

Symposium

CRIMTORTS

INTRODUCTION

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Criminal law and torts are regarded as different in several fundamental respects.¹ First, the parties to the action differ. In criminal law, the government brings an action for an injury to the general welfare of its citizens. In torts, a party files suit to rectify an injury to that party. Second, the remedies differ. The consequences facing a criminal defendant include the possible loss of liberty, or even life. In torts, the defendant (or often the defendant's insurer) can normally lose only money. Third, the rationales differ. There is a general agreement that the purposes of criminal law are deterrence and retribution (or punishment).² Punishment is not widely regarded as a goal of tort law.³

Yet it does not necessarily follow that the two areas of law are hermetically sealed off from one another. "Crimtorts" is a term coined to describe the middle ground between criminal and tort

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¹ I offer three examples to make the point, but Professor Kenneth Simons, in his piece, is considerably more thorough. *See infra* note 7.

² *See* Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1811 (1997).

³ *See, e.g.*, Anthony J. Sebok, *The Fall and Rise of Blame in American Tort Law*, 68 BROOK. L. REV. 1031, 1049 (2003) (describing the criminal law viewpoint applied to torts as "not merely nonobvious" but "contradict[ing] the dominant tradition of modern tort theory").

law.⁴ "Crimtorts [is] not a new body of law per se or even a new cause of action."⁵ Instead, "crimtorts [is] an explicit recognition that the criminal law principles of punishment and deterrence have been assimilated into tort [law]."⁶ The extent of the assimilation and its effects on the tort system are issues meriting robust consideration.

The Crimtorts Symposium, held at the Widener University School of Law in Harrisburg, Pennsylvania, on February 25, 2008, took up this challenge. In his opening piece, Professor Kenneth Simons explores the traditional understanding of the distinction between criminal and tort law.⁷ Simons analyzes differences not only in doctrine and structure, but also in normative principles. He begins by listing nine contrasts between the doctrine and structure of crime and tort. First, the state prosecutes violations of criminal law; in torts, the victim decides whether to file suit.⁸ Second, criminal law does not require harm as a prerequisite to remedy; tort law generally does.⁹ Third, criminal law often imposes more severe sanctions than tort law, such as loss of liberty or even life; in torts, money is generally all that is at stake.¹⁰ Fourth, criminal law purports to contain a proportionality principle in which the punishment "fits" the crime; in tort law, the remedy is "scaled to the severity of the harm caused," not to the "culpability of the injurer."¹¹ Fifth, the spectrum of fault in criminal law is broader than that in tort law.¹² Sixth, "Criminal law requires a greater . . . level of fault before liability will be imposed than does tort law."¹³ Seventh, in criminal law the victim's conduct is not significant; in tort law, however, it plays a large role.¹⁴ Eighth, criminal law is

⁴ Thomas Koenig & Michael Rustad, "Crimtorts" as Corporate Just Deserts, 31 U. MICH. J.L. REFORM 289, 293-94 (1998).

⁵ *Id.* at 294.

⁶ *Id.*

⁷ Kenneth W. Simons, *The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives*, 17 WIDENER L.J. 719 (2008).

⁸ *Id.*

⁹ *Id.* at 720.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 722.

¹³ Simons, *supra* note 7, at 723.

¹⁴ *Id.* at 724.

statutory; torts is mostly common law.¹⁵ Finally, ninth, excuses to liability are much more accepted in criminal law than in torts.¹⁶

Turning to the normative perspectives, Simons describes the main justifications for criminal law as retributive justice, expressive or communicative justice, and deterrence (both in the sense of efficiency and to prevent serious wrongs).¹⁷ On the other hand, he lists the main torts justifications as corrective justice, distributive justice, and deterrence (both in the sense of efficiency and to prevent wrongs).¹⁸

Simons then asks, "What follows from this typology of doctrines and principles?"¹⁹ Should we "be reluctant to tinker with [the] traditional approaches?"²⁰ Simons's approach is a moderate one. Although he sees no "need to be so conservative and cautious" as to "assume the optimality or desirability of the contemporary state of the law," he notes, "[W]e should also resist the temptation to mix and match doctrines and functions at will."²¹ Instead, Simons asserts that we "need to think seriously about what doctrines and features of tort law (or of criminal law) are essential to its underlying purposes."²² In the end, Simons finds crimtorts to be "a field of considerable promise if it avoids these twin dangers: the dangers of an oversimplified instrumentalism and of an excessive demand for doctrinal purity and insulation."²³

Professors Thomas Koenig and Michael Rustad, who coined the term, present and define the alternative paradigm of crimtorts. In his article, Professor Koenig describes the crimtort model as "antidoctrinal," borrowing from both tort and criminal law.²⁴ The "focus is not on the central mission of torts, which is to settle individual disputes, but rather on the relatively rare cases in which

¹⁵ Simons, *supra* note 7, at 724.

¹⁶ *Id.*

¹⁷ *Id.* at 729-30.

¹⁸ *Id.* at 727-28.

¹⁹ *Id.* at 730.

²⁰ *Id.*

²¹ Simons, *supra* note 7, at 730.

²² *Id.*

²³ *Id.* at 732.

²⁴ Thomas H. Koenig, *Crimtorts: A Cure for Hardening of the Categories*, 17 WIDENER L.J. 733, 736 (2008).

augmented tort remedies fill gaps in the criminal law."²⁵ Thus, the behavior that is at the heart of crimtorts is not garden-variety negligence; rather, crimtort plaintiffs "seek to vindicate grave health, safety, environmental, employment, or other mass tort menaces."²⁶ Crimtort litigation plays a dual role, "concurrently fulfilling the private function of compensating injured claimants and the broader purpose of controlling socially harmful behavior."²⁷

Koenig acknowledges that the "fundamental debate" is over the role of tort law: Is it just a mechanism for settling individual disputes, or does it have a role in protecting the "public interest"?²⁸ Pointing to the quintessential crimtort remedy, punitive damages, Koenig argues that they are an Anglo-American alternative to Europe and Japan's regulatory and social insurance schemes.²⁹ As a method of controlling harmful social behavior, punitive damages are preferable in America because of the popularity of market-driven solutions.³⁰ Furthermore, the tort remedy of punitive damages is superior to criminal prosecutions in many cases because of its flexibility: "threats emerge more rapidly than criminal law statutes can be drafted, let alone enforced."³¹ As examples, Koenig cites dangerously defective imports manufactured by Chinese companies and the alleged actions of Blackwater.³²

Koenig concludes by noting that punitive damages have both manifest and latent functions.³³ In addition to the manifest functions of punishment and deterrence, Koenig attributes to punitive damages the latent functions of enabling private enforcement of the law, educating the larger community about the limits of appropriate conduct, publicly stigmatizing the wrongdoer,

²⁵ Koenig, *supra* note 24, at 736.

²⁶ *Id.* at 737.

²⁷ *Id.*

²⁸ *Id.* at 739.

²⁹ *Id.*

³⁰ *Id.*

³¹ Koenig, *supra* note 24, at 748.

³² *Id.* at 750-62.

³³ *Id.* at 762-65.

and producing a sense of fairness within the larger society.³⁴ These are, Koenig asserts, functions worth preserving.³⁵

Professor Michael Rustad, in his article, differentiates crucial features of criminal law, torts, and the crimtort hybrid in a chart³⁶:

FEATURE	CRIMINAL LAW	TORT LAW	CRIMTORTS
Branch of Law	<i>Public Law</i>	<i>Private Law</i>	<i>Private Law with a Public Purpose</i>
Purposes	<i>Punishment, Deterrence</i>	<i>Compensation</i>	<i>Social Justice</i>
Enforcement Mechanism	<i>Public Prosecutors</i>	<i>Private Litigants</i>	<i>Private Attorneys General</i>
Role of Wealth in Calibrating Punishment	<i>Limited Role in Sentencing Guidelines</i>	<i>Wealth is inadmissible and grounds for reversal of compensatory award.</i>	<i>Wealth-Based Punishment</i>
Procedural Justice Framework	<i>Criminal Law Protections</i>	<i>Common Law Supplemented by Statutes</i>	<i>Middle Level; Reflecting Hybrid Nature</i>

Rustad then laments the Supreme Court's eight decisions over the last two decades constitutionalizing punitive damages awards.³⁷ He summarizes his analysis in two propositions: "(1) crimtorts rely upon a robust punitive damages regime to incentivize private lawsuits for a public purpose and (2) the Supreme Court's new punitive damage paradigm undermines each of the key aspects of the crimtort paradigm."³⁸

Rustad begins by noting that all eight cases "dealt with corporate punishment for group injuries that have a social impact

³⁴ Koenig, *supra* note 24, at 767.

³⁵ *Id.* at 781.

³⁶ Michael L. Rustad, *The Supreme Court and Me: Trapped in Time with Punitive Damages*, 17 WIDENER L.J. 783, 788 (2008).

³⁷ *Id.* at 784.

³⁸ *Id.* at 785.

beyond the immediate victim."³⁹ Despite this impact, the Court has adopted an "overly individuated view of punitive damages [that] diminishes state sovereignty by forcing punitive damages into a common retributory mold."⁴⁰ Rustad is particularly skeptical of the Court's holding in *Philip Morris USA v. Williams*⁴¹ that "a jury may not use punitive damages 'to punish a defendant *directly* on account of harms it is alleged to have visited on nonparties' "⁴² This restriction on introducing a defendant's other bad acts in order to punish the defendant, along with an earlier decision placing what Rustad terms "de facto caps" on punitive damages,⁴³ undermines incentives for plaintiffs to play the role of private attorney general.⁴⁴

Rustad further asserts that the plaintiff's inability to introduce evidence of defendant's other bad acts to punish the defendant has another deleterious effect: undermining plaintiff's incentive to conduct vigorous discovery.⁴⁵ Rustad values discovery as a method of unearthing " 'paper trails documenting instances of corporate misinformation and malfeasance.' "⁴⁶ Because plaintiffs cannot receive the full benefit from the discovery of such information, Rustad believes that they are less likely to engage in discovery with the same enthusiasm, even if they still file suit.⁴⁷ Finally, Rustad is concerned that the Court is turning away from the emphasis on defendants' wealth in setting the amount of punitive damages.⁴⁸ The presumptive ratio between compensatory and punitive damages de-emphasizes the importance of wealth (because the compensatory damages that anchor the ratio are never

³⁹ Rustad, *supra* note 36, at 804.

⁴⁰ *Id.* at 805.

⁴¹ 127 S. Ct. 1057 (2007).

⁴² Rustad, *supra* note 36, at 807 (quoting *Williams*, 127 S. Ct. at 1064 (emphasis added)).

⁴³ *Id.* at 821. He refers to the presumptive single-digit ratio between compensatory and punitive damages established in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 425 (2003).

⁴⁴ Rustad, *supra* note 36, at 826.

⁴⁵ *Id.* at 824-27.

⁴⁶ *Id.* at 824 (quoting John C.P. Goldberg, *Twentieth Century Tort Theory*, 91 GEO. L.J. 513, 561 (2003)).

⁴⁷ *Id.* at 824-27.

⁴⁸ *Id.* at 827-32.

ted to wealth).⁴⁹ The solution to all of these problems, Rustad offers, is "to return punitive damages to the states."⁵⁰

The next three pieces focus on the application of the criminal/tort law intersection to a particular aspect of torts. In his article, Professor Jeffrey O'Connell advocates the marriage of tort and criminal law in the reform of medical malpractice.⁵¹ He begins by pinpointing the flaws in the law of malpractice, namely uncertainty, delays, and high-transaction costs.⁵² The reform he proposes, "early offers," is an attempt to bypass those problems.⁵³

Under an early offer approach to medical malpractice, "liability insurers for health care providers . . . have the option within 180 days after a claim is filed of making an offer . . . of paying periodic payment[s] equal to [claimants'] net economic loss . . . plus reasonable legal fees, but nothing for pain and suffering damages."⁵⁴ If the claimant accepts the offer, the case is settled, with the claimant receiving compensation, on average, at least two years faster than the current system.⁵⁵ If the offer is rejected, the claimant can proceed with a normal tort claim for economic and noneconomic damages.⁵⁶ However, pursuant to O'Connell's proposal, "the legal standards of both the burden of proof and level of misconduct applied to the claim would be raised, with the claimant having to prove the defendant grossly negligent beyond a reasonable doubt."⁵⁷ If the defendant does not make an offer, the current tort system applies to the entire case.⁵⁸

The early offers proposal thus combines criminal and tort law in two ways. First, it operates on a lower, compensatory level, assuring economic damages to claimants injured by simple negligence, while reserving full-scale noneconomic damages for

⁴⁹ Rustad, *supra* note 36, at 832.

⁵⁰ *Id.* at 833.

⁵¹ Jeffrey O'Connell, *The Large Cost Savings and Other Advantages of an Early Offer "Crimtorts" Approach to Medical Malpractice Claims*, 17 WIDENER L.J. 835, 872 (2008).

⁵² *Id.* at 835-36.

⁵³ *Id.* at 836.

⁵⁴ *Id.* at 839.

⁵⁵ *Id.* at 836.

⁵⁶ *Id.* at 839.

⁵⁷ O'Connell, *supra* note 51, at 839.

⁵⁸ *Id.* at 840.

claimants who can prove a more egregious, quasi-criminal standard of conduct.⁵⁹ Second, to do so, it relies in part upon the criminal law burden of proof, beyond a reasonable doubt.⁶⁰

O'Connell, along with Professors W. Kip Viscusi and Joni Hersch of the Vanderbilt University Law School, analyzed how early offers would perform as measured against close claims databases from Texas and Florida. The studies contain a lot of variables, but it is clear that claimants would be compensated much more quickly (*e.g.*, 898 days for severe nonfatal injuries), transaction costs would be dramatically reduced (*e.g.*, \$560,406 per claim for severe nonfatal injuries), and the total cost per claims would be concomitantly reduced (*e.g.*, \$1,076,792 per claim for severe nonfatal injuries).⁶¹

Turning to products liability, Professor Frank Vandall argues that tort suits, and not criminal prosecutions, are the superior method to control defective products.⁶² The issue became salient when Senator Arlen Specter (R-PA) proposed a bill that persons who manufacture lethal products should be imprisoned or fined.⁶³ Vandall offers three main reasons that criminalizing products liability will result in weaker regulation and less safety. First, federal criminal law of products liability could possibly preempt state tort suits.⁶⁴ In essence, preemption is based on the Supremacy Clause.⁶⁵ If state law conflicts with federal law, the state law is without effect.⁶⁶ Vandall notes that federal courts have used preemption to limit and control the states.⁶⁷ Thus, if products liability is criminalized, "the courts are free to hold, under the preemption concept, that the state common law of products

⁵⁹ O'Connell, *supra* note 51, at 836.

⁶⁰ *Id.*

⁶¹ *Id.* at 857.

⁶² Frank J. Vandall, *Should Manufacturers and Sellers of Lethal Products Be Subject to Criminal Prosecution?*, 17 WIDENER L.J. 877 (2008).

⁶³ Vandall reproduces the proposal in its entirety. *Id.* at 878-79. On March 10, 2006, Vandall appeared before the Senate Judiciary Committee to testify against the bill.

⁶⁴ *Id.* at 879-81.

⁶⁵ U.S. CONST. art. VI, cl. 2.

⁶⁶ *See, e.g.*, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

⁶⁷ Vandall, *supra* note 62, at 881.

liability is in conflict with the new statute. This could result in the loss of most products liability law."⁶⁸

The second main reason not to criminalize is nonenforcement.⁶⁹ Vandall notes that federal prosecutors have limited resources, and other priorities, such as terrorism, will always trump a products prosecution.⁷⁰ Furthermore, Vandall argues that the federal government has a poor record of suing products manufacturers.⁷¹ Finally, even if the resources are available, products prosecutions may fall victim to Vandall's third issue: political abuse.⁷² Pointing to the recent firings of U.S. Attorneys, allegedly for political reasons, Vandall states that prosecuting manufacturers will become a political issue: "Whether an accused CEO is criminally prosecuted will depend on the views of the President and the politics of the day."⁷³ Instead, Vandall urges civil causes of action for products liability be retained: "The common law is transparent, efficient, and available to all who suffer injury from a lethal product."⁷⁴

In the final applications piece, Professor Byron Stier addresses class actions.⁷⁵ He begins by acknowledging the fears expressed by Professors Koenig and Rustad regarding the curtailment of punitive damages, as well as the dangers of lax public regulatory enforcement.⁷⁶ With reduced incentives for private parties to bring lawsuits and with minimal government regulation, concern for safety is understandable. Stier questions whether class actions can provide help for crimtort remedies.⁷⁷ At one point, class actions were "regarded as vehicles for the empowerment of plaintiffs' lawyers against well-financed and well-organized defense

⁶⁸ Vandall, *supra* note 62, at 881.

⁶⁹ *Id.* at 881-86.

⁷⁰ *Id.* at 882.

⁷¹ *Id.* at 883-86.

⁷² *Id.* at 887-90.

⁷³ *Id.* at 888.

⁷⁴ Vandall, *supra* note 62, at 888-89.

⁷⁵ Byron G. Stier, *Crimtorts, Class Actions, and the Emerging Mass Tort Method*, 17 WIDENER L.J. 893 (2008).

⁷⁶ *Id.* at 893-94.

⁷⁷ *Id.* at 895.

counsel."⁷⁸ However, during "the last fifteen years, courts have increasingly rejected class action[]" tort claims, due to the predominance of individualized issues.⁷⁹

Stier illustrates the rejection of class action torts with the example of tobacco litigation.⁸⁰ Starting in the early 1990s, courts either refused to certify a class or later reversed such certification based on a host of individualized issues.⁸¹ Such issues included medical causation, individual decision causation (for purposes of comparative fault, assumption of risk, and fraudulent reliance), and damages.⁸² Regarding class actions, Stier concludes, "widespread precedent now exists across both federal and state courts that mass torts are not certifiable for class actions, effectively removing class actions from plaintiffs' arsenal in the mass tort wars."⁸³

Yet, in the place of class actions, Stier sees a new paradigm: mass tort litigation as network.⁸⁴ Because of advances in information technology, individual litigation is now more efficient than it was even a few years ago.⁸⁵ Counsel, courts, and clients are able to share information, pool resources, and coordinate strategy.⁸⁶ Stier says that mass tort litigation now follows a pattern. First, after numerous cases are filed, "all federal cases are centralized in a particular multidistrict litigation court."⁸⁷ That court will coordinate nationwide and explore common issues such as scientific discovery and expert-opinion admissibility.⁸⁸ Next, courts try individual cases, resolving the dispute for individual parties.⁸⁹ More importantly, from Stier's perspective, "the verdicts and motion practice judgments also yield valuable information

⁷⁸ Stier, *supra* note 75, at 895 (citing David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561 (1987)).

⁷⁹ *Id.*

⁸⁰ *Id.* at 901-17.

⁸¹ *Id.* at 901-02.

⁸² *Id.* at 902-04.

⁸³ *Id.* at 916.

⁸⁴ Stier, *supra* note 75, at 920-21.

⁸⁵ *Id.* at 919.

⁸⁶ *Id.*

⁸⁷ *Id.* at 920.

⁸⁸ *Id.*

⁸⁹ *Id.*

about the value of the pending claims, often in the thousands of dollars or more for other plaintiffs."⁹⁰ In the end, one of three things occurs: (1) plaintiffs bankrupt defendant; (2) defendant litigates and generally defeats plaintiffs; or (3) "defendant[] and plaintiffs agree upon a non-class settlement."⁹¹

The last route is becoming the most popular.⁹² Under that approach, the information garnered from the initial verdicts is used to "haggle over the proper settlement valuation of remaining claims."⁹³ The benefit of this system is that it preserves each individual's autonomy; the settlement is not implemented through a mandatory, or even an opt-out, class.⁹⁴ Furthermore, in answer to the concerns of Professors Koenig and Rustad, "the process harnesses adequately incentivized plaintiffs and their counsel to serve public goals of deterrence."⁹⁵ He acknowledges that negative-value (small) claims may not function properly in this paradigm, but offers preliminary support to a loser-pays proposal to solve the problem.⁹⁶

The final articles cover the quintessential crimtort remedy, punitive damages. In his piece, Professor Keith Hylton analyzes what is widely considered to be the next major punitive-damages question the Supreme Court will address: the role of defendants' wealth in setting the amount of the punitive award.⁹⁷ Hylton, writing from an instrumentalist perspective, begins by acknowledging the intuitive arguments both for and against using wealth to set a punitive-damage award.⁹⁸ On the one hand, the more wealth a person has, the less likely a punitive-damages verdict is to have an impact on them, and "it seems intuitively undesirable to have a class of potential defendants who view punitive judgments as most of us view parking tickets—that is, as a

⁹⁰ Stier, *supra* note 75, at 920.

⁹¹ *Id.* at 920-21.

⁹² *Id.* at 921.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Stier, *supra* note 75, at 922-24.

⁹⁷ Keith N. Hylton, *A Theory of Wealth and Punitive Damages*, 17 WIDENER L.J. 927, 928 (2008).

⁹⁸ *Id.*

nuisance fine."⁹⁹ On the other hand, if punitive damages awards are limited to internalizing social costs, wealth should not matter.¹⁰⁰ The costs to society are independent of the defendant's wealth and can be calculated without the use of data on wealth.¹⁰¹

Hylton, however, rejects both absolute positions; he argues that whether wealth is relevant to setting the size of a punitive award is fact-specific.¹⁰² Hylton denies that cost internalization is the only goal of punitive damages.¹⁰³ Internalization is appropriate to reduce an actor's conduct to an efficient level.¹⁰⁴ Hylton identifies an alternative goal of punitive damages, namely gain elimination.¹⁰⁵ The goal of gain elimination is not to reduce a behavior to an efficient level, but to completely deter it.¹⁰⁶ Hylton offers several examples where the internalization method is insufficient and gain elimination is necessary.¹⁰⁷ Under the gain elimination theory, the defendant's gain is much more likely to be "unobservable" than under cost internalization.¹⁰⁸ He offers an example: "[I]f the defendant takes an entitlement of the victim that he values for consumption purposes, his valuation or willingness to pay for the entitlement may be affected by his wealth."¹⁰⁹

Thus, Hylton announces his hypothesis: "*Where the parameter of interest in the determination of an optimal punitive award, external cost or internal gain, is unobservable and correlated with the defendant's wealth, the optimal punitive award will be a function of the defendant's wealth.*"¹¹⁰ He next tests his hypothesis against five examples.¹¹¹ Having confirmed the hypothesis, Hylton concludes that the claim wealth is never relevant to punitive

⁹⁹ Hylton, *supra* note 97, at 928.

¹⁰⁰ *Id.* at 928-29.

¹⁰¹ *Id.* 929.

¹⁰² *Id.* at 930.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Hylton, *supra* note 97, at 932.

¹⁰⁶ *Id.* at 933.

¹⁰⁷ *Id.* at 935.

¹⁰⁸ *Id.* at 936.

¹⁰⁹ *Id.* at 937.

¹¹⁰ *Id.* (emphasis in original).

¹¹¹ Hylton, *supra* note 97, at 938-44.

damages is invalid.¹¹² There are instances, including instances when the defendant is a corporation, when wealth is relevant to the determination of an optimal punitive-damages award.¹¹³

In her essay, Professor Sheila Scheuerman considers the impact of the Excessive Fines Clause on punitive damages.¹¹⁴ Today, constitutional regulation of punitive damages is governed by the Due Process Clause of the Fourteenth Amendment, in both its procedural and substantive aspects.¹¹⁵ However, before the Supreme Court began using due process to limit punitive damages, it was faced with the question whether the Eighth Amendment Excessive Fines Clause applied to them—the Court held it did not.¹¹⁶ Dissatisfaction with the Court's punitive damages jurisprudence¹¹⁷ and the unanswered questions it has created¹¹⁸ have caused some scholars to question whether the Excessive Fines Clause would have been a superior mechanism to regulate punitive damages.¹¹⁹

In contrast, Scheuerman argues that whether the Court relies on the Due Process or Excessive Fines Clause does not appear to make a difference.¹²⁰ For both Clauses, the Court announced three-part tests.¹²¹ A cursory glance at the elements of each test shows them to be strikingly similar. First, both begin by evaluating the

¹¹² Hylton, *supra* note 97, at 948.

¹¹³ *Id.* at 947-48.

¹¹⁴ Sheila B. Scheuerman, *The Road Not Taken: Would Application of the Excessive Fines Clause to Punitive Damages Have Made a Difference?*, 17 WIDENER L.J. 949 (2008).

¹¹⁵ *See, e.g.*, TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 458 (1993); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

¹¹⁶ *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 257, 268 (1989).

¹¹⁷ *See, e.g.*, Rustad, *supra* note 36.

¹¹⁸ *See, e.g.*, Hylton, *supra* note 97.

¹¹⁹ *See, e.g.*, Erwin Chemerinsky, *The Constitution and Punishment*, 57 STAN. L. REV. 1049, 1050 (2004).

¹²⁰ Scheuerman, *supra* note 114, at 950-51.

¹²¹ *Id.* at 953 (citing *United States v. Bajakajian*, 524 U.S. 321, 339 (1998) (announcing a three-part test to determine if a fine is excessive), citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996) (announcing a three-part test to determine whether punitive damages are excessive under substantive due process)).

blameworthiness of defendant's conduct.¹²² Second, both then "compare the amount of the penalty with the harm caused."¹²³ Third, both analyze "comparable civil and criminal sanctions."¹²⁴ Furthermore, beyond the facial similarity, "The Court has intertwined the holdings, reasoning, and purposes of these doctrines such that one has substantially influenced the other."¹²⁵ Finally, Scheuerman notes that both punitive damages and forfeitures or fines aim at the same purposes: punishment and deterrence.¹²⁶ Thus, Scheuerman concludes, "At the end of the day, the Excessive Fines Clause leads to the same destination as the due process path that the Court chose to follow."¹²⁷

In conclusion, the articles and essays herein address significant issues in regulating undesirable behavior. This volume offers fresh perspectives on the tort/crime distinction and its many applications. These ideas will assist lawmakers, judges, academics, and practitioners as they continue to shape society's response to misdeeds.

¹²² Scheuerman, *supra* note 114, at 965-66.

¹²³ *Id.* at 966-67.

¹²⁴ *Id.* at 967.

¹²⁵ *Id.* at 953.

¹²⁶ *Id.* at 967.

¹²⁷ *Id.* at 971.