a business, thereby punishing innocent stockholders. Roginsky v. Richardson-Merrell, Inc., 378 F.2d at 841.

214. Even the ancient concept of satisfying the public's desire for revenge is outdated. As one author tersely observed, "vengeance is a questionable objective for a civilized legal system." Note, *The Assessment of Punitive Damages Against an Entrepreneur for the Malicious Torts of His Employees*, 70 YALE L.J. 1296, 1298 (1961). Society has long since progressed beyond the primitive concept of an eye for an eye and a tooth for a tooth.

215. *See supra* notes 48-60 and accompanying text.

216. *See supra* notes 71-76 and accompanying text.

217. *See supra* notes 17-30 and accompanying text.

218. Dillon v. Legg, 68 Cal. 2d 728, 730-31, 441 P.2d 912, 914, 69 Cal. Rptr. 72, 74 (1968) (en banc); Portee v. Jaffee, 417 A.2d 521 (N.J. 1980); W. PROSSER, *supra* note 34, § 12.

219. Ellis, *supra* note 10, at 16-17. Professor Ellis cites the interesting case of Forde v. Skinner, 172 Eng. Rep. 687 (Horsham Assizes 1830), in which the court held that cutting off the hair of female paupers in a poor house, if done "with the malicious intent imputed [by the evidence] of 'taking down their pride,' . . . that will be an aggravation and ought to increase the damages." Ellis, *supra* note 10, at 17.

ship.[220] Undoubtedly, the most eloquent condemnation of punitive damages as a form of compensation is etched in an early Washington case:

> There is nothing stinted in the rule of compensation. The party is fully compensated for all the injury done his person or his property, and for all losses which he may sustain by reason of the injury, in addition to recompense for physical pain, if any has been inflicted. But it does not stop here; it enters into the domain of feeling, tenderly inquires into his mental sufferings, and pays him for any angnish of mind that he may have experienced. Indignities received, insults borne, sense of shame or humiliation endured, lacerations of feelings, disfiguration, loss of reputation or social position, loss of honor, impairment of credit and every actual loss, and some which frequently border on the imaginary, are paid for under the rule of compensatory damages. The plaintiff is made entirely whole. The bond has been paid in full. Surely the public can have no interest in exacting the pound of flesh.[221]

Considering the expanded and virtually unlimited access to compensatory damages, punitive damages simply provide a windfall to the plaintiff, penalize the innocent consumers or society, and unnecessarily sap the vitality of the economy upon which society is totally dependent.[222]

The punitive damage doctrine theoretically is unsound, legally insupportable, economically unnecessary for plaintiffs, and economically disastrous for both defendants and innocent consumers. Therefore, it is time, and in fact, the hour grows late, for the legislatures and courts to dismantle this potentially destructive doctrine of another era. Neither right nor justice, neither fairness nor equity, and neither the vitality of the tort reparations system nor economic considerations warrant the survival of this outdated doctrine.

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220. Ellis, *supra* note 10, at 28; *see* Sanchez v. Schindler, 651 S.W.2d 249 (Tex. 1983) (Texas Supreme Court rejected over 100 years of judicial interpretation of the Wrongful Death Act to redefine pecuniary loss to permit recovery of loss of society and mental anguish). Even recovery for emotional upset in the absence of any physical injury is now recoverable. *See, e.g.*, Betancourt v. J. C. Penny Co., 554 F.2d 1206 (1st Cir. 1977).

221. Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 25 P. 1072 (1891).

222. Some commentators argue that "common sense makes it difficult to disbelieve that the possibility of a hefty punitive jury verdict would not deter a rational and reputable manufacturer." *See* J. GHIARDI & J. KIRCHER, *supra* note 9, § 6.07, at 24. *But see* Ellis, *supra* note 10, at 3 n.9 ("The burden of persuasion lies with the proponents of imposing punitive damages; if the question of whether imposing punitive damages promotes valid objectives cannot be persuasively answered in the affirmative, the damages are not justifiable and should not he imposed"). The vague and meaningless nature of the "reckless and wanton" standard as a basis for imposing punitive damages is exemplified in International Armament Corp. v. King, 674 S.W.2d 431 (Tex. Civ. App. 1984).

VI. THE ALTERNATIVE IN THE ABSENCE OF TOTAL ABROGATION OF PUNITIVE DAMAGES

One commentator observed that the issue of punitive damages in the past "merited scant attention" because such awards were "rarely assessed and likely to be small in amount."[223] Unfortunately, the tort reparations situation today has changed drastically, and the antiquated concept of punitive damages as applied in the 1980s poses serious, if not potentially fatal, consequences. If a complete abrogation of the punitive damage doctrine is not an achievable objective, then a series of coordinated and precisely defined limitations is imperative to forestall the economically and doctrinally debilitating effects of this concept.

First, it is necessary to formulate certain standards of conduct and proof by which the fact finder determines punitive damage liability. Realistic and meaningful standards presently are nonexistent, and confusing jury instructions only serve to further the confusion of juries.[224] Either the courts or the legislatures should authorize the recovery of punitive damages only upon a stringent showing that a defendant acted with deliberate intent, ill motive, or maliciousness.[225]

Second, the courts should require a significantly higher standard of proof than the less exacting "preponderance of the evidence" burden. The degree of proof required should be elevated to

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223. Ellis, *supra* note 10, at 2.

224. *See supra* notes 77-103 and accompanying text. Professor Ellis asserts that the vagueness of standards for determining liability and the wide discretion of juries in determining amounts of punitive damages extends "liability far beyond that justified by fairness." Ellis, *supra* note 10, at 76.

225. One authority has stressed that substituting the terms "outrageous" or "flagrant" for the current vague terms would be useless because these words are just as elastic as those now in use. Ellis, *supra* note 10, at 51. The courts must realize the importance of strictly construing even "deliberate intent," "ill motive," and "maliciousness" standards. *See* Cooter, *supra* note 8, at 80 (proposing that courts should allow punitive damages only for intentional faults, which would include only gross or repeated conduct).

A bill currently before the United States Senate would limit the imposition of punitive damages in product liability cases to situations in which the defendant manufacturer or product seller acted with "reckless disregard . . . for the safety of product users, consumers, or persons who might be harmed by the product." S. 44, 98th Cong., 2d Sess. § 12(a)(2) (1984). The Senate bill further defines "reckless disregard" as *"conscious, flagrant indifference* to the safety of those persons who might be harmed by a product *and an extreme departure from accepted practice." Id.* § 12(j) (emphasis added). A similar bill before the United States House of Representatives deletes the word "conscious" and would require only that the defendant act "with a *flagrant indifference* to consumer safety . . . *and an extreme departure from accepted practice."* H.R. 5214, 98th Cong., 2d Sess. § 11(b) (1984) (emphasis added).

a "clear and convincing" standard[226] or a "beyond a reasonable doubt" burden.[227] The Second Circuit, based upon its assertion that conduct which would "give rise to punitive damages must be close to criminality," recently stated that the plaintiff must *clearly* establish this degree of behavior by the defendant.[228] Because the punitive damages concept represents an anomalous perversion of a criminal law concept grafted to the civil law, and considering the weaknesses inherent in the rationale underlying the punitive damage doctrine in today's society, the wisest course strongly suggests the adoption of the more stringent "beyond a reasonable doubt" burden of proof.

Third, it is necessary to reallocate judicial power so that judges, rather than unknowledgeable juries, decide if punitive damages are merited, and if so, in what amount.[229] Judges, equipped by experience and familiarity with legal concepts, are

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226. Professor Owen recently recommended that courts institute a "clear and convincing" evidentiary test. He recognized that such a test might sacrifice a degree of efficiency in favor of some fairness, but fairness over efficiency and the concept that close cases should be resolved in favor of the accused are exactly what the American legal system should epitomize. *See* Owen, *supra* note 9, at 118-19 (ratio of additional innocent parties who get punished to the number of additional guilty parties who get punished by an expansion of the rule of punitive damages may be unfairly high). In Gavica v. Hanson, 101 Idaho 58, 608 P.2d 861, 864 (1980), the court suggested that punitive damages generally are not favored and should be awarded only upon clear evidence. Similarly, in Town of Jackson v. Shaw, 569 P.2d 1246, 1252 (Wyo. 1977), the court observed that "[p]unitive damages are not a favorite of the law, are to be allowed only with caution within narrow limits and have been the subject of much controversy." And, in Gent v. Collinsville Volkswagen, Inc., 116 Ill. App. 3d 496, 451 N.E.2d 1385, 1391 (1983), the court acknowledged that "[b]ecause of the penal nature of such damages, . . . the law disfavors them . . . ." *See* Acosta v. Honda Motor Co. v. Moll, 717 F.2d 828, 839 (3d Cir. 1983) (en banc) (need to prove "outrageous" conduct by clear and convincing proof); Travelers Indem. Co. v. Armstrong, 442 N.E.2d 349, 360 (Ind. 1982) (the court announced a change to "clear and convincing evidence"); S. 44, 98th Cong., 2d Sess. § 12(a)(2) (1984) (requiring "clear and convincing" proof); K. REDDEN, *supra* noto 1, at 124-25 (advocating that courts increase the burden of proof to a "clear and convincing" standard); *see also* Note, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408 (1967).

227. *See* Schwartz, *supra* note 200, at 144 (the American legal tradition indicates that incriminating facts must be proved beyond a reasonable doubt before punishment can be inflicted, but under tbe punitive damage doctrine the civil law awards millions of dollars based on a preponderance of the evidence standard).

228. Roginsky v. Richardson-Merrell, Inc., 378 F.2d at 843. The Second Circuit required only that the plaintiff clearly establish the defendant's recklessness. The term "reckless" lends itself to much confusion and arbitrariness, and therefore, courts should employ the more stringent standards of deliberato intent or maliciousness.

229. *See* H.R. 5214, 98th Cong., 2d Sess. § 11(b), (c) (1984) (proposing that the court, rather than the jury, decide punitive damage liability and amount). *But see* S. 44, 98th Cong., 2d Sess. § 12(b), (c) (1984) (proposing that court decide the amount of punitive damages, but allowing jury initially to determine if defendant is liable for them).

better able than inexperienced juries to distinguish behavior that justifies punishment,[230] and hopefully would be able to avoid the bias and naivete that jurors express through inflated punitive awards. Many judges currently support such a realignment of duties.[231] If responsible jurisprudence mandates punishment through civil law remedies, it is only logical to utilize the knowledge of judicial officers to achieve fair and rationale results. Punitive damages awards have become too large, too destructive, and too far removed from economic reality to allow biased and rhetorically enraged juries to continue on their present course.[232]

Fourth, specific limits should be established for punitive damages awards.[233] Such limitations would curtail the current destructive abuses of the doctrine and would eliminate the current inordinate number of outrageous awards. Professor Owen has suggested a limitation of either twice the amount of compensatory damages or the the plaintiff's costs plus $10,000.[234] A well-known example of a legislatively imposed limit on punishment oriented damages is the treble damage provision in the Clayton Act that allows actual damages plus twice their value as punitive damages for violations

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230. *See* Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 670 (1980) (suggesting that "the very power of the remedy demands that judges exercise close control over the imposition and assessment of punitive damages"); Owen, *supra* note 9, at 120 (recommending reallocation of judicial power because of the experience of judges and because judges have less rigid preconceptions that might bias decisions); *see also* Torres v. North Am. Van Lines, Inc., 135 Ariz. 35, 658 P.2d 835, 841 (1983) (discussion of the role of experienced trial judge controlling punitive damages award).

231. *See* Schwartz, *supra* note 200, at 146-47 (a questionnaire that the California Legislature's Joint Committee on Tort Liability submitted to California's Superior Court judges indicated that 56% of those judges who responded favored vesting in the trial court the authority to determine both when to award punitive damages and in what amount); *see also* Mallor & Roberts, *supra* note 230, at 664 (endorsing judicial determination of the appropriateness of punitive awards).

232. The jury in Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981), rendered a punitive damage award of $125,000,000 for a single claim. More recently in Durgill v. Ford Motor Co., C.A. 79-3203A-28th Dist. Ct. of Nueces Co., Texas (1983), the jury rendered a verdict of $6,800,000 in actual damages and $100,000,000 in punitive damages for a single claim.

233. *See* H.R. 5214, 98th Cong., 2d Sess. § 11(d) (1984) (limiting punitive awards to twice the amount of actual damages, and never allowing punitive damages to exceed $1,000,000 for any one claimant). The House bill also would permit the court to consider any prior punitive damage awards levied against the defendant. *Id.* § 11(e). A mathematical formula, as H.R. 5214 proposes, in the hands of an experienced trial judge might lead to equitable results. One commentator, however, has suggested that allowing a jury to consider prior punitive awards in an effort to minimize any current exemplary damages could backfire and cause a jury to fine a defendant even more harshly. K. REDDEN, *supra* note 1, at 122-23.

234. *See supra* note 176.

of the antitrust laws.[235] Whether legislatures validate a dollar for dollar ratio or a single established amount, an equitable and workable upper limit is essential to control the undisciplined punitive damages doctrine. A dollar for dollar ratio presents the arguable advantage of flexibility that automatically would fluctuate both upward and downward, depending upon the amount of compensatory damages. A ratio limit also presents the danger, however, that juries artificially will inflate compensatory awards to increase the possible punitive amount. The logical solution, therefore, is to view the dollar for dollar ratio as an upper limit, subject to judicial reduction.[236] Unlike the Clayton Act treble damage provisions, judges would retain the authority to exercise discretion in reducing punitive awards below the statutorily allowed upper limit.

Fifth, the application of the punitive damage doctrine must be modified significantly in the strict tort liability context of product litigation. The legislature should declare that punitive damages may be awarded only once. If a plaintiff establishes that he suffered injury because a defendant supplied a product containing a design or marketing defect, then the plaintiff should receive total compensation for the injury. When hundreds or even thousands of plaintiffs prosecute claims for injuries that emanate from a single design or marketing defect that exists in a single line of a product, however, the product supplier should not endure multiple punishments for a single design defect. The product supplier is deemed liable simply because of the condition of the product—a single design defect in a particular product. If the civil law is to embrace the added function of punishing product suppliers, then a single

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235. The Clayton Act provides in pertinent part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, *and shall recover three-fold the damages by him sustained,* and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15(a) (1982) (emphasis added). Professor Redden provides an excellent discussion of federal statutes that expressly provide for punitive damages, federal statutes that expressly preclude punitive awards, and federal statutes that are unclear on this issue. *See* K. REDDEN, *supra* note 1, at 558-93.

236. Judge Friendly favored the power of judicial reduction of punitive awards when writing the opinion in Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967):

> There is more to be said for drastic judicial control of the amount of punitive awards so as to keep the prospective total within some manageable bounds. This would require, for example, a reduction of the instant $100,000 award to something in the $5,000 - $10,000 range, still leaving defendant exposed to several million dollars of exemplary damages.

Id. at 840.

award for a single design deficiency is sufficient. To borrow a phrase from Justice Holmes, "even a dog distinguishes between being stumbled over and being kicked,"[237] and, as many asbestos manufacturers well know,[238] the punitive damage doctrine has assumed the form of strategically placed and excessively destructive kicks.

Sixth, any exemplary damages permitted and recovered should be payable to the state treasuries just like any other penal fines.[239] Plaintiffs currently receive compensation for every conceivable element of injury,[240] and punitive damage awards should not constitute a windfall for the plaintiff. Judicial transfer of punitive damage awards to the state would prevent unnecessary and inequitable windfalls to plaintiffs, would provide state funds that could be used for public purposes, and would be consistent with all other penal fines which are required to be paid to state treasuries.[241]

Seventh, if the punitive damage concept continues to survive its archaic origins, courts should declare that insurance coverage contravenes public policy. Punitive damage awards penalize innocent purchasers of insurance who suffer increased premiums each time a court concludes that liability insurance provides coverage

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237. O.W. HOLMES, THE COMMON LAW 3 (1881). As stated in *In re* Nothern District of California "Dalcon Shield" IUD Products Liability Litigation, 526 F. Supp. 887, 899 (N.D. Cal. 1981), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983), the purpose of punitive damages awards is "to sting, not kill, a defendant." *But see*, Acosta v. Honda Motor Co., 717 F.2d 828, 838 n.15 (3d Cir. 1983) (en banc), in which the court suggested punishment to destruction may constitute acceptable policy, or as the court more succinctly noted, "[n]or is such a result necessarily untenable").

238. As noted by the court in Town of Jackson v. Shaw, 569 P.2d 1246, 1253 (Wyo. 1977), "The punitive allowance should be in an amount that would promote the public interest without financially annihilating the defendants." See Martin v. Johns-Manville Corp., 469 A.2d 655 (Pa. Super. 1983), which authorized punitive damages from a successor corporation for allegedly defective asbestos products supplied by a predecessor corporation. The punished legal entity neither designed, manufactured, nor sold the alleged defective product causing plaintiff's injury. In Morris v. Parke, Davis & Co., 573 F. Supp. 1324 (D.Cal. 1983), the court carried the punitive damage doctrine to its illogical extreme. The court approved the imposition of punitive damages on a defendant in a case in which strict tort liability was initially predicated on the market share theory because the plaintiffs could not establish that the defendant was the manufacturer or the seller of the injury causing product.

239. *See* S. 44, 98th Cong., 2d Sess. § 12(e), (f)(1) (1984) (suggesting that the amount of punitive damages that a plaintiff can receive should not exceed the amount of compensatory damages awarded, with any remaining punitive damages going to a court-determined "public purpose"). The logic of this suggestion was recognized as early as 1877 by a court that, unfortunately, refused to follows its own instincts. *See supra* note 186 and accompanying text.

240. *See supra* notes 215-20 and accompanying text.

241. *See* Duffy, *supra* note 9, at 9.

for such penalties.[242] Increased premiums do not punish the wrongdoer; they punish all innocent purchasers of insurance.

Last, and undoubtedly most important, the appellate courts must initiate a more aggressive and standardized attitude in reviewing exemplary awards. Currently, appellate courts overturn a punitive damage verdict as excessive only if it is the result of passion, prejudice, partiality, corruption, or is manifestly unjust.[243] Professor Owen recently recognized this problem and suggested that appellate courts should scrutinize carefully the trial record "for improper evidence, for argument that might have inflamed the jury, and for the sufficiency of the evidence as a whole."[244] Appellate courts too long have summarily characterized the amount of punitive damage awards as a fact issue for jury determination. This attitude is an abdication of appellate review responsibility and the results of such an abdication cannot be justified and should not continue.

VII. CONCLUSION

Punitive damages may have served a valuable function in the scheme of ancient law. The historical justifications for the doctrine, however, have long since become obsolete, particularly with the current unfettered expansion of the compensatory damage system. Because the punitive damage doctrine is monstrously archaic and because of the distorted and arbitrary fashion in which it currently operates, the harm it causes is significantly greater than any good it produces. In today's society, punitive damages merely create a windfall for plaintiffs without serving either as a punishment or a deterrence. The doctrine should be abolished because it is a doctrine of a bygone age of the law.[245] Abolishing the punitive damage doctrine would leave unaffected the civil tort system that

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242. *See supra* notes 209-13 and accompanying text.

243. *See, e.g.*, Dempsey v. Auto Owners Ins. Co., 717 F.2d 556, 562 (11th Cir. 1983); White v. Conoco, Inc., 710 F.2d 1442, 1448 (10th Cir. 1983); Moore v. American United Life Ins. Co., 150 Cal. App. 3d 610, ____, 197 Cal. Rptr. 878, 897 (1984); Riegel v. Aastad, 272 A.2d 715, 717-18 (Del. 1970); Leimgruber v. Claridge Assoc., 73 N.J. 450, 375 A.2d 652, 656 (1977).

244. Owen, *supra* note 174, at 57-58; *see* Warren v. Ford Motor Credit Co., 693 F.2d 1373, 1380 (11th Cir. 1982) (maximum limit is exceeded if award is "neither just nor proper").

245. As the Fifth Circuit stated about an unrelated abusable relic, legal doctrines that invite appeals and confuse judges, juries, and attorneys ought to be given a "quick and not too decent a burial." United States v. Bailey, 468 F.2d 652, 668-69 (5th Cir. 1972), *aff'd en banc*, 480 F.2d 518 (5th Cir. 1973).

continues to compensate plaintiffs for every conceivable injury. Furthermore, if punishment or deterrence is necessary, legislatures should enact appropriate criminal statutes with the protections that normally accompany the imposition of penal fines.

If abolition of this outdated doctrine is not accomplished, then both logic and necessity require the imposition of severe restrictions to restrain the doctrine's ill-advised and economically devastating effects. The law continually must change and adapt to fulfill its noble purpose of insuring the fair and responsible administration of justice. This noble legal purpose is threatened by the onslaught of economically destructive punitive awards. Unless farsighted and aggressive judicial and legislative action is initiated, the punitive damages doctrine will continue to wreak a form of devastation never contemplated or intended in the evolution of the tort reparations system.

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