

PEACE: A PUBLIC PURPOSE FOR PUNITIVE DAMAGES?

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When reading cases and articles about punitive damages, one occasionally encounters an idea that seems somewhat quaint: a purpose of punitive damages is to preserve the peace.¹ The preservation of peace in this context is literal; the concern is to provide an attractive alternative to violence in the legal system. The idea that punitive damages preserve the peace makes intuitive sense. A person should be less likely to engage in violence against someone if she can sue that person and receive a lot of money in punitive damages. However, a recent piece by Professor Anthony Sebok² suggests a more sophisticated and perhaps more purposeful connection, at least historically, between the goal of peace and the design of punitive damages.

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1. See, e.g., *Grey v. Grant*, (1764) 95 Eng. Rep. 794, 795; Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1198 (1931).

2. Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957 (2007).

Sebok crafts a theory that punitive damages serve “as revenge for the violation of a private right,”³ emphasizing tort as private law. Indeed, Sebok devotes a section of the paper to how his theory of punitive damages is consistent with the theory of tort law as “civil recourse,”⁴ a conception of torts as private law associated with Professors John C.P. Goldberg and Benjamin Zipursky.⁵ However, Sebok’s interesting and powerful argument also has a public law corollary, though not one he pursues. Sebok’s argument can also be used to explain how the design of punitive damages was optimal for preserving the peace in civil society (whether it *remains* so is another issue).

To that end, this essay will proceed in three parts. Part I will discuss authority for punitive damages as a means of preserving the peace and describe Sebok’s theory of punitive damages. Part II will focus on how Sebok’s theory supports the argument that punitive damages were designed to preserve the peace. Finally, Part III argues that the necessity for punitive damages’ peacekeeping function is substantially diminished in modern society.

I. PEACE AND REVENGE

A. “to prevent the practice of duelling”⁶

There is widespread agreement that tort (and criminal) law developed historically as an alternative to violence.⁷ In *The Common Law*, Oliver Wendell Holmes, Jr. stated:

3. *Id.* at 961.

4. *Id.* at 1023-29.

5. See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 *FORDHAM L. REV.* 1563 (2006); John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 *MD. L. REV.* 364 (2005); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 *GEO. L.J.* 695 (2003).

6. *Merest v. Harvey*, (1814) 128 Eng. Rep. 761, 761.

7. Whether preserving the peace should or does remain the only goal of tort law is beyond the scope of this Essay. However, for a provocative argument in favor of the peacekeeping function of torts, both positive and normative, see JOEL LEVIN, *TORT WARS* (forthcoming 2008).

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It is commonly known that the early forms of legal procedure were grounded in vengeance. Modern writers have thought that the Roman law started from the blood feud, and all the authorities agree that the German law begun [sic] in that way. The feud led to the composition, at first optional, then compulsory, by which the feud was bought off. The gradual encroachment of the composition may be traced in the Anglo-Saxon laws. . . . The killings and houseburnings of an earlier day became the appeals of mayhem and arson.⁸

Other authorities support the point: “The primordial seed from which all crime and tort were to germinate was the blood feud. . . .”⁹ Similarly, “[f]or most of its long history, what is now known as tort law functioned as what may be called a ‘peace system,’ an alternative to violence that facilitated the peaceful coexistence of people in society.”¹⁰ In essence, “an age-old purpose of the law of torts is to provide a substitute for violent retaliation against wrongful injury.”¹¹

Given that pedigree, it is not surprising that preserving the peace would be pursued as a goal of punitive damages. Although the common law heritage of multiple damages is much older, the concept of punitive damages was not explicitly articulated until 1763.¹² One year later, the idea that punitive damages were granted to preserve the peace was espoused:

[W]hen a blow is given by one gentleman to another, a challenge and death may ensue, and therefore the jury have done right in giving exemplary damages; the plaintiff has been used unlike a gentleman by the defendant in striking him, withholding his property, and insisting upon his privilege, all of them tending to provoke him to seek his revenge in another way than by law, and therefore we think the damages are not

8. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 2-3 (Dover Publications, Inc. 1991) (1881).

9. Wex Malone, *Ruminations on the Role of Fault in the History of Torts*, in U.S. DEP’T OF TRANSPORTATION, *ORIGIN AND DEVELOPMENT OF THE NEGLIGENCE ACTION 1* (1970).

10. John Hasnas, *What’s Wrong with a Little Tort Reform?*, 32 *IDAHO L. REV.* 557, 558 (1996).

11. *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003).

12. LINDA L. SCHLUETER, *PUNITIVE DAMAGES* 5 (5th ed. 2005).

excessive.¹³

The rationale was still used approximately fifty years later: “It goes to prevent the practice of duelling, if juries are permitted to punish insult by exemplary damages.”¹⁴ The peace rationale for punitive damages eventually crossed the Atlantic to the United States. For example, the Supreme Court of Illinois described the function of punitive damages in 1872 as preservation of “public tranquility” by avoiding resort to violence.¹⁵

Scholars have also mentioned the connection between punitive damages and peace. An early 1930s article in the *Harvard Law Review* provided:

One of the possible uses of the tort money judgment is the prevention of private revenge—a pacificatory function. The theory is that an orderly, legal retaliation is to be preferred to a private vengeance which will disturb the peace of the community, and possibly prove injurious to non-combatants and embroil the friends of the principals.¹⁶

Punitive damages could assist compensatory damages by attracting into the tort system victims with low compensatory damages who might otherwise resort to violence.¹⁷ Over two decades later, a note in the *Harvard Law Review* included this passage: “Many plaintiffs seeking exemplary damages are motivated to some extent by a desire to revenge themselves on the defendant. Tort law is based in part upon a recognition that satisfaction of this impulse will help preserve the peace by discouraging self-help.”¹⁸ Finally, Professor Dorsey Ellis listed preserving the peace as one of seven potential purposes for punitive damages in a 1982 article.¹⁹ Ellis eventually reduced

13. *Grey*, 95 Eng. Rep. at 795.

14. *Merest*, 129 Eng. Rep. at 761.

15. *Alcorn v. Mitchell*, 63 Ill. 553, 554 (1872).

16. *Morris*, *supra* note 1, at 1198.

17. *See id.*

18. Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 521-22 (1957).

19. Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 3 (1982).

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the plausible purposes to two—retribution and deterrence—and did not explicitly note which, if either, category involves preserving the peace.²⁰

The preceding discussion demonstrates that courts have sometimes relied on preserving the peace as a reason for punitive damages and scholars have occasionally considered the idea. However, the precise relationship between punitive damages and society's interest in peace is relatively vague. Professor Sebok's recent article can be used to fill in the details.

B. Sebok's Theory of Punitive Damages

The United States Supreme Court²¹ and other commentators²² provide that punitive damages serve the functions of deterrence and punishment. Sebok believes that punitive damages actually have a deterrent effect: "It would be bizarre if the threat of punishment did not have an effect on an actor's *ex ante* choices."²³ However, for Sebok, the claim that punitive damages are a deterrence-based system requires more: "This claim presumes not only that a system of punitive damages has a deterrent effect, but that it is capable of a design that achieves that effect, and that this design is susceptible to control by its designers."²⁴ This, however, Sebok denies. For him, punitive damages are not capable of control by designers—not capable, in short, of achieving efficient deterrence.²⁵ Basically, Sebok states that for efficient deterrence to work, juries would have to produce awards that are, from an *ex ante* perspective, large enough and certain enough to motivate defendants to invest the correct amount in safety without over-investing. Sebok denies this possibility through studies, mostly by Professor

20. *Id.* at 11.

21. *E.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003).

22. *E.g.*, Ellis, *supra* note 19; Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages*, 56 S. CAL. L. REV. 133 (1982).

23. Sebok, *supra* note 2, at 983.

24. *Id.*

25. *Id.* at 976-89.

Cass Sunstein and coauthors,²⁶ showing that jury decision-making is “unreliable, erratic, and unpredictable.”²⁷

Sebok then focuses on the other proffered justification for punitive damages: punishment. Punishment is generally associated with criminal (public) law, but he argues that punitive damages cannot be designed as a means of public punishment

26. See CASS SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE (2002).

27. Sebok, *supra* note 2, at 984 (quoting SUNSTEIN ET AL., *supra* note 26, at 241). *But see* Neil Vidmar, *Experimental Simulations and Tort Reform: Avoidance, Error, and Overreaching in Sunstein et al.’s Punitive Damages*, 53 EMORY L.J. 1359 (2004). Though it is not relevant to a historical argument, recent punitive damages jurisprudence seems to undermine efficient deterrence as a rationale for punitive damages. Efficient deterrence theory regarding punitive damages is often based on the need for a “multiplier,” in which the award is the “harm caused multiplied by the reciprocal of the probability of being found liable.” A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 874 (1998). Professors Polinsky and Shavell offer the example of \$100,000 of harm and a 25% chance of liability. In that case, the total damages should be \$400,000 (\$100,000 x 1/.25, or 4), because the injurer will pay this amount every fourth time he generates harm. *Id.* Therefore, in addition to \$100,000 of compensatory damages, there should be a \$300,000 award of punitive damages. This causes the defendant to fully internalize the losses he creates. In addition to internalization, Professor Keith Hylton identifies “gain elimination” as an alternative method of achieving deterrence in cases involving conduct that has no potential social benefits, which should include much of the behavior covered by punitive damages. Keith N. Hylton, *Reflections on Remedies and Philip Morris v. Williams* 4 Boston Univ. Sch. of Law Working Paper Series, Law and Economics, *available at* http://ssrn.com/abstract_id=977998. Gain elimination involves completely disgorging from the offender the gains of his conduct. *Id.* Pursuant to either theory, the single-digit compensatory to punitive damages ratio the Court made presumptive in *State Farm* cannot be defended on efficient deterrence grounds. There are cases in which the amount needed to internalize the loss or eliminate the gain will greatly exceed a single-digit ratio with the compensatory damages. *See, e.g., Mathias*, 347 F.3d at 677. Furthermore, the restriction that punitive damages cannot be used to punish the defendant’s conduct to someone other than the plaintiff, *Philip Morris v. Williams*, 127 S. Ct. 1057, 1063 (2007), is not consistent with efficient deterrence. The multiplier is used as a measure of harm to others and gain elimination would include gains made from other people. In short, as then-Professor Thomas Galligan noted, “[t]he plaintiff in the optimal deterrence case may serve as a proxy for those who are damaged but who do not recover.” Thomas C. Galligan, Jr., *Disaggregating More-Than-Whole Damages in Personal Injury Law: Deterrence and Punishment*, 71 TENN. L. REV. 117, 131 (2003). Unless the Court alters its current course, the theory of efficient deterrence, from a positive perspective, cannot justify punitive damages.

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because of four structural features.²⁸ First, the plaintiff needs to prove harm to herself in order to bring a claim for punitive damages.²⁹ Second, a punitive damages award is measured against the plaintiff's injury, not the injury to society.³⁰ Third, in all but a handful of jurisdictions, the plaintiff retains the award; it does not go to the state.³¹ Finally, and most importantly, the defendant does not receive the "full panoply of constitutional protections afforded to criminal defendants."³²

Sebok argues that to truly understand punitive damages, we must consider two additional features.³³ First, punitive damages are awarded for violations of only a certain kind of private right. For Sebok, "[p]unitive damages vindicate the 'dignity' of the private citizen and, therefore, the private right whose violation grounds their award is the private right not to have one's dignity violated."³⁴ This right is necessarily distinct from the underlying substantive rights to property, reputation, freedom from personal injury, *etc.*, for which compensatory damages are already available. Second, punitive damages are *personal* punishment, not only in the sense that the state does not bring the claim, but also in the sense that third parties cannot pursue the claim on a victim's behalf.³⁵

28. Sebok, *supra* note 2, at 1002. In making this argument, Sebok relies in part on Thomas Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual Private Wrongs*, 87 MINN. L. REV. 583 (2003).

29. *Id.*

30. *Id.*

31. *Id.* For an alternative argument that justifies these "split-recovery systems," see Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347 (2003).

32. Sebok, *supra* note 2, at 1002 (*citing* Colby, *supra*, note 28, at 608-09). These protections include the "beyond a reasonable doubt" standard, U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1; *In re Winship*, 397 U.S. 358 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and the right to court-appointed counsel, U.S. CONST. amend. VI; *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Scott v. Illinois*, 440 U.S. 367 (1979).

33. Sebok, *supra* note 2, at 1007.

34. *Id.* at 1008.

35. *Id.* at 1007. Sebok acknowledges a few very rare exceptions that rely on the authorization of a statute, such as *qui tam* actions. *Id.* (*citing* John H. Beisner et al., *Class Action "Cops": Public Servants or Private Entrepreneurs?*,

As to the right to dignity (or respect), Sebok notes that the early punitive damages cases are based on “not just the *intentional* nature of the defendant’s wrong, but the insulting or humiliating way in which the defendant caused the intentional wrong.”³⁶ Sebok offers numerous examples:³⁷ a colonel whipping a common soldier,³⁸ the employee of a poor house maliciously cutting off the hair of a female resident,³⁹ seduction of the plaintiff’s daughter in the plaintiff’s house,⁴⁰ *etc.* In summation, Sebok quotes Ellis: “Diverse as they may have been, all of these cases share one common attribute: they involved acts that resulted in affronts to the honor of the victims.”⁴¹

Sebok notes that a “second phase” of punitive damages occurred in America in the beginning of the twentieth century when punitive damages became available in suits involving railroads and commercial transactions.⁴² Sebok labels these as “abuse-of-power” cases: “The victim was harmed not just by the defendant’s employee abusing his position of power but, as many courts noted, by the defendant corporation’s knowing tolerance of employee’s abuse of power.”⁴³ Rarely in the abuse-of-power cases are the defendant’s motivations rooted in the desire to humiliate the plaintiff, though the employees immediately involved in the incident may have had such a motive. Instead, these cases arise from “the defendant’s unequal or unfair treatment of the plaintiff.”⁴⁴ There is an attitude of “conscious disdain” toward the victim.⁴⁵

Thus, Sebok concludes that courts award punitive damages

57 STAN. L. REV. 1441, 1456-60 (2005); Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, 60 LAW & CONTEMP. PROBS. 167, 184-86 (1997).

36. Sebok, *supra* note 2, at 1009 (emphasis in original).

37. *Id.* at 1008-09.

38. *Benson v. Frederick*, (1766) 97 Eng. Rep. 1130, 1130 (K.B.).

39. *Forde v. Skinner*, (1830) 172 Eng. Rep. 687, 687 (Horsham Assizes).

40. *Tullidge v. Wade*, (1769) 95 Eng. Rep. 909, 909 (K.B.).

41. Sebok, *supra* note 2, at 1010 (*citing* Ellis, *supra* note 19, at 14-15) (emphasis removed).

42. *Id.* at 1011.

43. *Id.* at 1012.

44. *Id.*

45. *Id.* at 1013.

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when defendants express a certain attitude toward the plaintiff:

The attitude the defendants expressed in these cases is that they are free to choose to violate one or more of the plaintiff's primary rights. This attitude—that the plaintiff's primary rights are not worthy of respect—maps the borderline between claims for compensatory damages and claims for punitive damages.⁴⁶

After examining the history, Sebok turns to the late philosopher Jean Hampton. For Hampton, the lack of respect for rights is a “diminishment.”⁴⁷ The defendant is diminishing the victim, treating her as if she is of lesser worth. A diminishment is a “moral injury,”⁴⁸ and “[w]hat makes moral injury wrong is that it expresses a false claim about the value of the victim.”⁴⁹ The correct response to such “impermissible exercises of power”⁵⁰ is punishment, because it is a form of “defeating the wrongdoer.”⁵¹ Furthermore, it must be the victim who defeats the wrongdoer: “No one else can establish the victim's true value but the wrongdoer because nothing can establish the truth except the wrongdoer's own defeat by the victim.”⁵² Sebok labels this a form of “revenge.”⁵³

For the final step in his theory, Sebok argues that his conception of punitive damages as revenge for the violation of a private right is consistent with the theory of torts as “civil recourse.”⁵⁴ Sebok emphasizes that an important feature of this theory is that the “right to redress . . . is personal to the victim whose private right the wrongdoer violated.”⁵⁵ Only the victim has the ability to pursue the action, in this case for punitive damages, against the wrongdoer. Similarly, it is significant not

46. *Id.* at 1014.

47. *Id.* at 1017.

48. *Id.*

49. *Id.* at 1019.

50. *Id.*

51. *Id.*

52. *Id.* at 1020.

53. *Id.* at 1020-23.

54. *Id.* at 1023-29.

55. *Id.* at 1024.

only that the victim has the power to initiate the action, but that she retains an active role in determining the appropriate remedy for her loss.⁵⁶ She is “doing more than delivering the wrongdoer to the court for punishment; she is personally presenting *reasons* to the court for the punishment of the wrongdoer.”⁵⁷ Thus, “[t]he victory of her argument for punishment (and not the state’s), when accepted by the court, is her redress.”⁵⁸

II. A PUBLIC PURPOSE

Sebok’s theory reveals a punitive damages structure optimal for preservation of the peace. First, and perhaps most significantly, the types of cases that were eligible for punitive damages were exactly those cases that were most likely to lead to violence. “Because the rules developed as a way of avoiding violence, the complaints they addressed were usually those that were likely to give rise to violence if they were not redressed.”⁵⁹ These were “limited to fairly serious controversies.”⁶⁰ Punitive damages were and are limited to the most serious offenses covered by tort law.

But beyond the severity, Sebok’s analysis of the private right of dignity or respect is illuminating. It is just those cases in which offenders treat their victims with “conscious disdain”⁶¹ that would be most likely to turn violent. It is just those cases in which the victim’s honor was insulted or the victim was humiliated that threaten public peace the most. For example, when analyzing blood feuds, Professor Wex Malone noted, “The family outrage that cried for revenge lay not so much in the desire to enforce atonement for the bodily harm inflicted upon the wounded member as in the humiliation that was suffered by the entire family group.”⁶²

Social science research confirms the link between

56. *Id.* at 1029.

57. *Id.*

58. *Id.*

59. Hasnas, *supra* note 10, at 562.

60. *Id.*

61. Sebok, *supra* note 2, at 1013.

62. Malone, *supra* note 9, at 1.

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humiliation/shame and violence. Summing up a series of studies by experimental psychologists, Professor James Gilligan stated, “The consensus that has emerged from this work is that the most potent stimulus of aggression and violence, and the one that is most reliable in eliciting this response, is not frustration per se (as the “frustration-aggression” hypothesis had claimed), but rather, insult and humiliation.”⁶³ Gilligan’s own experience, involving more than thirty-five years in prisons and prison mental hospitals, led him to observe, “one after another of the most violent men I have worked with over the years have described to me how they had been humiliated repeatedly throughout their childhoods, verbally, emotionally, and psychologically. . . . They had also been physically humiliated.”⁶⁴ In fact, Gilligan spoke of “shame as the pathogen that causes violence just as specifically as the tubercle bacillus causes tuberculosis, except that in the case of violence it is an emotion, not a microbe—the emotion of shame and humiliation.”⁶⁵

Thus, punitive damages were available in just those cases that were most likely to lead to violence. Furthermore, the system is designed in such a way to maximize its appeal as an alternative to violence, and this is connected to Sebok’s point that punitive damages are *personal* punishment. The victim is empowered. The victim’s involvement in the process is active, not passive, giving the victim the sense that she is striking back against the defendant. The victim initiates the action against the defendant and becomes a plaintiff seeking punitive damages. Neither the state nor a third party can initiate the suit on her behalf.

The plaintiff not only initiates the action, but also retains control of the arguments (with the help of her attorneys). The

63. James Gilligan, *Shame, Guilt, and Violence*, 70 SOC. RESEARCH 1149, 1159 (2003).

64. *Id.* at 1153.

65. *Id.* at 1155 (citing JAMES GILLIGAN, *VIOLENCE: OUR DEADLY EPIDEMIC AND ITS CAUSES* (1996)). Significantly from a historical perspective, Gilligan noted the connection between humiliation and violence had been made centuries earlier in the Bible, *Genesis* 4:1-15 (Cain’s murder of Abel) and by Aristotle (RHETORIC, 1378-80) and Aquinas (SUMMA THEOLOGICA, I-II Q. 47, II-II Q. 41). Gilligan, *supra* note 63, at 1156-57.

plaintiff crafts the arguments and provides the reasons that the defendant is liable for punitive damages. Thus, it is the victim, not the state nor anyone else, who is allowed to convince a court that she is in the right and the defendant is in the wrong. If the court rules in the plaintiff's favor, she *personally* has defeated the wrongdoer. This provides her with a sense of satisfaction, one she desired from the time of her injury and the goal that led her to file a claim for punitive damages in the first place. However, the defeat of the wrongdoer has occurred in an orderly way in the courtroom and not in a duel or blood feud, which can impact not only the immediate parties, but their families, and innocent bystanders as well.

Furthermore, the slow pace of the tort system, which has a detrimental effect in most torts cases,⁶⁶ has a beneficial effect in punitive damages cases (serious cases often involving intentional, humiliating acts) by allowing tempers to cool. The victim channels her energy into the lawsuit, and the grind of litigation provides a period in which the immediate shock and anger of the injury can be absorbed and processed.

Thus, the peace function of punitive damages operates on two levels. First is the traditional deterrent effect from the imposition of a penalty. Although it may not be efficient deterrence, it would be bizarre, as Sebok notes, if the threat of an imposed penalty had no effect on people's behavior in many instances. Therefore, the *ex ante* threat of punitive damages should reduce the number of incidents in which people engage in the negative behavior that might lead to punitive damages liability. For those people who, despite the threat, still engage in the behavior, punitive damages are offered as an alternative to violence in just those cases most likely to lead to it. Furthermore, the alternative is made as attractive as possible by giving the victim an active role in seeking revenge.

Interestingly, the closest judicial statement to the pacificatory function based on Sebok's theory is from a federal court in the state hosting this symposium, South Carolina: "The cases speak in terms of vindicating a private right. In other

66. See, e.g., JEFFREY O'CONNELL & CHRISTOPHER J. ROBINETTE, A RECIPE FOR BALANCED TORT REFORM (forthcoming 2008).

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words, punitive damages serve as a type of private revenge which is carried out in the courts rather than through duels or in back alleys.”⁶⁷

III. ARE PUNITIVE DAMAGES DESIGNED TO PRESERVE THE PEACE TODAY?

Modern courts occasionally refer to preserving the peace as a rationale for punitive damages.⁶⁸ The rationale has a particularly influential defender in Judge Richard A. Posner. In *Mathias v. Accor Economy Lodging, Inc.*,⁶⁹ Judge Posner posited a hypothetical in which a person deliberately spit into the face of another.⁷⁰ Posner reasoned that compensatory damages alone would be insufficient in such a case because the incentive to sue would be “too slight,” and instead the victim “might decide instead to respond with violence.”⁷¹ Moreover, Posner explained that low compensatory damages would not deter the defendant from committing the offensive act, “and again there would be a danger that his act would incite a breach of the peace by his victim.”⁷² Although punitive damages may retain some element of preserving the peace it appears that the world has changed sufficiently to undermine that function.⁷³ In particular, three

67. *Campus Sweater & Sportswear Co. v. M.B. Kahn Constr. Co.*, 515 F. Supp. 64, 105 (D.S.C. 1979) (internal citations omitted), *aff'd*, 644 F.2d 877 (4th Cir. 1981).

68. *See, e.g.*, *Scott v. Plante*, 641 F.2d 117, 135 (3d Cir. 1981), *vacated and remanded on other grounds*, *Plante v. Scott*, 458 U.S. 1101 (1982); *Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d 675, 679 (Ariz. 1986); *Masaki v. Gen. Motors Corp.*, 780 P.2d 566, 571 n.2 (Haw. 1989); *Tuttle v. Raymond*, 494 A.2d 1353 (Me. 1985).

69. *Mathias*, 347 F.3d at 672.

70. *Id.* at 676. The hypothetical appears to be based on the facts of *Alcorn v. Mitchell*, 63 Ill. 553 (1872), discussed by Morris, *supra* note 1.

71. *Id.* at 677.

72. *Id.*

73. Following Sebok, I have focused on the design of punitive damages (rather than the effects). *See* Sebok, *supra* note 2, at 983. There are certainly groups of people who will not respond to the proffered incentive effects of punitive damages. In the past, the most rigid elements of the aristocracy in the American South rejected the legal system as a way to vindicate “honor.” *See, e.g.*, EDWARD L. AYERS, VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH CENTURY AMERICAN SOUTH 266-76 (1984). In the modern context, terrorists

changes have had a strong effect on society's receptiveness to, and the necessity for, the peace incentives of punitive damages. First, as a society, we have come to rely on criminal law as the principal legal means to control antisocial behavior. Second, the increasing number of cases against corporations, as opposed to individuals, reduces the likelihood of violent retaliation. Finally, the most intangible, but perhaps most significant, factor is the extent to which society has become accustomed to solving its problems through non-violent means.

Regarding the first point, Professor Alan Calnan has noted that in colonial America, punitive damages were one of the few available methods of regulating behavior, as criminal justice systems were relatively weak: "Criminal justice systems from New England to Georgia were crude at best and corrupt at worst."⁷⁴ The system consisted of "untrained constables and nightwatchmen" who "recovered lost children and provided shelter for the homeless."⁷⁵ Professional police forces did not begin to appear until the middle part of the nineteenth century. For example, the London Police Force was created in 1829,⁷⁶ Boston created a professional police force in 1838,⁷⁷ and New York followed suit in 1845.⁷⁸ Furthermore, "[w]hile chaos reigned in the streets, ineptitude and avarice presided in the criminal courts."⁷⁹ "Trials were informal and disorganized"⁸⁰ and

are not going to be brought into the legal system by the promise of revenge through punitive damages. In this section, I argue that changes in society have increased the number of potential plaintiffs who will be unaffected by the "peace" incentives of punitive damages.

74. Alan Calnan, *Ending the Punitive Damages Debate*, 45 DEPAUL L. REV. 101, 110-11 (1995).

75. *Id.* at 111.

76. Wesley MacNeil Oliver, *Magistrates' Examinations, Police Interrogations, and Miranda-Like Warnings in the Nineteenth Century*, 81 TUL. L. REV. 777, 798 (2007) (citing DAVID R. JOHNSON, *POLICING THE URBAN UNDERWORLD: THE IMPACT OF CRIME ON THE DEVELOPMENT OF THE AMERICAN POLICE 1800-1887*, at 9 (1979)).

77. Calnan, *supra* note 74, at 111 n.62 (citing KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 176 (1989)).

78. Oliver, *supra* note 76, at 798 (citing JAMES F. RICHARDSON, *THE NEW YORK POLICE: COLONIAL TIMES TO 1901*, at 51-59 (1970)).

79. Calnan, *supra* note 74, at 111.

80. *Id.* (citing LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 140-41

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“[j]udges were unskilled or unscrupulous.”⁸¹ “Because of this sorry state of affairs, victims seeking justice during this period had little choice but to sue their offenders (and hope for the best) or resort to private acts of vengeance.”⁸²

In both England and America, however, criminal law has increasingly become the leading legal method of social control. The creation of professional police forces, first in large cities and eventually in smaller areas, increased the skills and resources used to regulate society through criminal proceedings. Not only the street-level controls, but the entire system has been improved:

Knowledgeable judges bound by a myriad of procedural and evidentiary constraints now try cases in hi-tech courtrooms. Voluminous criminal codes, delineating a broad spectrum of offenses and sanctions, have been adopted in every jurisdiction. Violent offenses, in particular, have been more expansively catalogued and more vigorously prosecuted than ever before. Likewise, punishments for such offenses have been made more severe, though perhaps less barbaric, than at any earlier time in our nation’s history.⁸³

The law is still designed to achieve social control—among other things, to discourage violent retaliation—but it has shifted that function, at least in part, from punitive damages to criminal law.

As to the second factor, initially punitive damages were awarded almost exclusively in suits between individuals.⁸⁴ This is not surprising given that the vast majority of tort suits during this period were between individuals. However, coinciding with what Sebok refers to as the “second phase” of punitive damages aimed at railroads and commercial transactions,⁸⁵ the focus of

(1973)).

81. Calnan, *supra* note 74, at 111 (*citing* FRIEDMAN, *supra* note 80, at 141).

82. *Id.* at 111.

83. *Id.*

84. See, e.g., Michael Rustad, *Happy No More: Federalism Derailed by the Court That Would Be King of Punitive Damages*, 64 MD. L. REV. 461, 472, 485 (2005) (distinguishing between “American Punitive Damages for Personal Torts (1793-1870)” and “Corporate Punitive Damages (1870-Present)”).

85. Sebok, *supra* note 2, at 1011.

punitive damages shifted away from individuals to corporations in the late nineteenth century:

By the end of the nineteenth century, punitive damages had evolved into a means of social control against the reckless endangerment of the public by the proprietors of railroads, streetcars, coal mines, and other industrial enterprises. In the late nineteenth century and the early twentieth century, the emphasis on punitive damages shifted from personal torts to corporate torts committed by the agents of industrial corporations. Punitive damages were reconceptualized and transferred from a remedy designed to punish one-on-one torts to a remedy designed to deal with conduct that recklessly endangered the public.⁸⁶

The virulent hatred that can turn into violence when focused on a single individual can be diffused when aimed at an impersonal entity like a corporation. Furthermore, physical confrontation is a natural outlet for acting on violent feelings toward an individual. Acting on violent feelings toward a corporation is less intuitive. Do you attack the president? CEO? Storm corporate headquarters? Thus, “violent retaliation may no longer be a significant threat in modern times where the offender is a corporation.”⁸⁷

86. Rustad, *supra* note 84, at 485-86.

87. Orville Richardson, *Punitive Damages: A Common Law Doctrine in Need of Legislative Reform*, TRIAL, Mar. 1980, at 31. This reason can be overstated. Punitive damages are still awarded in cases of individual versus individual in significant numbers. See, e.g., Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 635 (1997). Using “one year of jury trial outcomes from 45 of the nation’s most populous counties,” *id.* at 623, the authors found individual versus individual constituted 38.7% of the cases, individual versus business constituted 36.6% of the cases, business versus business constituted 6.3% of the cases and “other” constituted 18.4% of the cases. Speaking of punitive damages’ role against individuals, Richardson states, “We should not too readily reject the notion that court action and civil punishment supplement the criminal law in affording a peaceful method of purging angry responses to illegal harm.” Richardson, *supra*, at 31. Furthermore, in some cases in which punitive damages might be awarded against a corporation, there is a strong conflict between the victim and a particular agent of the corporation. The corporation is liable for punitive damages only through vicarious liability, often established by the fact that the corporation authorized or ratified the act of the agent. See, e.g., RESTATEMENT (SECOND) OF TORTS § 909 (1965).

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The final factor reducing the necessity for the peace incentives of punitive damages is the extent to which our society has accepted non-violent means as the vehicle to resolve significant disputes.⁸⁸ In other words, our “social norm”⁸⁹ has moved from one that is more accepting of violence to one that is less accepting thereof.

Of course, many factors may have influenced the social norm regarding violence. Identifying all, or even most, is not possible. The law itself may have played a substantial role. One of Sunstein’s primary foci is the “expressive function of law,” which he describes as “the function of law in expressing social values and encouraging social norms to move in particular directions.”⁹⁰ Professor Lawrence Lessig “agrees with Sunstein that social norms regulate; they constrain behavior through the enforcement of the community, not through the centralized enforcement of the state.”⁹¹ Therefore, the law may have played an instructive role in reducing violent retaliation, through punitive damages and the advances in criminal law discussed earlier. In other words, the law may have performed its expressive function in quelling violence so well that it is no longer needed to the same extent.

IV. CONCLUSION

Professor Sebok constructs a private-law theory of punitive

88. Of course, this acceptance is not universal. There are still people in our society who resolve disputes with violence. *See, e.g.*, Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1397-99 (1992) (discussing “Informal Punishment Outside of the Official Law,” including the brothers of a girl beating up her boyfriend for using her as a prostitute).

89. Professor Cass Sunstein defines “social norm” as “social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done . . . [regarding] nearly every aspect of human behavior.” Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 914 (1996). For a good overview of the scholarship on social norms, see Sheila Vera Flynn, *A Complex Portrayal of Social Norms and the Expressive Function of Law*, 36 UWLA L. REV. 145, 145-75 (2005).

90. Sunstein, *supra* note 89, at 953.

91. Flynn, *supra* note 89, at 159 (citing Lawrence Lessig, *Social Norms, Social Meaning, and the Economic Analysis of Law: The New Chicago School*, 27 J. LEGAL STUD. 661, 662 (1998)).

damages that emphasizes two features.⁹² First, punitive damages are awarded for violations of only a certain kind of right: the right to dignity. Second, punitive damages awards are personal punishment. Those features can also be used to explain punitive damages' role in preserving the peace—the original purpose of what became known as tort law. Violations of the right to dignity are the most likely to be met with violence. Furthermore, the personal nature of the punishment of the offender maximizes the appeal of the legal system as an alternative to violence. However, three significant changes—the increased reliance on criminal law as a means of social control, the advent of corporations, and the establishment of a general social norm against violent solutions to serious conflicts—have substantially decreased the necessity of a pacificatory function for punitive damages.

92. Sebok, *supra* note 2, at 1007.