Punish or Deter? Theoretical Issues and Judicial Cases on Punitive Damages

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This paper presents an overview of the two fundamental purposes of punitive damages (deterrence and punishment) and their balancing in courts’ decisions. According to the first rationale, punitive damages should in fact be imposed when deterrence would otherwise be inadequate because of the possibility that injurers might escape liability. In particular, punitive damages should be set at a level such as to confront potential injurers with the total social cost of their actions, something that is achieved when their damage payments will, on average, equal harm. For this purpose, an overview is presented of the “multiplier formula,” as introduced in relevant scholarly literature. Taking into consideration the punishment rationale as well, it is further submitted that punitive damages might then be set at a compromise between the levels that are optimal when each objective is considered independently. The practical balancing of these two goals is finally explored by observing the behaviour of judges and juries in actual cases, including the most recent developments of In re Exxon Valdez.
PUNISH OR DETER? THEORETICAL ISSUES AND JUDICIAL CASES ON PUNITIVE DAMAGES

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I. INTRODUCTION

Analysis and synthesis are different mental operations that, together, foster the generation and improvement of human knowledge. More specifically, synthesis is needed in order to frame existing knowledge in such a manner as to make it immediately accessible to others. Good restatements -- because restating is not the same as “reheating” -- are therefore an important means to enable widespread understanding of a given problem. This is particularly true in the case of issues that are a source of great debate, such as those dealt with in this article; in such instances, it is felt that a general framework of reference is indispensable in order to fully appreciate the meaning of more specific, individual analyses. This is what the present paper attempts; to synthesize the main contributions on a topic, so as to deliver in a relatively concise manner an immediately accessible framework of reference, useful for comparing and contrasting the different views.

The imposition of punitive damages has become one of the most controversial aspects of the American legal system -- one that has been brought back into the spotlight by the United States Supreme Court’s recent decision in the Exxon oil spill case, which offered interesting new insights into some of the problems that will be outlined in this work. Courts have tried for years to find a set of principles to be applied in determining the appropriate amount of punitive damages; even legislative bodies have examined or approved a variety of statutes to define when and to what extent punitive damages should be awarded. But what exactly are punitive damages?

In a general fashion, they could be defined as extra damages sometimes imposed upon a defendant, in addition to compensatory damages, with a twofold aim:

1) to achieve proper deterrence, and

2) to appropriately punish injurers for the harm their conduct generates.

Wide scholarly debate still exists, however, regarding the rationale underlying this remedy. Moreover, many academics assert that a relationship might exist between compensatory and punitive damages, whereas a recent empirical analysis (which will also be illustrated later in this paper) indicates that, in practice, there might instead be no such relationship.

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1 “Reason is the faculty which perceives, identifies and integrates the material provided by man’s senses. Reason integrates man’s perceptions by means of forming abstractions or perceptions, thus raising man’s knowledge from the perceptual level, which he shares with animals, to the conceptual level, which he alone can reach.” Ayn Rand, Faith and Force: The Destroyers of the Modern World, Lecture delivered at Yale University (Feb. 17, 1960), in AYN RAND READER 298, 299 (Gary Hull & Leonard Peikoff eds., 1999).


3 See infra Sect. IV.C.4 for a discussion of the possible theoretical underpinnings of the Supreme Court’s dictum in Exxon.

4 See e.g., Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007) [hereinafter Philip Morris]; State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 409 (2003); N.Y. Pattern Jury Instr., Civil, No. 2:278 (2007) (“The purpose of punitive damages is not to compensate the plaintiff but to punish the defendant . . . and thereby to discourage the defendant . . . from acting in a similar way in the future.”).

5 For specific references, see infra Part II of this paper.

6 See e.g., Polinsky & Shavell, supra note 2, at 847-875 (“Once the proper level of total damages is calculated . . . punitive damages can be determined by subtracting compensatory damages from the total.”); Joni Hersch & W. Kip Viscusi, Punitive Damages: How Judges and Juries Perform, 33 J. LEGAL STUD. 1, 3 (2004) (“If the compensatory

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In turn, this uncertain theoretical framework is grounds for diffidence on the part of jurists in civil law jurisdictions, who generally see such a remedy as illogical or perhaps as a threat to the certainty and predictability of damage awards.

In light of the foregoing, the precise goal of this paper is to clarify -- in particular to jurists of civil law jurisdictions, a group to which the author of this paper belongs -- possible rationales to be used as guiding principles in the setting of punitive damages. To accomplish this goal, this paper conducts a helpful synthesis -- a restatement -- of several groundbreaking but dense works. The manuscript of Professors Polinsky and Shavell will be detailed, followed by the empirical studies performed by Professors Hersch and Viscusi. After these syntheses, the author will detail possible applications of the resulting framework in an attempt to make sense of several punitive damages cases -- including the 2008 Supreme Court decision in the Exxon oil spill case -- with the ultimate goal to provide a helpful guide for the setting of punitive damages.

Part II of this paper explores the economic justification of this kind of remedy. In so doing, it will be attempted to better define a coherent and relatively simple set of rules for the fixation of punitive damages and the determination of when they should be awarded.

Part III deals with the retributive justification of punitive damages, with a view toward the repercussions of such a vision on the practical functioning of the remedy.

The final chapters deal with two related issues: (1) real punitive damages cases and (2) the differences between judges and juries with respect to the setting of punitive damages. The aim of these final chapters is to provide a concise overview of some practical applications of the conceptual framework developed in the preceding sections.

A. Calculating Punitive Damages

Generally, the only time punitive damages (PD) should be awarded is when there is a chance the injurer will escape liability for the harm caused. 11 If a probability of escaping liability exists, and

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7 Hersch & Viscusi, *supra* note 6, at 2.


10 See *infra* sect. IV.C.4.

the injurer is found liable, then the correct amount of total damages is the harm caused (CD)\(^{12}\) “multiplied by the reciprocal of the probability of being found liable” (p).\(^{13}\)

\[
CD + PD = CD \cdot \frac{1}{p}
\]  

(Eq. 1)

Following this rule, called the “multiplier formula,” it becomes possible to fulfill the punishment goal\(^{14}\) -- to which punitive damages are also geared -- while simultaneously attaining appropriate deterrence.\(^{15}\) However, this is not the only way to determine the amount of punitive damages to be awarded.

\(^{12}\) The harm to consider for the purpose of awarding punitive damages should be that caused by the defendant’s conduct in the instant case alone. The magnitude of damages necessarily caused to third parties by the same defendant in other instances should not, instead, be an issue. More generally, similar cases should be considered only with respect to their frequency in order to devise the multiplier factor. Otherwise, considering similar torts both as to their magnitude and as to their frequency might lead to overly deterrent damage awards. For instance, let us assume that a car manufacturer caused damages of amount \(x\) to \(z\) customers, and that, out of all such cases, only one customer brought the manufacturer to court. The \(z-1\) cases where no suit was undertaken by the injured party should only be relevant for the determination of the probability of escaping liability, and should not contribute to increase the magnitude of damages upon which to apply the multiplier factor. Otherwise, the damage award would grossly exceed the amount required to foster optimal deterrence, as established infra, note 15. This might be the possible economically-oriented reading of the Supreme Court’s holding in Philip Morris supra note 4, at 1064, “precluding juries from awarding extra-compensatory damages that consider the amount of harm the defendant caused to nonparties.” (Dan Markel, Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction, 94 CORNELL L. REV. (forthcoming 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=991865#PaperDownload (last visited Apr. 21, 2008) (emphasis added)). If, however, we assume away the “standardization” of the amount of harm caused by a given conduct to different injured parties, it might be necessary—in order to assess the level of punitive damages required for optimal deterrence—to know the probability distribution of harm magnitude and to consequently use an average value of harm as a reference. However, we believe this consideration of the amount of harm caused to third parties would not necessarily go against the Supreme Court’s dictum, which might simply be taken to imply that the multiplier formula be applied using a value of harm pertaining to a single injured party’s position. Contra, at 4 n. 7.

\(^{13}\) Polinsky & Shavell, supra note 2, at 874; see Hersch & Viscusi, supra note 6, at 3.

\(^{14}\) For the purposes of this paper, we shall assume that the punishment goal is fulfilled by the mere imposition of punitive damages, regardless of their amount, also in light of the difficulties of deriving specific rules for the determination of such amount from the generic goal of sanctioning blameworthy parties. We shall instead consider the punishment goal for the purpose of determining to whom sanctions should be addressed; see infra Part III. This assumption will however be relaxed in Sect. IV.A.1.

\(^{15}\) This is so, since optimal deterrence requires that the costs of risky activities be internalized by injurers—something which is achieved by confronting each injurer with the total social cost brought about by her activity. Making each injurer bear damages (\(D\)) exactly equal to the value of harm caused (\(H\)) would attain the deterrence goal in case all injurers were tried. On an aggregate level, this would further result in total damage awards paid by all injurers being equal to the aggregate value of harm. On the other hand, should \(p < 1\) equal the probability that damage awards be imposed upon an injurer, for total damages to be equal to total harm (which, as has just been shown, indicates that costs are being fully internalized by injurers), the former should be increased by a multiplier factor equaling \(1/p\). This point can be better clarified by a formal exemplification: if \(x\) equals the total number of injurers, total damages (equal to total harm) should be \(x \cdot D = x \cdot H\). In case injurers were always caught, each injurer would then act while accounting for \(D = H\), which is the total amount of harm caused by her activity. If enforcement is imperfect (that is if not all injurers are brought to justice), the total damage awards paid by all injurers shall amount to \(px \cdot D\), which is less than total harm, \(x \cdot H\). In this situation, the amount of damages injurers shall consider in carrying out their cost-benefit analyses shall equal average damages, that is \(pD\), yielding a suboptimal internalization of social costs. Therefore, by increasing damage awards by a factor of \(1/p\), the total paid in damages shall amount to \(px \cdot D \cdot 1/p = x \cdot D = x \cdot H\), in relation to total harm. Thus, in balancing out costs and
It has, in fact, been submitted\textsuperscript{16} that punitive damages should be an amount to add to compensatory damages and fines only when the sum of these two elements were less than a hypothetical “ideal retribution,” meant to theoretically achieve the goal of punishment. The real problem with this theoretical stand, even if it may be considered very promising, is that it does not yet provide any objective rule for the calculation of punitive damages.\textsuperscript{17} Thus, the equation cannot help judges and juries in determining the total damages amount. Conversely, other academic theories\textsuperscript{18} relate the efficiency of imposing punitive damages with the elasticity of offenses’ supply: the more elastic the supply curve, the more efficient it would be to impose outstanding punitive damages. While that could be an economically correct and efficient theory, it might seem ethically and socially unacceptable (or, at least, very problematic to implement) because it would imply the reduction of compensatory damages in the case of total inelasticity of the supply curve.

II. THE AIM OF DETERRENCE

If punitive damages are imposed without being justified by deterrence, the result can prove to have socially harmful consequences.\textsuperscript{19} Deterrence is the effect that the prospect of having to pay damages will have on the behavior of similarly situated parties in the future (not just on the behavior of the defendant at hand). In determining the optimal level of deterrence, however, the benefits that injurers obtain from engaging in the conduct that gives rise to harm also have to be credited.

A. Optimal Damages with Perfect Enforcement

“[I]f a defendant will definitely be found liable for the harm for which [he or she] is responsible, the proper magnitude of damages [to achieve proper deterrence] is equal to the harm the defendant has caused.”\textsuperscript{20} Therefore:

\[
\text{If } p = 1 \text{ then } CD + PD = CD \cdot \frac{1}{1} = CD
\]

(Eq. 2)

When the level of liability is less than harm, a rational agent might have an incentive to avoid precautions against the harm, even though those precautions would be socially desirable. However, if damages exceed harm, rational agents may decide to take precautions that are benefits of the risky activity in question, each injurer, on average, shall again be forced to consider the full amount of social cost such activity would bring about.

\textsuperscript{16} Peter Diamond, \textit{Integrating Punishment and Efficiency Concerns in Punitive Damages for Reckless Disregard of Risks to Others}, 18 J. L., Econ & Org. 117, 127(2002); see infra Part III.

\textsuperscript{17} \textit{Id.} at 123 (“We do not analyze issues that might enter into the determination of the ideal retribution level; we merely assume an ideal retribution level for this class of defendants, one that does not vary with the precaution taken.”).


\textsuperscript{19} Polinsky & Shavell, supra note 2, at 955.

\textsuperscript{20} \textit{Id.} at 878; but see Friedman, supra note 18, passim (asserting on the contrary that the efficient level of damages is not, in general, equal to the harm done by the tort, once litigation costs are taken into account).
socially excessive, or they might be induced to withdraw from highly valuable though risky activities, which could eventually turn out to be too expensive for the firm itself.

It is, in fact, by taking precautions that possible injurers usually reduce the risk of harm. In this respect, while the proper magnitude of damages needed to achieve the goal of deterrence continues to be the harm the defendant has caused, the determination of the level of appropriate precautions must also include “a comparison of the cost of precaution with the reduction in expected harm.”

\[
\text{If } x = \text{ probability of occurrence of harm, then Expected Harm } E(CD) = CD \cdot x \quad \text{(Eq. 3)}
\]

The economic interpretation of the proper level of deterrence therefore stems from a confrontation between the cost of taking each additional precaution and the reduction in harm that is expected to result -- if the cost of precaution is less than the expected reduction of harm, then the precaution should be taken; to do otherwise is negligence. In this respect, it has further been observed that “[s]ince not all negligent injurers are apprehended, some punitive damages should probably be allowed in negligence cases.”

However, concealment of a tort might be a marginal problem - in comparison to “intentional torts that overlap with common law crimes” - with respect to unintentional accidents, such as those generally encompassed by the category of negligent behavior. This suggests that damages exceeding harm could lead to excessive precautions, should judges make a mistake in assessing the proper coefficient of “imperfect enforcement.” Under these conditions, “[t]o award punitive damages in a negligence case would often produce a misallocation of resources” and some possible injurers would in fact be led to increase their precaution expenditures over the efficient level of care.

**B. Optimal Damages with Imperfect Enforcement**

If there is a chance that a defendant can avoid liability for the harm for which he or she is responsible, the proper level of total damages to impose on him or her consists of a sum equal to

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21 Polinsky & Shavell, supra note 2, at 879.
22 Id. at 882.
23 Id. at 880.
24 Id. at 883.
25 Richard A. Posner, Economic Analysis of Law, 143 (1972); see also supra Sect. I.A., the discussion of the multiplier formula. Please notice that the use Professor Posner makes of the term “negligence case” in the cited excerpt is not meant to refer to a negligence rule of liability (according to which diligent offenders are not imposed any damages), as he clearly states a little earlier in the referenced text: “We begin our examination of tort remedies with the general rule that a negligence victim is entitled only to compensatory damages . . . .” (Id. at 142), where the reference is clearly to a strict liability regime.
26 Id., at 143.
27 William M. Landes & Richard A. Posner, The Economic Structure of Tort Law 162 (1987). Furthermore, in order to gather an idea of the magnitude of social costs – in terms of overdeterrence - induced by errors in the fixation of damage awards under a rule of strict liability, let us also consider that most parties will be located at the margin (i.e. at the balancing point of marginal costs and benefits), so that mistakes in the determination of damages (in excess) shall affect the weighing of risks by many parties, therefore, leading all of them to undertake small changes in behavior (yielding a so-called response on the intensive margin). See Robert Cooter, Prices and Sanctions, 84 Colum. L. Rev. 1523, 1529-30 (1984).
the harm the defendant has caused “multiplied by a factor reflecting the probability of . . . escaping liability.”

But how does it happen that injurers escape liability? In a first subset of cases, the victim may not discover the injury; secondly, even if the victim knows of the injury, he or she may have difficulties locating the source of harm suffered; lastly, even if the victim knows both that he or she has been unlawfully injured and the source of the injury, the victim might decide not to sue. “If damages merely equal harm, injurers’ incentives to take precautions will be inadequate and their incentive to participate in risky activities will be excessive.” To avoid the risk of underdeterrence, damages that are imposed in those instances in which injurers are found liable should be raised sufficiently so that injurers’ average damages will equal the harm they cause. An injurer should be responsible for total damages equaling “the harm multiplied by the reciprocal of the probability that the injurer will be found liable.”

\[
\text{Total Damages} = \text{Harm} \times \frac{1}{p} 
\]

(Eq. 4)

The application of this formula implies that, generally, injurers will exercise caution and carefully participate in risky activities.

C. Further Possible Rationales for the Imposition of Punitive Damages

The work of Professors Polinsky & Shavell, *Punitive Damages: An Economic Analysis*, discussed additional possible rationales for setting punitive damages. These considerations will be summarized below, with additional analysis provided.

1. Socially Unacceptable Behavior

If a defendant is found to have acted maliciously, or negligently, or with reckless disregard for the safety of others, the level of the defendant’s reprehensibility should be considered a relevant factor in determining the proper level of punitive damages and, in fact, is a key factor when the issue of punitive damages arises at trial. Substantial extracompensatory damages may be appropriate if the reprehensible injurer has the chance of not being identified or sued. Excessive

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28 Polinsky & Shavell, *supra* note 2, at 887.
29 See Bullock v. Philip Morris USA, Inc., 138 Cal. App. 4th 1029, 42 Cal. Rptr. 3d 140 (2006) (regarding a tobacco case, where a plaintiff cigarette smoker sued defendant manufacturer for products liability and fraud; the smoker presented evidence of extensive efforts by the manufacturer to mislead the public about adverse health effects of smoking, thereby concealing its responsibility).
30 Polinsky & Shavell, *supra* note 2, at 888.
31 Id.; see e.g., ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 353 (3rd ed. 2000).
32 Polinsky & Shavell, *supra* note 2, at 888.
33 See *supra* note 15.
34 See POSNER, *supra* note 25, at 167 (with an intuitive illustration of the balance between severity of sanctions and probability of their imposition with respect to criminal law); COOTER & ULEN, *supra* note 32, at 354-55 (“If the punitive multiple equals the inverse of the enforcement error . . . the equation becomes identical to the one for socially responsible decision-makers.”).
35 See Polinsky & Shavell, *supra* note 2, at 890.
36 Id. at 905; COOTER & ULEN, *supra* note 31, at 296 (“[T]he plaintiff must usually demonstrate that the defendant breached a duty that he or she owed to the plaintiff, and that the breach caused the plaintiff’s harm.”).
37 Polinsky & Shavell, *supra* note 2, at 905.

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damages may instead be imposed when reprehensible conduct occurs in situations in which an injurer is virtually certain to be found liable. Even for conduct that is reprehensible, if little chance of escaping liability exists, punitive damages will generally result in overdeterrence. In sum, that a defendant’s conduct can be described as reprehensible is in itself irrelevant; punitive damages should not be allowed just because of the reprehensibility of the conduct of the tortfeasor.\textsuperscript{38} An important exception to this conclusion occurs when an individual injurer’s gain does not count in social welfare, even when there is no chance of escaping liability -- that is when an injurer acts maliciously\textsuperscript{39} or, to be more specific, when the injurer’s benefit consists of the victim’s suffering.\textsuperscript{40} In such cases, in fact, it would maximize social welfare to completely eliminate the activity in question. If an activity should not at any rate be carried out, however, there will be no problem with overdeterrence.

2. Defendant’s Financial Condition

A defendant’s financial condition is another significant factor for the purpose of determining a punitive damages award,\textsuperscript{41} and even jury instructions often include the defendant’s financial condition as a factor, allowing juries the leeway to consider wealth when deciding punitive damages.\textsuperscript{42} When confronting wealthy defendants, especially large corporations, plaintiffs tend to stress this factor in particular.\textsuperscript{43}

In this respect, Judge Posner pointed out that for a very wealthy defendant, the imposition of even substantial punitive damages awards may not achieve any discouraging effect: “The more wealth the defendant has, the smaller is the relative bite that an award of punitive damages not

\textsuperscript{38} See Polinsky & Shavell, supra note 2, at 905-06.
\textsuperscript{39} See Friedman, supra note 18. Professor Friedman asserts that both the negligent and the malicious behavior should be considered intentional in a sense useful for economical analysis:

Consider two torts, one accidental and one intentional. The first is an auto accident; my car hits your car. The accident is not intentional in the sense in which the term is used either in the law or ordinary language, but it is intentional in a sense useful for economic analysis. The accident is the probabilistic result of decisions I make: how often to have my brakes checked, how fast to drive, whether to drive when it is raining, whether to drive after having a drink, how much attention to pay to the road and how much to the radio . . . . In making those decisions, I am, explicitly or implicitly, balancing costs and benefits. Compensatory damages force me to bear all of the costs of my action. Insofar as I am rational, I then choose the efficient level of precautions.

\textsuperscript{40} As the above assertion makes clear, what really matters is not the intentional or unintentional nature of the tort, but the particular nature of the benefit perceived by the defendant. This benefit is not to be regarded as a socially valued asset and therefore is unapt to be credited in social welfare. In other words, acts yielding such sorts of benefits are rather to be equated with acts yielding no benefit whatsoever and, therefore, as a net social loss. Some exemplifications of the concept are offered in Mitchell A. Polinsky & Steven Shavell, PUNITIVE DAMAGES, in 2 ENCYCLOPEDIA OF LAW & ECONOMICS 764, 770 (Boudewijn Bouckaert & Gerrit de Geest eds., 2000), available at http://encyclo.findlaw.com/3700book.pdf. Such examples include a person punching another out of spite, or a driver exceeding speed limits just for the fun of it. Another example could be that of a person injuring another in order to misappropriate a human organ. Although, in fact, a human organ may be regarded as a valuable asset, it is generally not socially accepted as such. So, for our purposes, such a tort should be regarded as generating a net social loss equal to the victim’s harm.

\textsuperscript{41} Polinsky & Shavell, supra note 2, at 910; see RESTATEMENT (SECOND) TORTS § 908 (1979).
\textsuperscript{42} Polinsky & Shavell, supra note 2, at 910; see, e.g., N.Y. PATTERN JURY INSTRUCTIONS- CIVIL 2:278 (2007); 8 TENN. PRACTICE PATTERN JURY INSTRUCTIONS- CIVIL 14:56 (2008); LINDA LYNCH, RAYMOND BOURHIS, WARD SMITH & NANCY HERSH, TORTS (CALIFORNIA CIVIL PRACTICE) § 45:33 (2008).
\textsuperscript{43} Polinsky & Shavell, supra note 2, at 910.
\textsuperscript{44} See Ryan, supra note 9, at 7.

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actually geared to that wealth will take out of his pocketbook . . . .” Hence, assuming the goal of proper deterrence is to be pursued through the imposition of punitive damages, it would seem necessary to link the magnitude of total damages to the wealth of the defendant in order to discourage defendant’s further misbehavior. In Kemezy v. Peters, however, Judge Posner observed that it would be odd to require the plaintiff to give evidence on the defendant’s wealth in order to determine the magnitude of punitive damages; conversely, they should be allowed only on the basis of the defendant’s conduct. Moreover, Posner posited that requiring plaintiffs to discover defendant’s net worth would be an invasive form of discovery and, since such information is more than likely in the defendant’s sole possession, it would be up to the defendant to produce it.

According to Polinsky and Shavell, the wealth of a defendant-individual may be pertinent in two situations. The first situation begins with the assumption that less affluent defendant-individuals are more risk averse than wealthier ones. Therefore, it would be more efficient to impose on poorer defendant-individuals lower punitive damages to obtain the same deterrent effect. Additionally, wealth may be relevant for the awarding of heavier punitive damages when the defendant-individual’s personal gain from the malfeasance has “socially illicit utility.”

3. Entity of Possible Additional Harm

The United States Supreme Court introduced the idea of taking potential harm into account in determining the appropriate punitive damages award in cases such as Pacific Mutual Life Insurance Co. v. Haslip, TXO Production Corp. v. Alliance Resources Corp., and such a rationale also occurred in an important appeals case, In re Exxon Valdez. However, according to Polinsky and Shavell, potential harm should not be a key factor for the determination of punitive damages. The rationale behind this suggestion is that it seems odd to link the punishment to a theoretical consequence of the defendant’s conduct (which could instead yield

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45 Kemezy v. Peters, 79 F.3d 33, 35 (7th Cir. 1996).
46 See generally id. at 37; see also Polinsky & Shavell, supra note 2, at 911 (discussing the multiplier formula which determines punitive damages on the basis of harm and the chance of escaping liability, which allows potential defendants to take “optimal precautions.”)
47 Kemezy, supra note 45, at 36 (“Individual defendants, as in the present case, are reluctant to disclose their net worth in any circumstances, so that compelling plaintiffs to seek discovery of that information would invite a particularly intrusive and resented form of pretrial discovery and disable the defendant from objecting.”).
48 See Polinsky & Shavell, supra note 2, at 911 (arguing that wealth should never be relevant in the determination of punitive damages when the defendant is a corporation because excessive punitive damages could lead the corporation to overdeterrence, which could negatively affect the defendant-corporation’s production and the prices of its products).
49 Id. at 913.
50 Id.
51 See id. According to Polinsky and Shavell, the term “socially illicit utility” refers to the manner in which people often would characterize the utility that individuals derive from certain reprehensible acts. Id. at 909 n. 125.
54 236 F. Supp. 2d 1043, 1057 (2002) (discussing how the original punitive damages award of $5 billion would not amount to excessive deterrence or excessive punishment of Exxon).
55 See Polinsky & Shavell, supra note 2, at 914.
the result of leading defendants to overdeterrence).56 Also, courts and parties would bear greater expense to calculate expected harm rather than to define the actual harm in the instant case.57

4. Gain Perceived by Defendants

As a general proposition, defendants should not gain anything from their malfeasance. In Haslip, the United States Supreme Court posited that the defendant’s gain from his or her malfeasance should be considered in determining the punitive damages award.58 However, this parameter for imposing punitive damages is misguided. Punitive damages should, in fact, be tailored exclusively to the level of harm caused and the coefficient of enforcement, whereas any gain perceived by the defendant should remain outside of the equation, even if harm were less than the defendant’s gain, as doing otherwise would risk causing overdeterrence.59 However, an exception arises “when the defendant’s gain is socially illicit” and the tortfeasor is an individual.60

5. Accounting for Costly Litigation61

Imposing damages is not a costless activity for plaintiffs nor for the courts. That is why, even in cases of simple compensatory damages awards, the imposition of punitive damages related to litigation costs62 is needed to allow plaintiffs to sue injurers.63 Raising the probability of suit by allowing heavier punitive damages awards is, however, usually unnecessary to achieve proper deterrence, and it increases the litigation costs borne by society.64 Interestingly, at least one state, Iowa,65 has adopted a policy where punitive damage awards are decoupled.66 This solution purports to “reduce the volume of litigation without compromising deterrence.”67

These are the reasons why litigation costs should be taken into account. In short, in order to strike the optimal balance in the determination of punitive damages amounts, one must consider the effect of litigation costs on both deterrence and the facilitation of lawsuits against wrongdoers. However, punitive damages should not be generally resorted to as a means to encourage lawsuits, for this might induce needless litigation.

56 See id. at 917 (summarizing the reasons why potential harm should not be taken into account when determining punitive damage awards).
57 See id. at 914-17.
59 See infra Sect. II.A.
60 See Polinsky & Shavell, supra note 2, at 918; see also supra note 40.
61 Richard A. Posner, The Economic Approach to Law, 53 Tex. L. Rev. 757, 778 (1975) (“[S]ince no rational society can ignore the costs of its public policies, they are issues to which economics has great relevance. The demand for justice is not independent of its price.”).
62 When punitive damages are justified because of litigation costs, they should not necessarily be set equal to the latter. Proper punitive damages are determined by the multiplier formula: Total Damages = \((CD + LC) \times 1/p\).
63 See Friedman, supra note 18, at 1127-28 (discussing a potential reason for punitive damages is “compensatory damages as defined by the courts are not really compensatory . . . they understate the costs actually imposed by tortfeasors, and . . . punitive damages are necessary to fully compensate the victims”).
64 See generally id. at 1131 (pointing out the imposition compensatory damages alone is not efficient because of the economic impact the cost of litigation has on the judicial system itself); see also Polinsky & Shavell, supra note 2, at 921 (discussing the cost of litigation in the determination of punitive damages awards).
66 See Polinsky & Shavell, supra note 2, at 921. Decoupling means giving the plaintiff only a fraction of punitive damages paid by the defendant, the remaining sum going to the state.
67 See id.
6. Civil Suits Past and Possible for the Same Injury

As a general proposition, a defendant may be liable to multiple plaintiffs for injury arising from a single incident. In Haslip and Green Oil Co. v. Hornsby, the United States Supreme Court supported the idea that in cases where a defendant is found liable to multiple plaintiffs for one act, punitive damages awards should be lessened. As the multiplier formula shows, a significant likelihood of suit implies a low multiplier, thus a low amount of punitive damages. Because of the difficulties of predicting the amount of future litigation, one way to avoid the problem of excessive punitive damages (which lead defendants to overdeterrence) is to use escrow accounts. Rather than pay the punitive damages directly to the plaintiffs, the defendant pays a sum defined by the court into the escrow account. Also, the court will contextually fix a period within which other plaintiffs will be able to sue the defendant; regardless of the number of new plaintiffs, the amount of total damages will be the number previously determined by the court, preventing overdeterrence.

7. Third Party vs. Consumer Victims

In Liebeck v. McDonald’s Restaurants, P.T.S., Inc., BMW of North America, Inc. v. Gore, and similar cases, the plaintiffs were customers of the defendants rather than merely third parties. “The status of victims as third parties or consumers is important to consider, for when victims are consumers, the need for punitive damages is lessened.” The rationale behind this proposition is that consumers will not purchase products that cause harm or are known to be dangerous; thus, out of concern for the marketability and sale of their products, producers will take precautions to make their products safe. Therefore, the imposition of punitive damages does not provide as great an incentive to create safe products for consumers as “market-based incentives.” Imposing liability would lead to overdeterrence and the costs associated with litigation would be a social waste.

8. Public Sanctions as a Benchmark?

Another issue concerning deterrence and punitive damages highlighted by Polinsky and Shavell is the impact that “public penalties” may have on punitive damages. In contrast to their

68 See id. at 924 (discussing Green Oil Co. v. Hornsby, 539 So. 2d 218, 224 (Ala. 1989) and Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 24 (1991)).
69 See generally id. at 926.
70 See generally id. at 924-26 (discussing the use of escrow accounts to assue punitive damages awards in situations where the defendant is sued by more than one plaintiff for injuries arising from one act by the defendant); see also Edwin S. Mills, The Functioning and Regulation of Escrow Accounts, 5 HOUSING POLICY DEBATE 203, 204 (1994), available at http://www.knowledgeplex.org/kp/text_document_summary/scholarly_article/relfiles/hpd_0502_mills.pdf (last visited Sept. 9, 2008) (defining “escrow account” as “consist[ing] of funds held by a third party, who collects, holds, and disburses the funds pursuant to a contract or an obligation between two parties.”).
71 See Polinsky & Shavell, supra note 2, at 925.
72 Id.
75 See Polinsky & Shavell, supra note 2, at 934 (discussing the differences between third party plaintiffs and plaintiffs that have some sort of contractual relationship with the defendant).
76 Id. at 935.
77 Id.
78 Id.
79 See id. at 926-28.
position that public sanctions should not be considered in the determination of punitive damages, Polinsky and Shavell cite the United States Supreme Court’s reasoning in Gore.\textsuperscript{80} In Gore, the Supreme Court found that in considering punitive damages awards, the amount awarded to the plaintiff should be indicative of the potential public penalties the defendant could have faced for his or her conduct.\textsuperscript{81}

Other courts have taken an approach that involves an inquiry into any public sanctions that the defendant has actually paid for her malfeasance.\textsuperscript{82} If punitive damages are not reduced, the defendant’s combined private and public payments would otherwise result in overdeterrence.\textsuperscript{83} The impact of public penalties should only be considered in determining punitive damages if it could be used as a means to infer the chance of escaping liability.\textsuperscript{84}

9. Harm in Excess With Respect to Compensatory Damages

Many courts have asserted that “punitive damages should be awarded to compensate plaintiffs for non-economic and other losses that would not otherwise be incorporated into compensatory damages.”\textsuperscript{85} By using punitive damages to make up for areas in which the compensatory damages award is lacking, the court mixes the rationales of different remedies.\textsuperscript{86} Compensatory damages are usually seen as a form of restoration of the plaintiff’s assets, while punitive damages take things one step further by introducing considerations pertaining to aggregate deterrence.\textsuperscript{87} In this context, there might be a risk of according plaintiffs a multiple of the missing component of compensatory damages. In fact, resorting to the punitive remedy (and the multiplier formula) absent a real problem of imperfect enforcement could lead to an amount unrelated to a specific rate of imperfect enforcement (by using, for instance, a “default” multiplier unsupported by specific evidence as to the need for deterrence), resulting in unpredictability and a risk of missing the mark of optimal deterrence.\textsuperscript{88} Moreover, the cost of estimating missing compensatory damages components on a case-by-case basis could be largely avoided if courts were to use a table listing standard values of such components of harm.\textsuperscript{89}

10. Purely Economic vs. Personal Injuries

Another issue that courts have considered in the determination of punitive damages awards is the type of harm caused to the plaintiff.\textsuperscript{90} “[M]uch was made of this distinction in Gore, in which the United States Supreme Court contrasted the ‘purely economic’ harm inflicted by the

\textsuperscript{80} See Polinsky & Shavell, supra note 2, at 926-28; 517 U.S. at 583 (1996).
\textsuperscript{81} See generally Gore, 517 U.S. 559.
\textsuperscript{82} See Polinsky & Shavell, supra note 2, at 926 (citing Green Oil Co. v. Hornsby, 539 So. 2d 218, 223-24 (Ala. 1989) and Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 22 (1991) as two such cases).
\textsuperscript{83} See generally Polinsky v. Shavell, supra note 2, at 927.
\textsuperscript{84} Id.
\textsuperscript{85} Polinsky & Shavell, supra note 2, at 939.
\textsuperscript{86} Id. at 940.
\textsuperscript{88} See generally Cass R. Sunstein et al., Assessing Punitive Damages (With Notes on Cognition and Valuation in Law), 107 YALE L.J. 2071, 2126-29 (1998) (discussing the disadvantages of using a multiplier formula in the determination of punitive damages).
\textsuperscript{89} See id. at 2115-18 (1998) (discussing the advantages of a case-by-case analysis for juries to determine punitive damages rather than the use of actual dollar figures).
\textsuperscript{90} Polinsky & Shavell, supra note 2, at 941 (noting that “[s]everal courts have [endorsed] the view that the level of punitive damages should depend on whether the plaintiff’s harm” was personal or purely economic).
defendant with instances of ‘reckless disregard for the health and safety of others,’ implying that the latter acts should be subject to higher punitive damages.”

Academics, however, assert that “punitive damages should not be awarded to correct for inadequate compensatory damages,” for the same reasons stated above in Section II.C.9.

11. Taxability or Not?

Defendants who are liable for acts committed within the scope of business are able to deduct from their tax liability the cost of damages, whether punitive or compensatory, as a business expense. “If damages were not deductible, a business actor might take precautions even when they cost more than the harm,” or decide not to engage in some socially desirable but risky activity (overdeterrence).

12. Insurance Against Punitive Damages

The majority of states allow punitive damages to be covered by liability insurance. “Liability insurance raises the wellbeing of potential injurers,” and permits them to engage in risky, yet socially beneficial and therefore desirable, activities, “which is why they choose to buy it, and the availability of such insurance does not affect the welfare of victims, who will be fully compensated anyway.” “Even if the purchase of liability insurance causes injurers to take less care and thereby increases the frequency of accidents, victims will not be affected because they are fully compensated.” Further, the victims’ losses, and the possible insureds’ underdeterrence, are mitigated because liability insurers have a financial incentive to structure coverage and premiums to control risks.

III. THE AIM OF PUNISHMENT

For our purposes we may say that there are two justifications of punishment. What we may call the retributive view is that punishment is justified on the grounds that wrongdoing merits punishment. It is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing. That a criminal should be punished follows from his guilt, and the severity of the appropriate punishment depends on the depravity of his act. The state of affairs where a wrongdoer suffers punishment is morally better than the state of affairs where he does not, and it is better irrespective of any of the consequences of punishing him.

91 Polinsky & Shavell, supra note 2, at 941 (quoting Gore, 517 U.S. at 576).
92 Id. at 942.
93 Id. at 942.
94 This conclusion might be different with respect to the punishment objective. Notably, when personal injury occurs, members of society may well experience a stronger desire to see the defendant punished than when the harm caused by the defendant is purely economic.
95 Polinsky & Shavell, supra note 2, at 928.
96 Id. at 929 (discussing the potential for defendant-businesses to engage in overdeterrence if they are not able to deduct the cost of damages from their income tax returns).
97 Id. at 931 n.193 (“A majority of jurisdictions follow the approach exemplified in Lazenby v. Universal Underwriters Ins. Co., 383 S.W.2d 1 (Tenn. 1964), under which punitive damages are insurable. In general, however, insureds cannot indemnify themselves against punitive damages assessed for intentional misconduct. [S]uch coverage would permit wrongdoers to escape punishment and would also compromise deterrence.”).
98 Polinsky & Shavell, supra note 2, at 932.
99 Id.
What we may call the utilitarian view holds that on the principle that bygones are bygones and that only future consequences are material to present decisions, punishment is justifiable only by reference to the probable consequences of maintaining it as one of the devices of the social order. Wrong committed in the past are, as such, not relevant considerations for deciding what to do. If punishment can be shown to promote effectively the interest of society it is justifiable, otherwise it is not.\footnote{John Rawls, Two Concepts of Rules, 64 PHIL. REV. 3, 4-5 (1955).}

In light of the above, by speaking of “punishment objective,” reference is meant to society’s goal of levying appropriate penalties on culpable individuals.\footnote{Polinsky & Shavell, supra note 2, at 948.} Culpability, or “blameworthiness,” is further equated with the maliciousness of a party’s conduct or the extent to which the party’s conduct constitutes a disregard for the welfare of others.\footnote{Id.} Finally, the assumption is made “that the punishment objective derives ultimately from the pleasure or satisfaction people obtain from seeing blameworthy parties punished.”\footnote{Id.}

\textbf{A. Punishing Individuals}

Where the defendant is an individual, one can readily ascertain whether or not a punitive damages award has accomplished the punishment objective -- that is, whether an award appropriately satisfies society’s interest in seeing blameworthy parties punished.\footnote{Polinsky & Shavell, supra note 2, 948.} This objective is accomplished if the appropriate punitive damages amount has been levied after considering the depravity and maliciousness of the individual’s bad acts.\footnote{Id. at 948-49.}

\textbf{B. Punishing Firms}

Defendant-firms, as opposed to individuals, complicate the relationship between the punishment objective and punitive damages awards. There are several potential punishment objectives when firms are sanctioned, principally: to punish the firm as an independent entity or to punish only the culpable individuals within the firm.\footnote{Id.; Markel, supra note 12, at 15-20 (A recent contribution has, however, pointed out the excessive indeterminacy inherent in such an approach, and attempted to establish the main animating principles of retributive justice, in order to qualify the punishment goal with respect to state-enacted punishment for the violation of legal obligations. In particular, the referenced commentator has pointed out how, in the first place, punishment “communicates the view that we are autonomous agents capable of responsibly choosing between lawful and unlawful actions.” Secondly, punishment effectuates our commitment to the principle of equal liberty under law, hampering the offender’s claim of superiority against both the victim and the legal order in general.).} The appropriateness of each will be examined in turn, to later conclude that the latter goal is not promoted by the imposition of punitive damages on a firm.

Levying punitive damages on a firm directly furthers the punishment objective, but it is not without problems.\footnote{See id. at 949 n. 254.} Firstly, this goal requires a definition of the firm’s blameworthiness that is
attenuated from the acts of those individuals who were involved in the wrongful actions.\textsuperscript{108} Secondly, it necessitates the belief that society wishes the judicial system to impose penalties on inanimate objects or artificial legal fictions -- "firms."\textsuperscript{109} Despite these shortcomings, when a firm is liable for punitive damages, the goal of sanctioning the independent entity is directly met.\textsuperscript{110}

However, when firms are sanctioned with punitive damages, the goal of punishing culpable members of the firm is not furthered. Firstly, a firm’s liability for punitive damages often will not result in the punishment of culpable members at all, mainly because the firm may have difficulties identifying culpable employees.\textsuperscript{111} Secondly, even if culpable individuals are identifiable, the imposition of punitive damages will not make the firm more likely to punish its culpable members.\textsuperscript{112} The tendency to punish malfeasance exists notwithstanding a punitive damages verdict,\textsuperscript{113} particularly given the possibility of compensatory damages. Thus, the use of punitive damages as a means of punishing culpable firm members is no more effective than internal sanctions, such as demotion or dismissal.\textsuperscript{114} Thirdly, there always exists the possibility that culpable employees within the firm’s ranks will not exist.\textsuperscript{115} “If a significant delay occurs between misconduct and the manifestation of harm and litigation (as was the case, for instance, in connection with the use of asbestos in products), blameworthy individuals may have changed jobs, retired, or died.”\textsuperscript{116} Moreover, since no single member of a firm is solely responsible for a firm’s typical decision-making process, it is possible that no single member had the required knowledge of risk to be worthy of reprimand.\textsuperscript{117}

There are yet more reasons why punitive damages are not a desirable method of punishing blameworthy members of a firm. For instance, the imposition of punitive damages on firms penalizes individuals who are unlikely to be considered responsible, such as shareholders and customers.\textsuperscript{118} “If a shareholder owns a significant fraction of a firm’s stock, participated actively in the firm’s decisions and acted egregiously, his position would be much like that of a blameworthy employee with decision making power[,]” as discussed above.\textsuperscript{119} On the contrary, if the shareholder held little stock and could not take an active role in the firm’s decision to make the wrongful act, he or she would not be culpable, but he or she would nonetheless suffer a detrimental change in position due to the firm’s payment of the punitive damages.\textsuperscript{120} Further, “to cover the added cost of punitive damages, firms will tend to raise their prices, which will cause the welfare of their customers to decline.”\textsuperscript{121} Thus, as a result of the imposition of punitive

\textsuperscript{108} Id. at 949.
\textsuperscript{110} Polinsky & Shavell, \textit{supra} note 2, 949-50.
\textsuperscript{111} Id. at 950.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} See id.
\textsuperscript{115} Polinsky & Shavell, \textit{supra} note 2, at 951.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{119} Polinsky & Shavell, \textit{supra} note 24, 951-52.
\textsuperscript{120} Id. at 952.
\textsuperscript{121} Id.

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damages on firms, innocent persons might be punished, which undermines the punishment objective of punishing the blameworthy.\(^{125}\)

It appears, therefore, that the imposition of punitive damages upon firms furthers only one punishment objective adequately -- that of punishing the firm as an independent entity.

### IV. COURTS’ DETERMINATION OF PUNITIVE DAMAGES AWARDS

#### A. Balancing Deterrence and Retribution

One of the two main purposes of punitive damages, as outlined in Section II of this article, is deterrence. For instance, it has been affirmed that punitive damages are intended “... to deter the wrongdoer and others from committing similar wrongs in the future ...”\(^{123}\) Given that achieving economic efficiency is an important goal entrusted to the courts, it follows from the logic of the deterrence theory that courts should take the multiplier formula into explicit account. As shown above, however, the need for punishment is also a relevant consideration in regard to punitive damages. Throughout this article, it has been simplistically assumed that the punishment goal is fulfilled by the mere imposition of punitive damages, regardless of their amount.\(^{124}\) If instead, one loosens this assumption, only then will one be confronted with the possible conflict between the objectives of deterrence and punishment in cases where there are different implications for the proper determination of the magnitude of punitive damages awards. In these cases, several scholarly contributions have attempted to explain how it would be necessary to achieve a compromise between the levels that are optimal when each objective is considered independently.\(^{125}\) “The weights to be used in the determination of the compromise will reflect the relative importance accorded to the goals of deterrence and punishment.”\(^{126}\) Overall, “it seems reasonable to want a punishment to fit the crime, and it seems reasonable to use that punishment that will maximize utility.”\(^{127}\)

1. Quantifying Punishment

In light of this, while the determination of the amount of damages according to the goal of deterrence has already been discussed in Section II of this article, the foregoing considerations call for a deeper discussion about how the goal of punishment may affect the magnitude of damage awards. Intuitively, if society determines an accident is caused by the defendant’s “outrageous behavior,” then society will want to impose a sanction upon the defendant.\(^{128}\) Society’s preferred punishment is called “ideal retribution” and is defined as the harm greater than or equal to the harm inflicted by the defendant.\(^{129}\) However, compensatory damages may be considered sufficient punishment when an accident results from the defendant’s less-than-outrageous behavior.\(^{130}\)

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\(^{122}\) Id.

\(^{123}\) Green Oil v. Hornsby, 539 So. 2d 218, 222 (1989).

\(^{124}\) See supra note 14.

\(^{125}\) See Diamond, supra note 16; Polinsky & Shavell, supra note 2.

\(^{126}\) See Polinsky & Shavell, supra note 2, at 953.

\(^{127}\) Alan Wertheimer, Should the Punishment Fit the Crime?, 3 SOC. THEORY & PRAC. 403, 420 (1975).

\(^{128}\) Diamond, supra note 16, at 123.

\(^{129}\) Id.

\(^{130}\) Id.
Similar to the pursuit of optimal deterrence, here one has to consider the role of civil and criminal fines in determining the ideal retribution. According to the theory of ideal retribution, civil and criminal fines, along with compensatory damages, should “fully capture the desire for retribution . . . .”131 Sometimes, however, compensatory damages and fines do not fill society’s desire for retribution; this unquenched desire “[e]stablishes a need for punitive damages” to satisfy this desire.132 Satisfactory punishment would then be achieved whenever the sum of payments equaled the ideal retribution. On the other hand, if “decision makers responsible for the accidents are [not] properly punished[,] then there [may be] an added cost to any accident, a cost from inapposite punishment.”133 In terms of a social cost (assuming it is possible to credit “satisfaction from punishment” in social welfare), both in case the sanction is too little (underpunishment) or too great (overpunishment).134 However, when the sum of punitive damages and fines is larger than the social cost of retribution, it would instead maximize social welfare to lower punitive damages so that they would not equal the ideal amount of damages imposed on the defendant, but only in conjunction with other fines.135 In the future, these suggestions could become a foundation for jury instructions. Instead of requiring “juries to select a level of punitive damages [that] reflect[s] both deterrence and punishment, the instructions could request that the jury consider each element separately.”136 The instructions could further require the jury to average the two levels of optimal punitive damages to achieve deterrence and retribution.137 Alternatively, an upward adjustment may be appropriate “if there is a strong [enough] need to deter because of similar . . . behavior escaping liability.”138 Nevertheless, all theoretical studies examined tend to assume the influence of punishment on the magnitude of punitive damages, while failing to provide appropriate guidance as to how to quantify it.139 This does not by any means diminish the theoretical validity of such analyses, instead it calls for further research on this theme in order to provide practical jurists and juries with a set of manageable criteria by which to determine the appropriate punishment while, with specific reference to the present work, simultaneously supporting the reasonableness of the assumption made in the treatise of the retributive view of sanctions discussed in the first part of this paper.140

B. “How Judges and Juries Perform”141

During the past twenty years the number of high punitive damages awards grew uncontrollably so that policy makers, legal scholars, and people involved in the legal system started to ask for a tort reform.142

131 Id. at 124.
132 Id.
133 Id. at 124–25.
134 Id.
135 Id. at 126–27.
136 Id. at 134.
137 Id.
138 Id.
139 In this respect, however, it is necessary to signal the recent attempt undertaken by Professor Markel, supra note 13, at 34–43, hypothesizing guidelines containing a reprehensibility scale associated with a monetary amount of damages expressed in terms of the defendant’s wealth. On the same topic, a relevant recent development is that offered in Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008), discussed infra, Part. IV.C.4.
140 See supra note 14.
141 Hersch & Viscusi, supra note 6, at 1.
Trying to find a solution to this problem, “many states have imposed caps of various kinds on punitive damages awards: an absolute ceiling (for example, $350,000 in Virginia) [and a] maximum ratio of punitive damages to compensatory damages (for example, three times compensatory damages in Florida).”\textsuperscript{143} Deterrence does not justify these caps, as such caps may prevent a correct award of punitive damages.\textsuperscript{144} While caps may function to constrain consistently excessive jury awards of punitive damages, caps may be improper if such consistency does not exist.\textsuperscript{145}

It has frequently been urged that legislatures shift the task of calculating the amount of such damages from juries to judges.\textsuperscript{146} It is suggested that such a transformation would have two principal impacts: (1) it would make punitive damages awards more predictable, and (2) it would make punitive damages awards less in amount.\textsuperscript{147} The reasons for this argument were well stated by Professors Hersch and Viscusi:

This view stems from the observation that very large punitive damages awards are typically reduced on appeal. Indeed, defenders of punitive damages often note that the appeals process greatly diminishes the influence of awards that may be regarded as outliers. Additional support derives from experimental research that shows that judges award lower levels of punitive damages than jurors when confronting the same case scenario.\textsuperscript{148}

1. \textit{Runaway Awards}

Large awards, although rare, are at the forefront of discussion on civil justice reform.\textsuperscript{149} In order to determine if juries or judges are more prone to give high punitive damages awards, it is necessary to set a dividing line that will define “large awards.” As have others, those cases will be considered in which there were punitive damages of at least $100 million.\textsuperscript{150} Further, punitive damages awards at the trial level will be included, notwithstanding remittance on appeal. The statistics that will be considered are pulled from the groundbreaking work of Professors Hersch and Viscusi.\textsuperscript{151} The professors compiled an exhaustive list of every $100 million punitive damages award from January 1985 to June 2003.\textsuperscript{152} They documented sixty-three $100


\textsuperscript{143} See Polinsky & Shavell, supra note 2, at 900; see also VA. CODE ANN. §8.01-38.1 (2007); FLA. STAT. §768.73 (2007).

\textsuperscript{144} See Polinsky & Shavell, supra note 2, at 900.

\textsuperscript{145} Id.


\textsuperscript{147} See Hersch & Viscusi, supra note 6, at 2.

\textsuperscript{148} Id.

\textsuperscript{149} See id. at 5 (stating that “[d]espite their rarity, it is the large awards that figure prominently in discussions of civil justice reform”).

\textsuperscript{150} Id. (using $100 million as a marker in studying the habits of judges and juries in awarding “extremely large punitive damages awards”).

\textsuperscript{151} See generally id.

\textsuperscript{152} Hersch & Viscusi, supra note 6, at 5-8 (displaying a table listing the highest punitive damages awards from January 1985 to June 2003 by case name, decision date, amount of compensatory and punitive damages, and the ratio of punitive to compensatory damages).
million punitive damages verdicts during this period. Only three of these sixty-three $100 million verdicts were awarded by judges. The largest punitive damages verdict during this period amounted to $1.45 billion and was awarded by the jury in Engle v. R.J. Reynolds Tobacco Co., a tobacco class action lawsuit. Of the fourteen largest punitive damages awards reported by Hersch and Viscusi, only one was levied by a judge. These numbers reveal a great deal about the tendency of juries to award larger amounts of punitive damages than judges. These findings are well summarized by Hersch and Viscusi:

That juries account for 95 percent of these blockbuster awards is a notable statistic. Jury trials account for about 68 percent of all civil cases tried to verdict in state courts and federal district courts. The difference between the observed 95 percent share of blockbuster awards by juries and the expected share of 68 percent jury awards is statistically significant and indicates that juries awarded a disproportionate share of the blockbuster awards.

One way to determine whether a punitive damages award is out of line is the observation of the ratio of the punitive award to the compensatory award. In these blockbuster awards cases, “the ratio of punitive to compensatory damages varies considerably.” While the ratio between punitive damages and compensatory damages may be tremendously high, compensatory damages may sometimes be larger than a punitive damages award. The question of whether punitive and compensatory damages correlate is answered in the negative; a punitive damages award cannot be significantly predicted by the amount of compensatory damages.

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153 Id. at 5.
155 Hersch & Viscusi, supra note 6, at 5.
156 Id.; see also No. 94-08273 (Fla. Cir. Ct. Nov. 6, 2000).
157 Hersch & Viscusi, supra note 6, at 5-8. The second largest punitive award was for $28 billion, and it was also the result of a jury verdict. Further, the third ($5 billion), fourth ($4.774 billion), fifth ($3.42 billion), and sixth ($3.365 billion) largest awards were also made by juries. While the seventh largest punitive damages award during the subject period was levied by a judge ($3.1 billion), the eighth (two cases at $3 billion) through the fourteenth ($752 million) largest awards were imposed by juries.
158 Id. at 9.
159 Hersch & Viscusi, supra note 6, at 4.
160 Id. at 9.
161 Id.
162 Id. at 10. Contra Theodore Eisenberg and Martin T. Wells, supra note 6, at 194-95. (The referenced commentators criticize the conclusions drawn in Hersch & Viscusi, supra note 6, on grounds of the use of Ordinary Least Squares (OLS) regression analysis therein performed, which is deemed inappropriate according to the methodological tenet that “one should graph one’s data and check the assumptions of OLS regression are satisfied before endorsing a model.”); Kaz Uekawa, What is OLS Regression?, http://www.estat.us/sas/OLS.doc (last visited July 1, 2008) (OLS regression analysis can be defined as a method used to model numerical data obtained from observations by adjusting the parameters of a model so as to get an optimal fit of the data. In particular, this is done by approximating a line that “minimizes the distance between each observations (sic) and a line.”).
2. The Sample of Civil Justice Survey of State Courts, 1996 and 2001

Hersch and Viscusi also considered a sample of almost 9000 cases drawn from the 1996 Civil Justice Survey of State Courts.\textsuperscript{163} This survey encompassed both bench and jury trials decided during that year.\textsuperscript{164} The resulting data offers further support to the assertion that punitive damages awards in jury trials tend to be more unpredictable in comparison to bench trials, since the punitive damages amount varies substantially depending on each jury’s approach.\textsuperscript{165} In particular, the 1996 survey showed how -- plaintiffs’ probability of being awarded punitive damages being equal (around 4%) in either type of trial -- jury awards were higher ($1,816,031 average award by juries and $557,292 average award by judges).\textsuperscript{166} Consistent with this observation was the fact that juries had a mean punitive damages award level that amounted to 3.3 times the award level for judges.\textsuperscript{167} In sum, such data may hint towards a general trend, with juries tending to deviate from predictable standards more than judges.

In 2004, the Bureau of Justice Statistics issued another Civil Justice Survey of State Courts, this time measuring state cases during 2001.\textsuperscript{168} This sample of civil dispute cases was even larger than that used by Hersch and Viscusi; therefore, it is of sure interest to perform a comparison of the two data sets in order to verify whether the same conclusions may also hold over time and over larger samples of cases.

The 2001 Civil Justice Survey of State Courts consisted of 11,908 cases. Of these, about three-fourths were decided by a jury, while the remaining were bench trials.\textsuperscript{169} Plaintiff-winners were awarded punitive damages 6% of the time in trials.\textsuperscript{170} This percentage, however, is just an average between the 6% punitive damages award ratio in jury trials (which accounted for about three-fourths of total cases) and the 4% of punitive damages award ratio in bench trials (the remaining one-fourth).\textsuperscript{171}

If one puts this observation together with the fact that the median award was also, on average, higher in jury trials than in bench trials,\textsuperscript{172} it can be reasonably inferred that Hersch and Viscusi’s observations on the 1993 sample may still hold with respect to the larger 2001 sample. In particular, it can at least be agreed that juries tend to award more damages than judges do, and do so more often than the latter.


\textsuperscript{164} U.S. DEP’T OF JUSTICE, supra note 163.

\textsuperscript{165} See Hersch & Viscusi, supra note 6, at 13 (stating that “the mix of cases heard in each venue will depend both on the routing of cases to judges and juries as well as on which cases are settled and which are not”).

\textsuperscript{166} See id. (citing data collected by the 1996 Civil Justice Survey of State Courts and reported in U.S. DEP’T OF JUSTICE, supra note 164).

\textsuperscript{167} Id. at 14.

\textsuperscript{168} U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: CIVIL JUSTICE SURVEY OF STATE COURTS, 2001: CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 2001 (2004), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/ccvclc01.pdf (hereinafter U.S. DEP’T OF JUSTICE 2) (referencing sampled cases including not only tort disputes, but also contract and real property litigation). In the reported contract and real property cases, however, punitive damages were awarded only with respect to related tort claims. See id. at 7 tbl.8.

\textsuperscript{169} Id. at 3 tbl.2 (stating that 8,859 cases were determined by a jury and 2,828 cases were determined by a judge).

\textsuperscript{170} Id. at 6.


\textsuperscript{172} Id.; see also U.S. DEP’T OF JUSTICE 2, supra note 168, at 5-6.
However, any conclusion derived from as broad and diverse a sample as that of the Civil Justice Survey of State Courts must be taken with great caution. Surveyed judges and juries did not decide the same cases.\(^{173}\) When the facts of the dispute are different, there can be no surprise in the fact that the ensuing damages awards will also be different. Hence, it might just be that the observed differences are merely a function of the different types of cases the judges and juries decided.\(^{174}\)

Yet, attributing all differences to the types of cases that were decided (as opposed to the different behavior of judges and juries) ends up being an equally extreme, and therefore unlikely, position. Most likely, decision-making differences between judges and juries as to the determination of damages awards do exist, although their correct assessment would require more detailed observations and data than are available in the Civil Justice Survey of State Courts.\(^{175}\) In view of the foregoing, it can be extremely beneficial to move on to the analysis of actual cases in which punitive damages were awarded, in order to assess such awards with better knowledge of the facts of each case.

C. Punitive Damages Cases

1. BMW of North America, Inc v. Gore\(^ {176}\)

The plaintiff purchased a brand new car from an Alabama BMW dealer. After having completed the purchase, the plaintiff found out that the defendant, BMW of North America, had repainted part of the car, in order to conceal damage that the car had suffered prior to its arrival in the United States. On first instance, the jury issued an award in favor of the plaintiff consisting of a $4,000 component for compensatory damages – accounting for the decreased value of the car because of damage so suffered – as well as of a second “slice” in the amount of $4 million for punitive damages. The latter component was however halved by the Alabama Supreme Court, something which still did not prevent the US Supreme Court from considering the punitive damages component as being overly high. Upon remand from the US Supreme Court, the Alabama Supreme Court therefore opted to reduced the punitive award to $50,000.

In order to consider the consistency of this final outcome with the theoretical framework synthesized in the preceding sections of the work, it has been observed how one needs to focus on the probability for the defendant to escape liability. For this purpose, there are two possible outcomes that have to be factored in: on the one hand, that the car’s being repainted would go completely unnoticed. On the other hand that, notwithstanding discovery of such repainting, the party suffering harm would still have an incentive to sue.\(^ {177}\) Considering the somehow “fortuitous” circumstances in which discovery of the repainting by the plaintiff took place, the inference is warranted that many other purchasers would likely remain unaware of the car’s hidden defect indefinitely.

As for the probability that one owner who positively discovered the car’s defect would later sue for damages, one needs to weigh the two variables embodied by (i) the costs of lawsuit and (ii)

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\(^{173}\) See generally U.S. DEP’T OF JUSTICE, supra note 163; U.S. DEP’T OF JUSTICE 2, supra note 168.

\(^{174}\) U.S. DEP’T OF JUSTICE 2, supra note 168, at 2 (discussing the ratios of types of cases that were decided by judges versus juries).

\(^{175}\) In particular, it would be necessary in order for a comparison to be truly meaningful, that surveyed cases be selected according to certain common representative characteristics (e.g. the amount of harm suffered by the plaintiff) to make differences stand out more clearly, all other things being equal.

\(^{176}\) Gore, supra note 74.

\(^{177}\) Polinsky & Shavell, supra note 2, at 901.

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the prospects as to the possible magnitude of damage awards. Recovery of a mere $4,000 harm seems, in this respect, of little enticement to prospective plaintiffs. If anything, all of these circumstances can ultimately build up to justify the conclusion that the defendant enjoyed, in this particular case, a high probability to escape liability, thereby warranting the presence of a punitive damages award.

As for the assessment of the precise amount of damages, if one considers that - among the facts of the trial – it was established that 14 “repainted” cars, but only one other owner – along with the plaintiff in Gore – ultimately brought suit,

the probability of detection and liability might be thought to be two in fourteen, in which case the total damages should be seven times the $4000 harm, or $28,000. Of that total, $4000 would represent compensatory damages, and $24,000 would represent punitive damages. By this reasoning, the $2 million punitive award initially approved by the Alabama Supreme Court was grossly excessive, and the reduced award of $50,000 was much more reasonable.


An insurance agent misappropriated premium payments. Mrs Haslip, a city employee, knew that her policy lapsed because of the agent’s fraud when, after she was hospitalized, the hospital and her physician asked her for the payment of their services. After she sued the agent and Pacific Mutual Insurance Company, the jury awarded her total damages of $1.04 million, of which $200,000 as compensatory and $840,000 as punitive damages, an amount later confirmed at all levels, from the trial court through to the US Supreme Court.

In an attempt to interpret the outcome of the case in light of the deterrence goal, it has once again been observed how one key point for an assessment of the soundness of the ultimate solution is the understanding of whether there was some significant chance for the insurance company to escape liability[^181].

Obviously, if a policy has been invalidated because of an agent’s misappropriation of premium payments, the invalidation will come to the attention of a person who applies for coverage under that policy. If the insurance company doesn’t pay the individual voluntarily, the individual would probably sue the company, provided the amount at stake is large enough[^182].

This as regards the possibility that harm may be discovered in the first place. Moving on, instead, to consider the likelihood that the party having suffered harm would further undertake the costs of a lawsuit, it is material to consider that only $4,000 of the grand total of $200,000 allotted in compensatory damages consisted of out-of-pocket expenditures, the rest compensating non-economic losses such as emotional distress. If anything, this subdivision can allow one to speculate that recovery of out-of-pocket expenses – by standing on firmer ground than other kinds of non-economic losses – would be easier to substantiate with evidence so as to ultimately

[^178]: Id.
[^180]: *Haslip, supra* note 52.
[^181]: See *supra*, Sect. II.B.
[^182]: Polinsky & Shavell, *supra* note 2, at 903.
succeed. Hence, depending on the likelihood that one party may succeed in establishing any non-economic loss, the likelihood that she may bring suit in the first place might be affected. The awarding of an extra amount of compensatory damages to account for such loss headings may, in fact, push other possible plaintiffs to sue. As the probability of suit increases, further law suits are filed, thereby justifying a diminution in the punitive damages component of the final award in order to balance the increased likelihood of punishment, according to the multiplier formula. “On balance, therefore, although a suit seems reasonably likely in the circumstances of Haslip, some countervailing considerations might justify one - although modest - punitive damages award, to offset the residual chances that a lawsuit might not be brought.”

3. *In re The Exxon Valdez, Lower Courts*\(^1\)\(^8\)\(^3\)

The defendant’s supertanker, the Exxon Valdez, ran aground on a reef in Prince William Sound in Alaska, spilling millions of gallons of oil and polluting thousands of miles of Alaskan coastline. The ships’ captain was found to have violated regulations governing alcohol consumption, thereby justifying the inference that the accident might be - at least partly – his fault. In the private civil litigation against Exxon stemming for accident, the plaintiffs (various classes of fishermen and Alaskan natives) were awarded several hundred million dollar in compensatory damages and $5 billion in punitive damages, the largest punitive award ever to be imposed upon a corporation. The jury also ordered the former captain of the Valdez, Joseph Hazelwood, to pay $5,000 in punitive damages. Exxon said that the decision was too severe and that they would have appealed the decision.

Subsequently, the US Court of Appeal in December 2006 reduced the 1994 damages award by $2.5 billion.\(^1\)\(^8\)\(^5\) A three-judge panel held that the original $5 billion punitive damages award against the corporation was excessive in light of a 2003 US Supreme Court ruling on the need for punitive damages to be reasonable and proportionate, in the Exxon case, to the harm incurred and the cleanup and compensation efforts already made by Exxon. Give the peculiar circumstances and – most notably – the magnitude of consequences engendered by the accident, the chance of the defendant not being caught was essentially nil. Thus, according to what has been said before, no punitive damages would normally be needed in order to achieve proper deterrence.

On August 28, 2007 the plaintiffs asked the US Supreme Court to restore the $5 billion punitive damages award against Exxon Mobil Corp. by filing a petition which followed one filed the previous week by Exxon Mobil that asked the Supreme Court to overturn the $2.5 billion punitive fine assessed by the 9th Circuit Court of Appeals.\(^1\)\(^8\)\(^8\)

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\(^1\)\(^8\)\(^3\) *Id.*


\(^1\)\(^8\)\(^5\) In re Exxon Valdez, 472 F.3d 600 (9th Cir. 2006) (remitting punitive damage award to. $2.5 billion, from original award of $5 billion).

\(^1\)\(^8\)\(^6\) *State Farm Mut. Auto. Ins. Co. v. Campbell, supra note 4.

\(^1\)\(^8\)\(^7\) *See supra, Sect. II.A.*

\(^1\)\(^8\)\(^8\) *Yereth Rosen, Exxon Valdez plaintiffs want $5 bln award restored, REUTERS, August 30, 2007, available at http://www.reuters.com/article/domesticNews/idUSN301828862007070831 (last visited Apr. 3, 2008). The US Supreme Court has recently agreed to consider the $2.5 billion in punitive damages approved by the 9th Circuit
Finally, on June 25, 2008 the US Supreme Court decided to vacate the latter judgment and to remand the case for the Court of Appeals to remit the punitive damages award in a manner not exceeding a 1:1 ratio with respect to the compensatory damages award, amounting to $507.5 million.\textsuperscript{189}

4. The Supreme Court’s 2008 Decision on the Exxon Punitive Damages Case

The Supreme Court’s decision in the Exxon case does – it is submitted - contain some interesting theoretical developments,\textsuperscript{190} which justify an attempt to put its dictum into the wider theoretical perspective outlined in this paper as a means both (i) to expand on the efforts of Polinsky and Shavell with respect to the cases discussed earlier, so as to include more recent decisions and, chiefly, (ii) to derive possible principles and guidelines for future use.

For our purposes in particular, it might be most beneficial to focus directly on the Court’s reasoning regarding the quantification of punitive damages in light of the deterrence and punishment goals, which it explicitly recognized as being the two overarching purposes of this type of remedy.\textsuperscript{191} In this respect, it can be observed how the Court’s holding attempted to balance the two goals by calling for the application of the same punitive to compensatory damages ratio observed in similar cases:

In a well-functioning system, we would expect that awards at the median or lower would roughly express jurors’ sense of reasonable penalties in cases with no earmarks of exceptional blameworthiness within the punishable spectrum (cases like this one, without intentional or malicious conduct, and without behavior driven primarily by desire for gain, for example) and cases (again like this one) without the modest economic harm or odds of detection that have opened the door to higher awards.\textsuperscript{192}

Hence, the Court concluded that:

On these assumptions, a median ratio of punitive to compensatory damages of about 0.65:1 probably marks the line near which cases like this one largely should be grouped. Accordingly, given the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution, we consider that a 1:1 ratio, which is above the median award, is a fair upper limit in such maritime cases.\textsuperscript{193}

Applying this standard to the present case, we take for granted the District Court’s calculation of the total relevant compensatory damages at $507.5 million . . .

\textsuperscript{189} For the related news, see e.g. Erika Blostad, \textit{Exxon Valdez: 'This is it; it's done'}, ANCHORAGE DAILY NEWS, June 26, 2008, available at http://www.adn.com/exxonvaldez/story/446057.html (last visited July 2, 2008).

\textsuperscript{190} But cf. Anthony J. Sebok, The Lessons of the Supreme Court’s Recent Decision Granting a Huge Victory to Exxon in the Exxon Valdez Oil Spill Case, Findlaw (July 1, 2008), http://writ.news.findlaw.com/sebok/20080701.html (defining the Court’s solution as \textit{ad hoc}). The reasons for the authors’ dissent are made apparent further in the text.

\textsuperscript{191} \textit{Exxon Shipping Co.} 128 S.Ct. at 2628 (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, 492 U.S. 257, 275 (1989)).

\textsuperscript{192} \textit{Id.} at 2633.

\textsuperscript{193} \textit{Id.}
punitive-to-compensatory ratio of 1:1 thus yields maximum punitive damages in that amount.194

Quite clearly, one of the Court’s main concerns is the unpredictability of punitive damages awards.195 In this respect, it seems that the suggested way of tackling such a problem should be by considering the punitive to compensatory damages ratio in cases of comparable blameworthiness,196 the level of economic harm, and the odds of detection, and apply it to the instant case.

In view of this, the first theoretical problem needing to be discussed regards the use of a punitive to compensatory damages ratio, which left some early commentators rather perplexed.197 In this respect, it can instead be observed how, with regard to the determination of the optimally deterrent punitive damages award,198 the amount of harm (and, hence, of compensatory damages awarded, assuming full compensation occurs) may actually have to be factored in the related multiplication.199 If one further assumes (as the Court implicitly seems to do) that the punitive damages award required for optimal punishment could somehow also be determined by referring to a multiple of the compensatory damages award,200 it could then make sense to resort to a punitive to compensatory damages ratio:

\[
\text{Deterrence-driven award} = CD \cdot \frac{1}{p}; \quad \text{(assuming that)} \quad \text{Punishment-driven award} = CD \cdot x; \\
\text{Final award} = CD \cdot y; \quad \text{(Eq. 5)}
\]

where \( y \) is the multiplier accounting for both deterrence- and punishment-related concerns.

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194 Id. at 2634.
196 According to the Court, blameworthiness should, inter alia, be scaled after the intentional, malicious or gain-driven nature of the defendant’s conduct; see Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2639 (2008) (Ginsberg, J., concurring).
197 See Lahav, supra note 195 (“[I]f deterrence is your goal, pegging punitive damages (in any multiplier) to compensatory damages makes no sense. The theory of deterrence requires that the wrongdoer pay something more than the cost of preventing the accident/bad act. That cost has no relationship to compensatory damages.”).
198 The ensuing discussion sets off from the methodological suggestion contained in Diamond, supra note 16, at 134 and reported supra sect. IV.A.1.
199 See supra sect. II.
200 This would require one to establish the existence of a relationship between a given conduct’s reprehensibility and the amount of damages caused by it. From a theoretical point of view, this would not be impossible, were one to allow the possibility that a certain type of conduct, when causing—in a given episode—a lower amount of harm, might actually be considered to be less reprehensible, compared to instances in which the same kind of behaviour caused larger damages. In fact, a lower amount of damages might in turn be an index of the lower offensive potential inherent in the actual steps adopted by the injurer in the milder instance of the given conduct. For example, the harm caused by an accidental oil spill like Exxon’s could likely be lower than that caused by an intentional one and, in such case, the lower reprehensibility of the former instance of oil spill would therefore reflect itself onto the level of harm caused (and, possibly, of the subsequent compensatory damages awarded). Contra Lahav, supra note 221 (stating how the punishment goal would be better achieved by “tailoring” the punitive damages award to the defendant’s wealth); in response to this criticism, see Hersch & Viscusi, supra note 6, at 3.
The latter, in fact, would then simply yield the actual multiplier (y) used for the setting of the punitive damages award, meaning the multiplier that simultaneously accounted for both the punishment and deterrence goals. If the above were correct, it would then follow that those cases with a comparable equilibrium of deterrence-related and punishment-related concerns should conclusively be equally expected to display similar punitive damages multipliers.

This last statement, however, directly introduces the second theoretical problem arising from the Court’s decision. In fact, reference has just been made to cases with a “comparable equilibrium of deterrence- and punishment-related concerns.” The question is, however, how should this equilibrium be set? Or, in other words, how can the relative needs for punishment and deterrence be assessed?

Understanding the Court’s answer to this second question requires some further theoretical elaboration. It has been previously observed how both over- and under-deterrence and over- and under-punishment may reduce the aggregate value of social welfare. Yet, the socially optimal amount of punitive damages requires taking into account each separate goal (i.e. deterrence and punishment) with a view toward the maximization of social welfare. Therefore, whenever the deterrence-driven and punishment-driven awards are different in their amounts, it would be necessary to set punitives at an intermediate level allowing to optimally offset the relative losses originated by over- or under-deterrence or over- or under-punishment (depending on the circumstances of the case) for a given award. The discussion carried out in section IV.A.1 has, however, pointed out how difficulties in the quantification of punishment-driven punitive damages have made it very hard to devise a proper way to achieve such balancing between punishment-related and deterrence-related concerns.

In this respect, the Court, by endorsing an empirical comparative approach with respect to the punitive to compensatory damages ratio emerging from similar cases, seems to assume that such a balancing has already been performed, and performed correctly, by judges and juries in previous decisions. This way, the Court circumvents the need to determine an absolute value for the punishment-driven award and balance it with the deterrence-driven award in a social welfare-maximizing manner. In such a case, then, it is ultimately correct, in the Court’s view, to extend tout court previous evaluations to other cases displaying similar characteristics both from deterrence and punishment points of view. The only theoretical weakness inherent in this approach, however, is that it simply assumes away the problem of balancing deterrence-related and punishment-related concerns for the purpose of maximizing social welfare, leaving the question as to the correctness of previous decisions on this very point unanswered.

Were this objection to be deemed decisive, it could however still be possible to ascribe a general theoretical meaning to the Court’s reasoning, although of a more limited scope. Namely, the

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201 See supra sects. II.A and III.
202 Under the Court’s set of assumptions, it would then be possible to further attempt to describe ex post the relationship between a given conduct’s blameworthiness and deterrence-related concerns (i.e. odds of detection). In fact, after having chosen a certain conduct with given odds of detection (i.e. deterrence-related concerns being the same), one could further determine the appropriate deterrence-driven award (by using the multiplier formula introduced in sect. I.A), and compare it with actual punitive damages awarded at varying levels of blameworthiness. The ensuing differences would, in fact, represent the deviation from the deterrence-driven award caused by punishment-related concerns, for the purpose of maximizing social welfare. All deviations so obtained could then represent a basis of data from which to attempt to ascertain the relationship between punishment-related and deterrence-related concerns in the setting of punitive damages, for a given level of detection odds. Yet, without any inquiry as to the underlying logic of the balance struck by judges and juries in previous cases, such an operation could hardly display any prescriptive relevance, resting on a merely descriptive level.
Supreme Court’s conclusions might still prove particularly relevant for establishing a reasonable correlation between the punishment goal and the amount of punitive damages awards. In fact, it has been pointed out in the previous section how the likelihood of imperfect enforcement in the case at hand was close to zero, thereby calling for a low deterrence-driven punitive damages award. Hence, it might further be inferred that the bulk of the punitive damages award in the instant case might have (unknowingly) been driven by punishment-related concerns. Therefore, the Court’s holding might be taken to imply that a relational assessment of the correlation between a tort’s blameworthiness and the amount of a punishment-driven punitive damages award could be the way to go. In particular, given a tort’s blameworthiness, the amount of punitive damages to be awarded in light of punishment-related concerns should be determined after the punitive to compensatory damages ratio applied in cases situated along the same “blameworthiness scale.”

5. Liebeck v. Mc Donalds Co.

Mrs. Liebeck was placed in the passenger seat beside his nephew, who was driving, and she was holding a cup of hot coffee that she just bought at Mc Donalds’ Mc drive. As she took off the top of the paper-cup to add some sugar, some coffee split on her trousers. The lady, as a result, suffered serious burn wounds. Mrs. Liebeck contacted Mc Donald’s to ask for the payment of $11,000 medical charges, while the corporation denied to pay the whole sum, proposing a $800 refund.

During the trial, the plaintiff could prove that the defendant had already caused 700 or more coffee-burning cases, and he had never been sued before. This implies that the defendant could have prevented Mrs. Liebeck’s burning by taking appropriate precautions. That’s the reason why the trial court allowed the plaintiff $160,00 as compensatory damages, and a $2,7 million dollar punitive damages award. According with the multiplier formula, the probability of being found liable and then sued fixed at one in seven hundreds, the jury should have imposed an $11 million punitive damages award!

The defendant appealed, and the New Mexico Appeal Court diminished the punitive damages award to $480,000, asserting that the $160,000 compensatory damages were more than the actual harm (medical charges and legal costs could be approximately fixed at $22,000), thus the previous punitive damages award resulted in overdeterrence and overpunishment for the defendant.

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204 In this case, however, nothing would forbid courts, after establishing the relative blameworthiness of a given case in comparison to previous ones, to later adjust the magnitude of punitive damages to the defendant’s wealth in order to preserve or adjust its punishment potential. This, in fact, seems the more general approach emerging from the recent proposal of Professor Markel, supra note 13, at 34–43 (reconciling a “rating” after a blameworthiness scale and an award formulated in terms of the defendant’s wealth).

205 Liebeck, supra note 73; discussed in Ryan, supra note 9, at 14.

206 This award wasn’t obviously determined by using the multiplier formula: the procurer asked the jury to set punitive damages equal to the daily Mc Donalds’ earnings from the coffee purchase.

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V. CONCLUSION

The hope the author cultivates in closing this paper, is that it will achieve its goal, stated at the outset, of offering a synthetic outline, useful for the comprehension of the structure of punitive damages, particularly to jurists of civil law jurisdictions.

In this paper, it has been attempted to explain the two fundamental purposes of punitive damages and their balancing in courts’ decisions.

Punitive damages should be imposed when deterrence otherwise would be inadequate because of the possibility that injurers would escape liability. In particular, punitive damages should be set at a level such as to confront defendants with the amount of harm they have caused, for then their damage payments will, on average, equal harm. In this respect, if punitive damages are calculated according to the multiplier formula, precautions will then tend to be optimal.

With respect to the punishment objective, the connection between punitive damages and punishment (retribution) is relatively straightforward if the defendant is an individual, or if the defendant is a firm and the goal is to punish firms as entities.

It has further been submitted that the best level of punitive damages might be set at a compromise between the levels that are optimal when each objective is considered independently. Finally, I have attempted to compare and contrast the two goals of punitive damages by comparing and contrasting the behavior of judges and juries, even through cases describing the reforming of punitive damages awards by appeals courts.

Of course, some issues emerged in the paper. First and foremost, the quantification of the “punishment goal” is far from settled and could offer interesting departing points for future analysis and research on this extremely interesting area of tort law.