WHY PUNITIVE DAMAGES DON’T DETER CORPORATE MISCONDUCT EFFECTIVELY

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"[W]hen ancient rules maintain themselves . . . new reasons more fitted to the time have been found for them, and . . . they gradually receive a new content, and at last a new form, from the grounds to which they have been transplanted."

—Holmes¹

INTRODUCTION

Should the “ancient rule” of punitive damages, which authorizes juries to award private fines in civil cases, be abandoned or “maintained” by supplying “new reasons more fitted to the time”? That is the central question underlying this Symposium, and the current debate concerning punitive damages.² The answer, I submit, turns on what purposes we want the private tort law system to serve, a subject which is itself in flux and much debated.³

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1. O.W. Holmes, Jr., The Common Law (M. Howe ed. 1933).

2. For a good review of the debate, see generally American College of Trial Lawyers, Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice (1989).

One may approve or disapprove of the changing role of torts, but one cannot deny that in the last generation a fundamental revolution has reshaped the intellectual underpinnings of tort law.\textsuperscript{4} From a system for punishing wrongdoers and compensating victims, United States tort law has increasingly become a system that aspires to regulate safety in all aspects of our lives.\textsuperscript{5} Creating proper incentives for deterrence, not punishing morally blameworthy misconduct, has become the order of the day.

Put aside for the moment whether a system that relies on case-by-case litigation before lay judges and juries is the best choice of an institution to perform this function;\textsuperscript{6} post-	extit{Escola}\textsuperscript{7} tort law exists. Like it or not, the judicial revolution in tort law has gone too far to be rolled back anytime in the near future. The task now facing us is to re-assess traditional doctrines of tort law to determine which fit the new paradigm; which should be modified by substituting new reasons “more fitted to the time;” and which should be jettisoned as relics of a bygone era.

Punitive damages stand out as a good candidate for rejection as a “relic”\textsuperscript{8} that does not fit the new paradigm. Under the ancien régime in tort law, juries had virtually unlimited discretion to

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5. Compensating injured persons is also a goal—perhaps the predominant goal—of tort law after the revolution. See generally Schuck, \textit{The New Ideology of Tort Law}, 92 PUB. INTEREST, Summer 1988, at 93. Compensating victims is not, however, a primary goal of punitive damages, and accordingly, compensation goals receive little discussion hereafter. \textit{But see M. Franklin & R. Rabin, Cases and Materials on Tort Law and Alternatives} 649 (4th ed. 1987) (suggesting that reimbursing plaintiffs for attorney’s fees might be a justification for punitive damages).

The short answer to clever suggestions that punitive damages are “actually” performing a latent function such as compensating plaintiffs for their attorneys’ fees is twofold. First, it makes little sense to compensate plaintiffs for attorneys’ fees only in the relatively rare cases that meet the legal standard for awarding punitive damages. Second, in most jurisdictions, punitive damages are neither based on, nor limited to, the amount that the plaintiff has paid in attorney’s fees. In Connecticut, however, exemplary damages are limited in amount to expenses of litigation, less taxable costs. \textit{See Craney v. Donovan}, 92 ConN. 236, 102 A. 640 (1917).


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award monetary damages against defendants for conduct that the juries considered especially aggravated or blameworthy. The primary purpose was to punish wrongdoers. This broad, standardless authority for juries to award punitive damages was compatible with the governing premises of the ancien régime in tort law, which measured individual conduct against community norms of moral duty or fault.

Whether unlimited jury discretion to impose private fines on an ad hoc basis makes sense in the new world of modern tort law is questionable. Today we no longer recognize unlimited power by juries to make legal policy based on their own values; the prevailing concept is that law is a rational instrument to implement the policies of the state. The notion that individual juries may willy-nilly punish those who offend them is anomalous in a system of tort law that increasingly conceives of itself as devoted to creating rational incentives for appropriate levels of safety.

Creative minds like those at work in this Symposium may yet succeed in saving punitive damages by inventing clever rationalizations “more fitted to the time” to justify the ancient curiosity of punitive damages. One thing is virtually certain, however: If punitive damages did not already exist, no one designing a system of incentives would include a “wild card” giving juries essentially standardless discretion to award unlimited amounts in particular cases. Charles McCormick made essentially the same point half a century ago: “It is probable that, in the framing of a model code of damages to-day for use in a country unhampered by legal tradition, the doctrine of exemplary damages would find no place.”

But punitive damages do exist, and therefore when lawyers think about them at all, we see them in a different light. Punitive damages are such a familiar part of the legal landscape that, until recently, they were taken for granted—like electric wires overhead or the sounds of automobiles in cities. As a result of recent consti-

stitutional challenges, lawyers are finally beginning to see punitive damages as an issue, rather than a background assumption.

Unfortunately, however, recent constitutional challenges, while making punitive damages an issue, have cast the problem in a way that obscures the basic policy question: are punitive damages useful and effective as a legal device? This Article attempts to raise the more fundamental question that the current challenges overlook: does it make sense in a modern tort law system committed to creating efficient incentives for safety to give juries unlimited, standardless discretion to punish corporate conduct by awarding monetary damages? The conclusion reached is a qualified "No." At least in cases of nonintentional torts such as products liability and personal injury, which are at the core of the current policy debate over punitive damages, there is very little reason to believe that punitive damages are effective at performing the role that is usually said to justify them: deterring corporate misconduct. On the contrary, awarding money damages against corporations in cases that juries perceive as involving reckless or outrageous misconduct


14. By challenging the amounts awarded as punitive damages in particular cases as disproportionate, constitutional challenges implicitly presume the basic soundness of punitive damages as an institution. Marginalism is perhaps understandable as a strategy for Supreme Court litigation, but it has the unfortunate side-effect of taking for granted, and thereby reinforcing, the validity of the institution that is under attack while attempting to nip away at its edges. In both Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 109 S. Ct. 2909 (1989), and Bankers Life & Casualty Co. v. Crenshaw, 108 S. Ct. 1645 (1988), the petitioners challenged punitive damages awards on the basis of the eighth amendment's excessive fines clause. In Bankers Life, the Court did not consider the issue because the petitioner had not raised the issue in the courts below. Bankers Life, 108 S. Ct. at 1650. With the issue squarely before it in Browning-Ferris, the Court held that the eighth amendment's excessive fines clause is inapplicable to civil disputes involving only private litigants. Browning-Ferris, 109 S. Ct. at 2920. However, the two decisions left open the possibility that the fourteenth amendment's due process clause places limits on punitive damages awards. Browning-Ferris, 109 S. Ct. at 2921; Bankers Life, 108 S. Ct. at 1649-50. For further discussion of these two cases and their implications for future punitive damages law, see Schwartz, Browning-Ferris: The Supreme Court's Emerging Majorities, 40 Ala. L. Rev. 1237 (1989).

15. See Landes & Posner, New Light on Punitive Damages, 10 REGULATION, Sept./Oct. 1986, at 33 (In the case of "intentional harms . . . engaged in knowingly . . . . [d]amage awards equal to the victim's damages provide inadequate deterrence against such concealed harms, since the wrongdoer's expected damage payment is frequently less than his immediate gain. The current debate over punitive damages does not involve intentional torts. It involves products liability and other accident cases where liability is based on negligence or strict liability—where harm has been done, but not deliberately.")
may have just the opposite effect: rather than discouraging corporate misconduct, punitive damages awards against corporations may actually have the perverse effects of decreasing economic incentives for safety, undermining individual responsibility, and encouraging business-as-usual by corporations.

It is important to be clear, however, that my thesis is not the stone-dumb one that the threat of punitive damages never has any effect on anyone. That is obviously an absurd and untenable position. Any situation in which people are confronted with the prospect of a future change in their economic position—whether the risk of punitive damages, or a chance of winning the lottery—has some present incentive effects on their behavior. But the present incentive effects of risks of future income changes are not always equal. We can think of legal devices as alternative technologies of justice, which, like other technologies, are relatively effective or ineffective at changing behavior. My claim is merely that punitive damages are relatively ineffective at deterring corporate misconduct.

The central failing of punitive damages that renders them incompatible with modern tort law is unpredictability. The modern conception of tort law as a regulatory system depends on predictability, so that the actions taken ex post in one case can be used by others as ex ante incentives to guide future behavior. From the perspective of potential tortfeasors, punitive damages are an unguided missile: it may or may not strike them, but there is very little that potential tortfeasors can do to alter their risks of punitive damages. As a consequence, punitive damages are fundamentally out of step with the new regime in tort law, which is committed to the concept of efficient deterrence.

To understand why, it is helpful to make a distinction between what may be called general or class predictability and specific or act predictability. By “general or class predictability,” I mean the ability to foresee the incidence of some future consequence as a result of engaging in a class of activity, as opposed to “specific or act predictability,” which refers to the ability to predict which of the specific actions within the class are likely to give rise to the consequence. An example of general predictability

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16. Ellis, Fairness and Efficiency, supra note 9, at 53-57, 77 (emphasizing “uncertainty” of punitive damages awards).
would be the increased risk of death as a result of taking a trip on a commercial airline. We know that there is a statistical risk of death associated with the trip, but as we get on the plane, we are unable to predict very well which particular trip on which particular airplane is likely to result in death. We can predict the class of activity that results in an increased risk of harm, but we can say little if anything about what specific subactions within the class increase or decrease the risk.

Most of the thinking to date about deterrence in tort law has ignored the distinction between what I have called general and specific predictability. The importance of the distinction for the law of torts lies in the type of response that is available to someone who has information regarding general but not specific predictability. A person who knows that engaging in a class of activity will increase the risk of an adverse consequence may choose to restrict her participation in the activity, but how one conducts the activity is unlikely to be affected unless she also has information bearing on specific predictability.

Like much of modern tort law, the threat of punitive damages creates incentives at the level of general, but not specific, predictability. Thus, if a company is engaged in the pharmaceutical business, it can predict generally that it will probably be subjected to some punitive damages awards. It may even be able to predict roughly what the anticipated range of punitive damages awards will be over time. General predictability may lead to restricting participation in the pharmaceutical business (or to raising prices, thereby restricting the level of pharmaceuticals available to customers). In the absence of information about the liability consequences of specific predictability, however, it is unlikely that practices or modes of operation are going to be affected much. Thus, what are called general and specific deterrence might be associated with the availability of general and specific predictability. Information going to general predictability may deter a general class of activities; only information about the liability consequences of specific practices or modes of engaging in the activity is likely to enhance specific predictability and thereby shape the way that the activity is conducted.

The interesting question is not whether the threat of punitive damages has some incentive effects on future behavior. It is rather whether punitive damages are an effective technology of justice for
achieving society’s deterrence goals. In other words, are punitive damages more or less effective in shaping conduct than a straight percentage surcharge on all tort verdicts of an amount equal to the aggregate value of punitive damages awarded? Most practicing attorneys appear to believe that the uncertainty and large size associated with punitive damages creates a kind of “leverage” on the behavior of corporate defendants that is even greater than the straight economic value of the awards.\(^\text{17}\) I will argue that in fact the actual economic effect of punitive damages awards is quite low, and there are strong reasons to believe that the effect on behavior is less than their straight economic effect, not greater.

In what follows, I first review what little evidence I have been able to find bearing on whether punitive damages actually have a significant effect in deterring corporate misconduct.\(^\text{18}\) I conclude that at least in the area of corporate decisions in products liability and other safety-related fields, there is no credible evidence that punitive damages have a substantial deterrent effect. Next, I attempt to explain this finding analytically. In theory, deterrence of particular behavior is promoted by clear commands backed by swift, certain sanctions. None of these factors characterizes the tort system.\(^\text{19}\) Moreover, it is highly debatable whether penalties imposed on corporations, rather than the individuals actually responsible for making decisions, have much effect on the types of

\(^{17}\) See, e.g., Brief for Consumers Federation of America, as Amicus Curiae at 42-51; Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 109 S. Ct. 2909 (1989) (No. 88-556).

\(^{18}\) In the final analysis, the effect of punitive damages on conduct is an empirical question, which should be susceptible to study. I am in the process of designing a study that would compare the incidence of malpractice claims in two jurisdictions, one which restricts punitive damages awards and another which freely allows them.

\(^{19}\) See generally Elliott, Torts With Multiple Causes, supra note 3:

What little we know about effective deterrence in other areas of law suggests that tort law would be a very poor mechanism for regulating unsafe conduct. Deterrence seems to work best when the law gives simple, clear commands which are backed by the swift and sure imposition of sanctions. Tort law satisfies none of those criteria. Its commands are anything but clear; instead, they must be gleaned from voluminous caselaw and usually turn on vague requirements that a person act “reasonably under all the circumstances.” Moreover, for a variety of reasons, only a small minority of injured persons actually sue, and when they do recover, generally years have elapsed since the events transpired. These are the antithesis of conditions that create efficient deterrence, particularly in the corporate context, in which individual managers who made the fateful decisions often will have long since left the company before the tort law sanction finally hits “the bottom line.”

Id. at 30.
misconduct that are supposedly reached by punitive damages. In the final section, this Article argues that in the case of truly aggravated misconduct, which is supposedly the special province of punitive damages, monetary awards against corporations are probably counterproductive because their existence dilutes the sense that the individuals who actually decide are responsible for the consequences of their actions, and because punitive damages promote the idea that avoiding misconduct is purely a matter of "dollars and cents." Criminal and other sanctions against the individual corporate employees directly responsible for making wrongful decisions would be a far more effective remedy for deterring truly outrageous misconduct by corporations than punitive damages against the corporation.

I. ARE PUNITIVE DAMAGES AN EFFECTIVE DETERRENT OF CORPORATE MISCONDUCT?

Like so many empirical issues in law, the question of how effectively the threat of punitive damages deters corporate misconduct is one that the side with the burden of proof will almost certainly lose. There is very little credible empirical evidence that punitive damages have much effect in deterring corporate misconduct, but there is also no evidence proving that they don’t. 20

About the only things that we think we know about punitive damages are that they are relatively rare, but they have been awarded somewhat more frequently and in larger amounts in recent years. According to a 1987 RAND Institute for Civil Justice study of punitive damages awards in Illinois and California, "the incidence of punitive damage awards . . . and the amount of money . . . awarded for punitive purposes have increased substantially over the years" 1960 through 1984. 21 Admittedly, the numbers of punitive damages awards in the two samples were small, and the findings were not consistent across all types of litigation. Nonethe-

20. See Ellis, Fairness and Efficiency, supra note 9, at 77 ("Without better empirical evidence, it is impossible definitively to establish that the present law of punitive damages does not promote efficiency. The most that can be said is that there is no empirical basis for believing that it does and that the intuitive arguments supporting the proposition are weaker than those against it.").

less, there does seem to be a general trend toward awarding punitive damages more frequently and in larger amounts in recent years.

If punitive damages were an effective deterrent of corporate misconduct, one might expect to find a corresponding decrease in corporate misbehavior in response to the increase in punitive damages liability.\textsuperscript{22} Does anyone believe that there is less corporate misbehavior around today than in the past as a result of the increase in punitive damages?

An empirical study of corporate responses to tort liability in the product liability area is also inconclusive, but it too suggests a skeptical response to the claim that punitive damages have a significant influence on corporate decisions.\textsuperscript{23} In a recent study for the Conference Board, Nathan Weber polled 232 major United States corporations about the effect of product liability awards on their decisions. In general, Weber found that product liability suits made only "a relatively minor dent on the economics and organization of individual large firms."\textsuperscript{24} Most product liability claims were either dismissed or settled out of court for under $25,000, with only six percent of final court judgments going in favor of plaintiffs after all appeals were exhausted.\textsuperscript{25}

The most common corporate response to products liability awards was to increase prices slightly, but Weber also found modest effects on product labeling, design, and discontinuation.\textsuperscript{26} Interestingly, fewer than a third of the firms surveyed said that they had made changes in safety designs of their products in response to products liability awards, and among those that had, only about one in five reported a subsequent decline in accidents as a result of the changes.\textsuperscript{27}

The general picture that emerges is that tort liability has only a mild influence on corporate decisions about product design, with

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\textsuperscript{22} But see Fishback, Liability Rules and Accident Prevention in the Workplace: Empirical Evidence from the Early Twentieth Century, 16 J. LEGAL STUD. 305 (1987) (finding decreased incidence of workplace accidents following adoption of strict liability workers compensation systems).


\textsuperscript{24} Id. at 2.

\textsuperscript{25} Id. at 10-11.

\textsuperscript{26} Id. at 13-14.

\textsuperscript{27} Id. at 13-14.
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punitive damages hardly even mentioned. This squares with other studies that have found punitive damages are "rare" and "relative[ly] insignificant[t]" in the products liability field.\textsuperscript{28}

II. WHY PUNITIVE DAMAGES AREN'T AN EFFECTIVE DETERRENT

The conclusion that the threat of punitive damages is probably not a major factor in corporate decisionmaking is hardly surprising when one considers the problem from an analytical perspective.

In the criminal law, it is generally recognized that three factors increase the deterrent effect of sanctions: \textit{swiftness}, \textit{certainty}, and \textit{magnitude}.\textsuperscript{29} Punitive damages against corporations in tort cases are deficient as a deterrence mechanism on all three counts.

1. \textit{Swiftness of Sanction}.—A typical products liability or other tort case against a corporation may not be brought until years after the fateful decisions that form the basis for the lawsuit. Case-by-case litigation in court has always been a slow process. Today, as a consequence of the adoption of the "discovery rule" for starting the statute of limitations, it is not unusual for sanctions to be imposed through the tort system for design decisions and other corporate conduct that occurred ten, twenty, or even fifty years earlier. For example, a jury recently rendered a verdict for $1 million in compensatory and $7 million in punitive damages in a case involving the Copper-7 intrauterine birth-control device; the evidence focused on decisions made by the manufacturer about testing and warnings before the device was first marketed in 1974, fourteen years earlier.\textsuperscript{30} Punitive damages evidence in asbestos cases routinely focuses on what the companies knew about the health effects of asbestos fifty years ago, in the early 1930s.\textsuperscript{31}

\textsuperscript{28} Landes & Posner, supra note 15, at 35-36.

\textsuperscript{29} See, e.g., J. Wilton & R. Herrnstein, \textit{Crime and Human Nature} 397-401 (1985) ("To increase the expected disutility of crime for people in general, society must increase either the speed, the certainty, or the severity of punishment, or some combination of all three.").


\textsuperscript{31} See Fischer v. Johns-Manville Corp., 103 N.J. 643, 512 A.2d 466 (1986) (rejecting argument that punitive damages for misdeeds of asbestos companies in the 1930s should not be visited on current stockholders 50 years later).
There is no reason to believe that corporations are any less sensitive than human beings to long lag-times in the imposition of sanctions. In fact, there are strong reasons to suppose that corporations may discount future costs even more sharply than people do. Under the usual rules of accounting, contingent liabilities, such as the future risk of punitive damages, are regarded as too speculative to be taken into account in current financial statements. Even if projected future expenditures are considered for some purposes, in a discounted cash flow analysis, expenditures a decade or more into the future become vanishingly small. Finally, most top managers or other relevant corporate decisionmakers look forward to only a limited tenure in office. Expenditures that will not be felt by the corporation for decades have little prospect of affecting the individuals who actually make decisions.

When punitive damages are assessed against a corporate defendant decades after the events at issue in a lawsuit took place, it is only a legal fiction that leads us to consider the corporation to be the “same person” that committed the evil acts. The corporate owners, officers, and decisionmakers who will bear the brunt of today’s punitive damages verdicts are almost certainly not the same as those who were involved when the fateful decisions were made. Thus, punitive damages against corporations for events far in the past are like “corruption of the blood,” the ancient common law remedy that punished the children for the sins committed by the parents.

There is very little reason to suppose that corporate managers are going to be strongly moved by the remote threat of penalties against the corporation many years in the future.

2. Certainty of Sanction.—The second condition for efficient deterrence is the certainty that sanctions will be imposed. From the ex ante standpoint of a manager making a decision, the chances that punitive damages will later be imposed as a result of a particular decision have to be regarded as vanishingly small.

The Supreme Court has already declared punitive damages unconstitutional in one area of law, holding that awards of puni-

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32. See Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 841 (2d Cir. 1967) (as a result of punitive damages “many innocent shareholders [are] suffering extinction of their investments for a single management sin”).

tive damages are "wholly unpredictable," and therefore pose an unacceptable risk of stifling freedom of expression.\textsuperscript{34}

We also find no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation. In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views.\textsuperscript{35}

The \textit{Gertz} holding was, of course, limited to special circumstances under the First Amendment, but the point that jury awards of punitive damages are unpredictable has far broader ramifications.

The modern conception of tort law as a system of incentives depends upon the assumption that the actions taken in particular tort cases will generate information useful to others in shaping their behavior. This assumption may be open to serious question generally,\textsuperscript{36} but it seems particularly dubious in the case of punitive damages. Punitive damages verdicts are notoriously inconsistent, with some juries finding for defendants, but other juries making huge punitive damages awards on the same facts.

For example, in the Bendectin litigation,\textsuperscript{37} to date there have been fifteen judgments on the merits for the defendants, including a jury verdict in a case involving over one thousand claims consolidated for trial, which was recently upheld on appeal in the Sixth Circuit.\textsuperscript{38} and a recent D.C. Circuit decision holding that the scientific literature is so clear that Bendectin does not cause birth defects that no jury should be permitted to find for the plaintiffs.\textsuperscript{39} Nonetheless, in ruling on the same facts involving exactly the same corporate conduct, juries in Philadelphia and Washington, D.C. have awarded $1 million and $20 million in punitive damages re-

\textsuperscript{35} Gertz, 418 U.S. at 350 (emphasis added).
\textsuperscript{36} Latin, Problem-Solving Behavior and Theories of Tort Liability, 73 CALIF. L. REV. 677, 682-93 (1985); see also Mashaw, A Comment on Causation, Law Reform, and Guerrilla Warfare, 73 GEOR. L.J. 1393, 1394 (1985); Abel, Risk as an Arena of Struggle (Book Review), 83 MICH. L. REV. 772 (1985).
\textsuperscript{37} For an overview of the status of the Bendectin litigation, see 3 INSIDE LITIGATION 46-47, Jan. 1989, at 46-47.
\textsuperscript{38} In re Bendectin Litig., 857 F.2d 290 (6th Cir. 1988).
\textsuperscript{39} Richardson v. Richardson-Merrell, Inc., 857 F.2d 823 (D.C. Cir. 1988).
spectively against the manufacturer of Bendectin for decisions that most other juries have found blameless.\textsuperscript{40}

These apparently inconsistent punitive damages verdicts from different juries should not be surprising. What little we know about what motivates jurors to award punitive damages suggests that the composition of the particular jury—the values, preconceptions, and strength of convictions of individual jurors—has more to do with the imposition of punitive damages than the facts of the case.\textsuperscript{41} In addition, “atmospheric” factors—things like how the lawyers perform, whether the defendants appear heartless and uncaring, and whether there are any “smoking gun” documents—also appear to be important to juries in deciding whether to award punitive damages. These factors are also very difficult for a potential tortfeasor to predict in advance, and to the extent that they can be predicted, they have very little to do with the level of precautions or care taken by the defendant.

With good reason, potential defendants perceive juries as awarding punitive damages capriciously. This perception (whether valid or not) undermines the efficacy of punitive damages as a deterrent. If defendants are fatalistic about the circumstances that may expose them to punitive damages, it is unlikely that they will alter the substance of their risk-creating behavior with punitive damages in mind. Because punitive damages are generally predictable, but not specifically predictable,\textsuperscript{42} defendants may raise their prices or restrict their levels of activity, but they are unlikely to change their practices much in response to the threat of punitive damages.

3. \textit{Magnitude of Sanctions}.—On the surface, the primary attraction of punitive damages as a means of deterring misconduct would appear to be in increasing the magnitude of sanctions.

The argument that punitive damages increase deterrence by increasing the magnitude of sanctions is superficially attractive, and it does have limited validity, but its importance should not be


\textsuperscript{42} For an explanation of these concepts and their importance for the deterrent effect of tort law, see supra pp. 1057-58.
exaggerated. There is no question that in an individual case damages can be much larger with punitive damages than without them. As Melvin Belli, a prominent plaintiff's lawyer, suggests, punitive damages are the only civil judicial "steel hammer" we have. The argument that punitive damages increase the magnitude of awards, and therefore increase deterrence, should not be overemphasized, however. In the first place, very large jury verdicts for punitive damages are usually reduced substantially through post-trial motions or on appeal. Moreover, there has been a trend in recent years to permit insurance coverage against punitive damages, which tends to spread the loss and further weaken the magnitude of the effect on an individual defendant.

In fact, the availability of punitive damages as a separate legal category may actually reduce the total economic effect of tort judgments on corporations. Punitive damages encourage the jury to give specific, monetary expression to their moral outrage. The latent function of the doctrine of punitive damages may be to induce juries to separate their damages awards into two components—one of which represents the jury's sense of pure moral outrage against the corporate defendant. The separate punitive element is then usually reduced or set aside by the appellate courts. This leads to the perverse result that aggregate monetary damages finally awarded against corporations might actually be greater if punitive damages were "abolished," since some of the jury's moral sentiments that now go into punitive damages awards that are set aside on appeal would find their way into general compensatory awards for intangible items such as pain-and-suffering or emotional distress, but would be less susceptible to being set aside or reduced after verdict.

44. Id. at 23.
45. In the RAND study, one-third of the amounts awarded by juries against corporations and two-thirds of the amounts awarded against individuals were eliminated after trial. M. Peterson, S. Sarma & M. Shanley, supra note 21, at 55 Table 4.10; accord Landes & Posner, supra note 28, at 35 Tables 2 & 3 (finding "much higher reversal rate" for punitive damages on appeal than for other trial court outcomes).
Whether or not the actual effect of maintaining a separate category of punitive damages is to increase or reduce total damages awarded against corporations, when punitive damages are considered from an overall, systemic perspective, rather than in the context of an individual case, their overall magnitude appears to be small. The RAND study found that between 1980 and 1984, punitive damages were awarded in only 2.5 percent of the cases tried in Cook County, Illinois, and 5.1 percent of the cases tried in California. In addition, most punitive damages awards are relatively modest in size; half of all awards against businesses in California were under $100,000 and under $143,000 in Illinois, with a few very large awards bringing up the averages. Landes and Posner’s data for reported product liability cases are similar, with punitive damages remaining after appeal and post-trial motions in “less than 3 percent of the cases.” These data are generally consistent with other, more recent studies which also find punitive damages awards generally modest both in frequency and in size of awards.

Bearing in mind that the overwhelming majority of cases are settled rather than tried, the total liability from punitive damages appears to be relatively modest, although the risk of punitive damages may be factored into settlements, particularly if defendants perceive juries as awarding them unpredictably. The main economic effect of large, highly publicized punitive damages awards may be to increase the total number of claims brought against a defendant by increasing the enthusiasm of plaintiffs’ lawyers for bringing such cases.

On balance, then, while an award of punitive damages in an individual case may be a huge windfall to a particular plaintiff (and the plaintiff’s attorney), from the standpoint of the corporate defendant whose liability risk is diversified over a large portfolio of cases, the incremental contribution of punitive damages to aggregate liability is probably relatively modest, although not nonexistent. The threat of punitive damages probably contributes no more to deterring misconduct than would a flat rule increasing all damages awards in tort cases by a uniform five percent.

47. M. Peterson, S. Sarma & M. Shanley, supra note 21, at 33 table 3.1.
48. Id. at 50.
49. Landes & Posner, supra note 28, at 35.
From the standpoint of deterring corporate misconduct, however, the relevant issue is not whether punitive damages increase the total magnitude of the sanction, but whether the marginal or incremental contribution of punitive damages to total liability significantly alters incentives. It seems unlikely that many situations arise in which corporations willingly assume the large financial burdens of legal expenses and settlements from liability for an unsafe product, but would be deterred by the small additional increment of liability provided by punitive damages.

Rather than evaluating the effect of punitive damages on a model of a particular result in individual cases, one should consider the effect of punitive damages on the diversified portfolio of cases actually held by most corporate defendants. From this perspective, the threat of punitive damages emerges as a modest additional cost of doing business, which must be spread across broad categories of activity because it is relatively difficult to predict ex ante what specific practices or actions may later result in punitive damages. Punitive damages may have a modest effect on increasing prices (and restricting the availability of goods and services), but they are unlikely to have any major effect on deterring specific practices or misconduct.

III. PUNITIVE DAMAGES SEND THE WRONG MESSAGE

In recent years, a number of scholars have pointed out that legal devices cannot be evaluated solely in terms of the incentives that they create. Law is part of the culture that shapes our values and how we think about the world. When punitive damages are evaluated from this perspective, they suffer from two basic flaws: First, like other forms of vicarious liability, punitive damages against corporations undermine individual responsibility, and second, awarding civil money damages in cases of gross misconduct promotes the view that avoiding misconduct is purely a matter of dollars-and-cents. Thus, in the long run, punitive damages awards against corporations for gross misconduct may be counterproductive to the goal of creating effective incentives for safety. Criminal

sanctions against the individuals directly responsible would be a far more effective deterrent.

A. Punitive Damages Undermine Individual Responsibility

While in theory, punitive damages are available against individuals as well as corporations, in practice punitive damages are rarely awarded against individuals, and when they are, awards against individuals are likely to be set aside after trial or on appeal.\(^{52}\) The role of punitive damages is supposedly to send a message to wealthy institutions, such as corporations.\(^{53}\) Unfortunately, however, the focus on holding institutions liable undermines the concept that individuals are responsible for the consequences of their actions. For example, while corporations are routinely found liable for compensatory and punitive damages for knowingly placing unsafe, defective products on the market, it is virtually unheard of that the designer or manager actually responsible for making the fateful decision is held responsible as an individual in any way.

Certainly vicarious or organizational liability has a role in some circumstances, but when it becomes the exclusive focus, incentives for individuals who actually make decisions may be undermined. It is important to remember that corporations don’t kill people; people kill people (sometimes while in the service of corporations). If the goal is to influence decisions about safety, the relevant question is what incentives exist at the point of decision. Holding the corporation liable imposes a buffer that protects the individual from the incentives that are supposedly intended to affect his or her decisions. When everyone is responsible for a misdeed, no one is responsible. The late Karl Menninger pointed this out in a perceptive (and unfortunately overlooked) book a decade ago: “If a group of people can be made to share the responsibility for what would be a sin if an individual did it, the load of guilt rapidly lifts from the shoulders of all concerned.”\(^{54}\)

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52. M. Peterson, S. Sarma & M. Shanley, supra note 21, at 55 table 4.10.
54. K. Menninger, Whatever Became of Sin? 95 (1973); see also id. at 124-25.
There is a basic tension in our present system of tort law between the traditional concept of an individual’s responsibility for misconduct and developing notions of collective or organizational responsibility, as University of Virginia Law Professor Kenneth Abraham has pointed out in a perceptive essay. By holding corporations liable for punitive damages, we implicitly grant the individuals who actually made the fateful decisions a kind of de facto “corporate immunity.” The immunity of corporate employees and officials from responsibility for their actions is anomalous in that parallel immunity has been specifically denied to individuals in government and virtually all other institutions in our society.

B. Punitive Damages as Licenses to Disobey

A second unfortunate effect of punitive damages at the level of legal culture or preference-shaping is that punitive damages reinforce the view that human life is a commodity that can be bought and sold. By converting issues of life and death into issues of dollars and cents via punitive damages, we may be unwittingly licensing corporations to engage in misconduct to the extent that it is cost-effective for them to do so.

The conceptual tension that lies at the heart of punitive damages as a remedy is clear if one considers one of the most famous of modern punitive damages cases, the “Pinto Case,” Grimshaw v. Ford Motor Co. In that case, Ford allegedly considered but rejected design changes to the gas tanks of its Pinto automobiles which would have made them less susceptible to bursting into flames in rear-end collisions. Ford allegedly rejected a simple de-

55. Abraham, Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform, 73 VA. L. REV. 845, 883 and passim (1987) (“Running through each of the principal problems that tend to be raised by mass tort litigation, however, is the tension between the traditional notion of individual responsibility and the expanded notion of collective responsibility.”)


57. For a general argument that “[c]apitalist tort law systematically encourages unsafety,” see Abel, Torts, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 185, 190 (D. Kairys, ed. 1982); cf. Cooter, Prices and Sanctions, 1984 COLUM. L. REV. 1523, 1523 (“Officials should create prices to compel decisionmakers to take into account the external costs of their acts, whereas officials should impose sanctions to deter people from doing what is wrong.”) [hereinafter Cooter, Prices and Sanctions].

sign change on the grounds that it was too expensive; it would be cheaper to pay damages in lawsuits, Ford calculated, than to make the design change which would have saved many victims from being badly burned. The jury was evidently quite horrified at the thought that Ford was trading off dollars and lives. The solution was to award more dollars in punitive damages against Ford.

Unfortunately, however, the Grimshaw “solution” is no solution at all; it has the perverse effect of validating the very type of reasoning that it was intended to condemn. After Grimshaw, it is apparent that our present legal system does not consider it wrong for Ford to decline to make available design changes that could save lives; what was wrong, apparently, was only a computational error: Ford did not reckon into its cost-benefit equation the possibility of punitive as well as compensatory damages.

The basic rationale for awarding money damages, as opposed to orders that flatly prohibit certain conduct, is to give regulated parties the opportunity to make the final decision whether to comply or to pay the price and continue to disobey. 59 Legal endorsement of the regulated party’s freedom to choose whether to comply is what ultimately distinguishes prices and sanctions. 60 How odd that while finding corporations guilty of unconscionable misconduct in placing defective products on the market and awarding millions of dollars in punitive damages, it apparently never occurs to American courts to issue injunctions mandating design changes or banning products from sale in products liability cases. The flexibility that money damages give private parties may be appropriate in many situations, but not if misconduct really meets the tests for punitive damages. We would be far better off to rely more on criminal and other sanctions against the individuals directly responsible for unconscionable decisions and less on punitive damages against corporations.


60. Cooter, Prices and Sanctions, supra note 57, at 1523, 1523; see also Elliott, Regulating the Deficit After Bowsher v. Synar, 4 Yale J. Reg. 317, 346 (1987). ("The essential defining characteristic of regulation is that while preserving nominal freedom of individuals to make private decisions, regulation attempts to alter the course of decisions in the aggregate by altering the structure of incentives individuals face when making their decisions.").
IV. CONCLUSION

Punitive damages continue to exist out of a vague, unreasoning sense that they are a way to "get tough" with corporations that do things we do not like. In fact, punitive damages probably have very little effect on corporate behavior other than to cause corporations to increase prices modestly. They are a relic that has largely outlived its usefulness. They should be abolished, or severely restricted, rather than preserved through the invention of new rationales more suited to the new order in tort law.