January 27, 2013

The Risky Interplay of Tort and Criminal Law: Punitive Damages

Daniel M Braun, Columbia Law School

Available at: https://works.bepress.com/daniel_braun/1/
The Risky Interplay of Tort and Criminal Law: Punitive Damages
The rise of modern mass tort litigation in the U.S. has transformed punitive damages into something of a “hot button” issue. Since the size of punitive damage awards grew so dramatically in the past half century, this private law remedy has begun to involve issues of constitutional rights that traditionally pertained to criminal proceedings. This has created a risky interplay between tort and criminal law, and courts have thus been trying to find ways to properly manage punitive damage awards. The once rapidly expanding universe of punitive damages is therefore beginning to contract. There remain, however, very serious difficulties. Despite the effort to guard against excessive punitive damage awards through the use of certain “guideposts”, courts continue to struggle with this remedy. This article examines the concept and historical arc of punitive damages, and suggests that deep problems persist because the notion of punishing and/or deterring defendants by ordering them to more than fully compensate plaintiffs, creates intractable dilemmas.

I. Introduction

It is perhaps in part due to increasingly complex societal relations and transactions that the historic legal distinction between crime and tort has been fading. Within the past half century in particular, the private law has witnessed such a growth in the size of punitive damage awards that this remedy has not only been termed “quasi-criminal”, but rather, punitive damages have even begun to involve issues of constitutional rights that traditionally pertained to criminal proceedings. Yet, we are

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1 John Calvin Jeffries, Jr., already in 1986, for instance, stated, “More problematic is the question whether the Eighth Amendment applies to civil or quasi-criminal fines, as well as to distinctly criminal punishments. The Supreme Court has noted that past applications of the Eighth Amendment... involve criminal sanctions and has suggested that the amendment be limited to that context [relying upon Ingraham v. Wright, 430 U.S. 651, 664-68 (1977)]... The critical fact... [however] is that punitive damages are, as the name implies, a form of punishment”. (emphasis
perhaps also witnessing an interesting phenomenon, in which the universe of punitive damages, which was once rapidly expanding, is now in the process of contracting. By acquiring certain characteristics of criminal sanctions, punitive damages, a private law remedy, have generated cross-cutting issues. This, in turn, has triggered some significant concerns, and certain constitutional constraints are now being used to attempt to manage the quasi-criminal character of this private law remedy. Still, the very fact that the Constitution is being invoked in such a way – to help ensure that private law defendants are not treated as criminal law defendants sans key protections – only serves to entrench the notion that, today, the private law has developed somewhat of a split personality in which it not only compensates a private plaintiff for her losses at the hands of a private defendant, but in which it may punish and deter the latter as well.

The above seems to evidence a shift in the private law. Although punitive damages are a remedy so old that they predate the founding of this nation, their original purpose, at least in the United States, was not necessarily to punish. Instead, punitive damages, as John Calvin Jeffries, Jr. explains, “…survives from the days when pain and suffering were not permissible elements of an ordinary compensatory award. Today, of course, such restrictions no longer apply…” Consequently, it is now rather anachronistic to ascribe to punitive damages the purpose of compensating for such intangible losses. Indeed, already by 1986, only three states assigned any compensatory function to punitive damages. Today, in fact, the U.S. Supreme Court sees punitive damages as having the function of punishment and deterrence.

Yet, there is a conundrum here. That is, logically, where there is a right, there ought to be a remedy. The corollary to this proposition, then, is that where there is no remedy, there is no

\[2 \text{Id. at 149-150.}\]
\[3 \text{Id. at Fn 43.}\]
\[4 \text{See, for example, BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) at 575.}\]
(recognized) right. Consequently, where there is a remedy, we should be able to infer that there is a corresponding right. However, due to its function as a punishment and deterrent and thus its supra-compensatory role, it seems that punitive damages can correctly be regarded as a windfall for a plaintiff. But, how might one claim a right to a windfall? It is for this reason that it is difficult to see how a plaintiff could make a plausible claim of personal entitlement to punitive damages. This realization, however, is arguably not highly revelatory, for modern punitive damages, evidently, focus on punishing and deterring the defendant rather than rehabilitating the plaintiff’s rights.

Still, it seems analytically awkward in the context of the private law to have such a focus on punishing and deterring. Logically, in an assessment of harm to the plaintiff’s rights, we examine the defendant’s corresponding duties. But, once we have fully repaired the plaintiff’s rights (so far as it is possible through the vehicle of monetary compensation), an examination of the defendant’s duties would appear to end, and an evaluation of the latter’s especially egregiously conduct would here seem to begin. This subsequent query, however, logically entails a new set of considerations. Since, in this latter assessment, we turn away from the defendant’s particularized duty to the plaintiff, and shift to a broader question concerning the reprehensible nature of the defendant’s conduct and the proper punishment that it supposedly necessitates, a punitive damages decision does seem to demand a quasi-criminal law analysis.

Proceeding in such a way, understandably, generates the need for certain additional safeguards (and this becomes especially evident in the face of very large punitive damage awards), thus requiring a special focus not on the private law defendant’s duties to the plaintiff, but rather on the private law defendant’s constitutional rights. This seems necessary, as will be discussed, in order to protect against

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punitive damages that are grossly excessive. As reasonable as this might appear, however, certain highly difficult questions arise. For instance, how do we, in the context of the private law, identify what constitutes a grossly excessive punishment? Does an analytically sound answer to this question exist? And, is the question of what represents a grossly excessive punishment, again, in the context of the private law, the correct inquiry here? It seems that if we pursue a solution to such a problem as the one of grossly excessive punitive damages, then we necessarily step onto a path that leads us through deeply problematic interplays of, or a variety of tensions between, tort law and criminal law. Unfortunately, these issues might well be unresolvable, and thus this route may direct us to a dead-end.

Given these issues, this paper will critically examine the concept of punitive damages, their evolution in the United States, and the difficult problems that they raise with respect to the interplay of tort and criminal law. This essay will do so through a probing analysis of the historical arc of punitive damages in American jurisprudence and the tensions that they have generated, particularly in the area of constitutional Due Process concerns. Through the course of this analysis, this paper will assess the various constitutional safeguards that the U.S. Supreme Court has implemented in an effort to manage punitive damages. In finding these measures problematic, this paper will address the question of whether their shortcomings are in actuality symptomatic of far deeper problems embedded in the very concept of modern (that is, non-compensatory) punitive damages. Such an investigation, this paper will conclude, reveals that this modern conception of punitive damages seems to inescapably entangle us in essentially unresolvable interplay problems, and consequently, serious consideration should be given to abandoning the project of punitive damages altogether, rather than attempting to build unstable or unsound constitutional limits around this quasi-criminal, private law remedy.
II. Analyzing the problematic historical arc of punitive damages: the encroachment of criminal law properties into private law

While a broad conception of punitive damages might be traced back to the Code of Hammurabi⁶, the term “exemplary damages”, a synonym for punitive damages, can be found in pre-American case law at least as early as 1763, in Lord Camden’s ruling, Huckle v. Money⁷. In 19th Century American jurisprudence, when harm from pain and suffering, mental anguish, and other intangible injuries were not recoverable through standard compensatory awards⁸, punitive damages vacillated between compensating for intangible harms and making an example out of a defendant for egregiously tortious conduct⁹. Today in the United States, as noted, punitive damages are, by contrast, intended to punish the defendant, and to deter future wrongdoing.¹⁰

The rise of modern mass tort litigation in the United States in the 1960s transformed punitive damages into something of a “hot button” issue.¹¹ Lawsuits involving an anti-cholesterol drug, “MER/29”, began to make clear the difficult questions arising from punishment in the private law realm.¹² Interplay issues quickly emerged as this case reached the Second Circuit in Roginsky v. Richardson-Merrell, Inc.¹³ Here, Judge Henry Friendly foresaw that repetitive punitive damage awards for a single course of conduct, for instance, could potentially culminate in a sanction so harsh that it could conceivably be far

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⁷ Huckle v. Money, 2 Wils. 205 (K.B. 1763).
⁸ Supra note 1, at 149.
⁹ Id.; also see Note, “Exemplary Damages in the Law of Torts”, 70 Harv. L. Rev. 517, 520 (1957).
¹⁰ Cooper Indus. v. Leatherman Tool, 532 U.S. 424, 432, 2001: “[Punitive Damages] have been described as ‘quasi-criminal’, [and] operate as ‘private fines’ intended to punish the defendant and deter future wrongdoing... A jury’s... imposition of punitive damages is an expression of its moral condemnation.”
¹¹ Supra note 1, at 140-141.
¹² Id. at 141.
¹³ Roginsky v. Richardson-Merrell, Inc., 378 F. 2d. 832 (2d Cir. 1967).
greater than a maximum penalty permitted by the criminal law.\textsuperscript{14} Indeed, the Second Circuit reversed the $100,000 punitive award.

Despite the concern in \textit{Roginsky} about excessively harsh, criminal-like punishments bleeding into private law, which ultimately threatened to erode the historic legal distinction between tort and crime, Judge Friendly’s reversal of the punitive damages award was not enough to reverse the onset of the general trend that concerned him. An unprecedented number of punitive damage awards in mass tort situations arose in the mid-1970s.\textsuperscript{15} And, not only did this trend continue into and even accelerate in the 1980s\textsuperscript{16}, but a line of U.S. Supreme Court cases beginning in the late 1980s led to what has now become the modern approach to punitive damages.\textsuperscript{17}

Although the Supreme Court, as early as 1919, had signaled the existence of some constitutional limits to punitive damages\textsuperscript{18}, it only developed the way in which it handles the interaction of constitutional law with such a quasi-criminal private law remedy between 1988 and the present.\textsuperscript{19} Since 1988, no fewer than nine cases concerning the constitutional limitations applicable to punitive damages have come before the Supreme Court, and seven of these have been analyzed through the lens of due process.\textsuperscript{20}

In 1988, in \textit{Bankers Life & Casualty Co. v. Crenshaw}\textsuperscript{21}, Justice O’Connor set the Supreme Court on the path toward reviewing the excessiveness of punitive damages. Although the Court declined to rule on the petitioner’s due process challenge, finding that a statute instituting monetary penalties for

\begin{itemize}
\item[\textsuperscript{14}] Id. at 839-40.
\item[\textsuperscript{15}] Supra note 1, at 142.
\item[\textsuperscript{16}] Id.
\item[\textsuperscript{17}] Melissa Michelle Davis, “Procedural Protections in Punitive Damage Cases: Ensuring That Juries Are Asking the Right Questions About Wealth Evidence”, \textit{Temple Law Review}, Vol. 81, 2008 at 1124.
\item[\textsuperscript{18}] \textit{St. Louis, I.M. & S.R. Co. v. Williams}, 251 U.S. 63, 66-67 (U.S. 1919).
\item[\textsuperscript{20}] See Schubert, supra note 19 at 17; see also Davis, supra note 17.
\end{itemize}
unsuccessful appellants from money judgments failed to constitute a violation of the Equal Protection Clause of the Fourteenth Amendment, Justice O’Connor did signal her concern about punitive damage awards.\(^{22}\) Absent proper constraints on the jury, Justice O’Connor wrote, punitive damages would have an “unpredictable” and “potentially substantial” impact.\(^ {23}\)

A year later, in *Browning-Ferris Industries of Vermont, Inc., v. Kelco Disposal, Inc.*\(^ {24}\) the Supreme Court again did not rule on a due process argument about punitive damages since it had not been raised in the lower courts\(^ {25}\), but it did note that the Due Process clause *could possibly* offer a basis for an argument against excessive punitive damage awards.\(^ {26}\) In this case, a jury awarded $6 million in punitive damages for an antitrust violation and tortious interference with a competitor’s contract, even though the actual damages were only $51,146.\(^ {27}\) The Supreme Court found that this award, even though the punitive-to-compensatory damages ratio was 117:1, did not violate the Eight Amendment’s protection against excessive fines, finding that the latter only applied to criminal cases involving fines, or civil cases in which it was the government seeking money from the defendant.\(^ {28}\) Indeed, it is interesting here how the Court seemed to maintain a crisp distinction between tort and crime with respect to the Eight Amendment, but left open the possibility that the Due Process Clause of the Fourteenth Amendment might transcend such a border.

Perhaps as expected, due process challenges to punitive damage awards followed suit. In 1991, the Supreme Court issued its first ruling on a due process challenge to a punitive damage award, in *Pacific Mutual Life Insurance Co. v. Haslip*.\(^ {29}\) Here, the Supreme Court affirmed a jury award of $840,000

\(^{22}\) *Id.* at 76, 80-87.
\(^{23}\) *Id.* at 87.
\(^{25}\) *Id.* at 276-77.
\(^{26}\) *Id.* at 280.
\(^{27}\) *Id.* at 263.
\(^{28}\) *Id.* at 275-6.
in punitive damages and $200,000 in compensatory damages, a punitive-to-compensatory ratio of about 4:1.\textsuperscript{30} A plurality of the Court determined that the punitive damages in this case did not violate the Due Process Clause of the Fourteenth Amendment.\textsuperscript{31} In its assessment of what constitutes a permissible award of punitive damages within the boundaries of due process, the majority famously wrote:

One must concede that unlimited jury discretion – or unlimited discretion for that matter – in the fixing of punitive damages may invite extreme results that jar one’s constitutional sensibilities. We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus. With these concerns in mind, we review the constitutionality of the punitive damages awarded in this case.\textsuperscript{32}

(emphasis added)

While this approach appears on its face to be reasonable, in actuality, it seems to raise some very difficult questions. A closer analysis of these dilemmas will follow, but for our immediate purposes, it is worthwhile here to highlight a certain quandary. The majority correctly determined that there “cannot” exist a clear, well-defined boundary that separates constitutionally acceptable from constitutionally unacceptable punitive damage awards, in all cases. Yet, the majority still seems to believe that, in specific cases before the court, in which general concerns of reasonableness and adequate guidance from the court are entered “into the constitutional calculus”, the Court can demarcate, with a sufficient level of determinacy, the due process boundaries of acceptable punitive damage awards in that particular case. As will be shown, as a matter of logic, it is less than completely clear that even this latter, seemingly more manageable task, is any more possible than drawing a bright line that would fit every case. In other words, there may be just about as much indeterminacy and vagueness inherent in a punitive damages award in a specific case, as there is across an array of cases.

Nevertheless, the majority’s reasoning in Haslip represented the beginning of the Supreme Court’s endeavor to articulate the meaning of “grossly excessive” punitive damages as a means of

\textsuperscript{30} Id. at 6-7.
\textsuperscript{31} Id. at 23-24.
\textsuperscript{32} Id. at 18-19.
protecting substantive constitutional rights. Indeed, it is interesting that a private law remedy, in this new era of jurisprudence, had become potent enough to potentially implicate the defendant’s substantive constitutional rights. An analysis of the historical arc of punitive damages, here, reveals that traditional compensatory damages in the United States, and even punitive damages meant to compensate for intangible harms before they were made more fully recoverable, did not threaten to compromise a defendant’s substantive constitutional rights. Today, however, there seems to be a clear interplay due to the size and definitively punitive (rather than compensatory) purpose of punitive damages, and managing this interplay has certainly created very difficult challenges.

Just two years after Haslip (involving, as noted, a punitive-to-compensatory ratio of 4:1), the Supreme Court, in TXO Production Corp. v. Alliance Resources Corp., faced the question of whether an unprecedented punitive-to-compensatory damages ratio of 526:1 violated the defendant’s due process rights. In TXO, the defendant knowingly misrepresented ownership of certain mineral rights, and was therefore found liable for $19,000 in compensatory damages. The court, however, awarded to the plaintiff an additional $10 million in punitive damages. The defendant, understandably, submitted that such a punitive damages award constituted an arbitrary deprivation of its property rights without due process of law. The Supreme Court though, held that the need to deter, especially given the potential harm to the plaintiff, entered into the consideration here, and as such, the award ought not be struck down on substantive grounds, it was not “grossly excessive”, and thus, the Court affirmed it. Yet, potential harm to the plaintiff seems to represent quite an inchoate factor, and its very consideration signals that the majority in Haslip might perhaps have been overly optimistic that general concerns of reasonableness and adequate guidance to a jury could make possible a robust review of the

34 Id. at 451-453.
35 Id. at 447-448, 453.
36 Id. at 453.
37 Id. at 453-61.
38 Id. at 458.
constitutionality of punitive damages awarded, using the lens of due process, even in a particular case with its specific set of facts.

Then, in 1996, the Supreme Court rendered the landmark ruling, *BMW of North America, Inc. v. Gore*[^39] in which it, at one level, reigned in punitive damages, but at another level, more deeply embedded the interplay problems arising out of this quasi-criminal remedy’s presence in the private law. In this case, BMW fraudulently concealed from its customers repairs that it made on approximately 1,000 vehicles prior to their sales[^40]. The plaintiff, Mr. Gore, sought compensatory as well as punitive damages, and although the former only amounted to $4,000, he sought and received $4 million in punitive damages at trial[^41]. The state supreme court reduced Mr. Gore’s punitive damages award to $2 million, making the ratio of punitive-to-compensatory damages 500:1[^42]. Although the Supreme Court, just three years earlier in *TXO*, upheld a punitive award that dwarfed compensatory damages by an even larger margin (as noted, it was 526 time larger than the plaintiff’s compensatory damages), the Court here in *BMW*, for the first time, reversed the punitive damages award on substantive due process grounds[^43], holding that the award was grossly excessive under the Due Process Clause[^44].

In reversing the award, the Supreme Court attempted to offer some direction in its dicta, indicating that lower courts ought to turn to three “guideposts” to assess the excessiveness of punitive damage awards. First, courts should consider the level of reprehensibility of the defendant’s conduct[^45];

[^39]: Supra note 4.
[^40]: Id. at 564.
[^41]: Id. at 564-565.
[^42]: Id. at 567.
[^43]: Supra note 19, at 22.
[^44]: Supra note 4, at 586-587.
[^45]: In order to assess reprehensibility, the Court provided a set of factors, including: (a) nature of the harm – “purely economic” or not; (b) “indifference to or reckless disregard for the health and safety of others”; (c) “pattern[s] of tortious conduct; and (d) evidence of bad faith. Id. at 576-7.
second, courts should consider the ratio of punitive-to-compensatory damages; and third, courts should consider the sanctions, criminal or regulatory, that exist for comparable misconduct, and whether a lesser deterrent might have been sufficient to induce compliance. These guideposts have come to dominate modern punitive damages methodology, and perhaps somewhat ironically, they have functioned to institutionalize the interplay of torts, criminal law, and constitutional rights. By introducing these guideposts, the Supreme Court, in effect, approved of the eroding distinction between torts and crime here, signaling that this quasi-criminal remedy of punitive damages indeed has a place in the private law, even though it sometimes implicates a defendant’s Due Process rights.

The erosion of the distinction, here, is problematic because of the grey area that this creates. Within this grey area, for instance, it is difficult to discern whether punitive damages are indeed grossly excessive. The three guideposts are designed to help, and the Court in BMW even noted that the first (reprehensibility) is of particular importance in the analysis. Yet, extremely difficult and arguably unsolvable interplay issues nevertheless remain in this grey area, and as will be seen, even these guideposts might be insufficient to overcome the dilemmas here.

From the outset, for instance, it seems that it is difficult to simultaneously consider in one’s assessment of the reprehensibility guidepost (although the Court does suggests such a consideration) such factors as: (1) whether the defendant’s tortious conduct evinced a reckless disregard for the safety of others, and (2) whether the defendant’s conduct was part of a pattern. Which, for instance, would be more reprehensible — a highly reckless but isolated tortious act, or less reckless but highly repetitious

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46 Here, the Court provided examples of circumstances in which a greater ratio of punitive-to-compensatory damages might nonetheless be constitutionally valid, including: especially egregious acts that cause only minor harms, are difficult to detect, or are noneconomic and hard to valuate. Id. at 583.
47 Id. at 574-575, 583.
48 Supra note 17, at 1130.
49 Supra note 4, at 575.
50 Id. The Supreme Court in fact identified five probative questions for determining the degree of reprehensibility of the defendant’s conduct.
51 Id.
conduct? In other words, which factor carries more weight? Indeed, can one factor even be weighed against another? That is, are they really commensurable? Certainly, if there exist difficulties in determining the degree of reprehensibility then, how can we reliably determine if that reprehensibility rises to a level necessary to justify the punitive award?

And, suppose for a moment that one can and does make sense of the Supreme Court’s factors for determining the degree of reprehensibility of the defendant’s conduct: how exactly does one, in turn, consider that reprehensibility alongside a consideration of the punitive-to-compensatory ratio? There may well be a similar commensurability issue here. Let us say, for instance, that a defendant’s conduct involved repeated actions, and this consideration militates in favor of deeming the defendant’s conduct to be particularly reprehensible.\(^\text{52}\) At the same time, we must also consider the second guidepost, namely, the punitive-to-compensatory damages ratio. The plurality in BMW stated a number of factors that may permit a larger ratio. One such factor that might permit a larger ratio, is non-economic harm that is difficult to valuate.\(^\text{53}\) Presumably, then, if we have a defendant who caused purely economic harm which was also quite simple to valuate, then this would seem to militate in favor of a smaller ratio.

Now, hypothetically, let us attempt to simultaneously consider the guideposts of reprehensibility and of the punitive-to-compensatory ratio. On the one hand, the above defendant’s repeated actions indicate that his conduct ought to be considered quite reprehensible – favoring a larger punitive award. On the other hand, the defendant’s conduct only caused purely economic harm which here was fairly easy to valuate – suggesting a smaller punitive-to-compensatory ratio. The two guideposts here seem to pull us in different directions. So, which one pulls with more force? In order to answer this question, we must be able to measure the force of one guidepost against the force of

\(^{52}\) Indeed, whether conduct involved repeated actions is one of the five probing questions that the Court suggested be considered in determining the degree of reprehensibility. \textit{Id.}

\(^{53}\) \textit{Id.} at 583.
another, but it is not entirely clear that these two guideposts, in principle, share a common measure. That said, the Supreme Court did, as noted, suggest that the reprehensibility guidepost is particularly important in our analysis, but even this does not necessarily get us over the impasse because adding even some “default force” to one of the two guideposts, still does not supply us with a common unit of measurement between the two.

At the very least, perhaps, the Supreme Court in *BMW* offered some clarity with respect to the definition of punitive damages as it stands today, indicating clearly that punitive damages are *not* any longer compensatory in nature, for “It should be presumed a plaintiff has been made whole... by compensatory damages, so punitive damages should *only* be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence”.54 Therefore, even though the guideposts perhaps left the punitive damages analysis less than completely clear, at least the Supreme Court had done a good job of making clear the *definition* of punitive damages.

In 2003, in *State Farm Mutual Automobile Insurance Co. v. Campbell*,55 the Supreme Court sought to clarify somewhat the position it took in *BMW*. In *Campbell*, it was shown that the defendant insurance company, State Farm, defrauded consumers, refused out of bad faith to settle within policy limits, and intentionally inflicted emotional distress.56 State Farm’s “performance, planning, and review”

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54 Id. at 575.
56 Id. at 415-16. Indeed, one might argue that any such behavior is particularly egregious in the context of insurance. This has been the case in other common law jurisdictions, such as Canada. In 2002, for instance, the Canadian Supreme Court affirmed what was at the time an unprecedentedly large punitive damages award, of $1 million, in *Whiten v. Pilot Insurance Co.*, 1 SCR 595 (2002). Here, the Canadian Supreme Court permitted the huge (by Canadian standards) punitive award, reasoning that the defendant’s conduct was particularly reprehensible in light of the fact that the case involved an insurance plan, which the Court termed a “peace of mind” contract (*Whiten v. Pilot Insurance Co* at 115). To be sure, *Whiten* was not like *Campbell* in that it involved homeowner’s insurance rather than automobile insurance. And, the reference here to *Whiten* is not, in any way, intended to suggest that *Whiten* ought to enjoy even a modicum of persuasive value here in the United States. Rather, the purpose here is to illuminate a certain principle that arguably already exists in the United States, but which
policies, here, had served as evidence that the defendant had systematically defrauded consumers. Consequently, in applying the three guideposts from BMW, the Utah Supreme Court reinstated a punitive award of $145 million, which was 145 times larger than the plaintiff’s compensatory damages.

In so doing, the Utah Supreme Court considered the defendant’s “massive wealth”, the very low probability of the defendant’s misconduct being detected, and the various civil and criminal penalties that State Farm could have faced, which included fines, license suspensions, disgorgement, and imprisonment of its officers. At first blush, these various considerations would seem to have generally been in line with the guideposts set forth in BMW, in which the bad faith pattern of conduct signaled reprehensibility, where the difficult-to-detect wrongdoing militated in favor of a greater ratio, and where the harsh types of criminal penalties and other civil sanctions that State Farm could have faced, arguably demonstrated that the punitive damages award, by comparison, was not excessive. If (and again, this is a “big” if) there were ever a case in which a punitive damages award might be justified, this one would seem to be a good candidate. After all, the Supreme Court just one decade earlier in TXO, as

happened to be articulated particularly well in Whiten – that insurance agreements are essentially “peace of mind” mechanisms. And, when an honest, good faith individual must activate that mechanism due to some sort of harmful occurrence, then it would invariably seem to be the case that that individual is in a comparatively vulnerable state. This is the reason why any bad faith dealings by insurance companies would seem to generally be so reprehensible. Even though one might conceivably argue that, based on the specific facts of a case, automobile insurance does not function as a peace of mind mechanism as much as homeowner’s insurance does, it would seem that both forms of insurance function as peace of mind mechanisms, and the difference between the two is a matter of the degree of peace of mind provided. The point, here then, is to illuminate the overarching, common principle, that happened to be usefully articulated by Whiten, that if there are to be punitive damages (and this is a “big” if), then the context of insurance schemes would seem to be among the most appropriate places to award them – which if anything, therefore, would militate in favor of affirming the punitive award in Campbell (again, provided that punitive damages should exist at all).

57 Campbell, id. at 415.
58 Id.
59 Id. at 415-416.
60 Id.
noted, affirmed a vastly larger punitive-to-compensatory damages ratio against a defendant who engaged in seemingly less reprehensible conduct: misrepresenting ownership of certain mineral rights.61

Yet here in *Campbell*, the Supreme Court found these punitive damages problematic, and therefore deemed them to be constitutionally impermissible.62 In reaffirming the BMW guideposts, the Court suggested that, “Here, the argument that State Farm will be punished in only the rare case, coupled with reference to its assets... had little to do with the actual harm sustained by the Campbells”.63 (emphasis added) But, let us recall that difficulty in detecting the tortious conduct goes to an analysis of the size of the ratio.64 And, as the Court explains here in *Campbell*, the actual harm to the plaintiff (physical or economic, malicious or accidental) goes to an analysis of the reprehensibility of the defendant’s conduct.65 It seems obvious, then, that the difficulty in detecting the defendant’s wrongdoing would have little to do with the actual harm suffered by the plaintiffs, because the former and the latter, as detailed above, seem to be incommensurable. Once again, how can one logically measure the plaintiff’s actual harm against the detectability of the defendant’s conduct? In other words, what bearing, exactly, does the detectability of the defendant’s conduct have on the plaintiff’s actual harm? Does it exacerbate the actual harm? If so, how?

Indeed, there might not exist robust analytical answers to these questions, either in the abstract, or in a case with a voluminous set of facts. It is perhaps for this reason (at least implicitly, or possibly unwittingly) that the Supreme Court in *Campbell*, did introduce a certain rule of thumb which

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61 It should be noted that, even though it was adjudicated before BMW introduced the guideposts, TXO has not been overturned (it has been explained by and distinguished from many cases, but it has also been followed in dozens of cases). “Shepard’s” on LexisNexis.com (2011), available at http://www.lexisnexis.com/lawschool/research/Default.aspx?e=&pp=002&com=2&ORIGINATION_CODE=00086&searchtype=get&search=509+U.S.%20443%20%281993%29&autosubmit=yes&com=2&topframe=on&powernav=on&tocdisplay=off&cookie=yes.
62 Supra note 55, at 428.
63 Id. at 427.
64 Supra note 4, at 583.
65 Supra note 55, at 428.
would generally minimize disparities between punitive awards and compensatory damages. The Court stated, “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process”.66 Interestingly, in its single-digit ratio discussion, the Supreme Court here referred back to Haslip, reminding us that, “in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety... Single-digit multipliers are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution...”67

Once again, there may be a certain irony here. That is, the Court attempted to clarify the operation of a concept – punitive damages – that evidently blurs the distinction between torts and crime. Yet, by further embracing this concept of punitive damages, the Court effectively reinforced its existence, thereby preserving and permitting the continuation of an agent that has been corroding the historic border between these two different legal paradigms. The Court’s attempts to introduce further clarity, therefore, might well have been counterproductive here. And, this rule of thumb concerning the single-digit ratio, as will be seen, seems rather problematic.

An important aspect of the dilemma of punitive damages, moreover, is that since they blur this historic legal distinction between tort and crime, they not only introduce criminal law aims such as punishment, deterrence and retribution to the operation of the private law, but in so doing, they raise questions about the proper scope of the private law, potentially introducing questions of broad public concern into disputes between two private parties. This is what in fact occurred recently in the Philip Morris USA v. Williams saga. In the trial, the jury awarded, and on appeal, the court affirmed, a punitive damages award of $79.5 million to the plaintiff, who was the representative of her late husband’s

66 Id. at 425.
67 Id.
estate. The decedent was Jessie Williams, a smoker who died from lung cancer, and these punitive damages were awarded not only because of the fraud perpetrated against Mr. Williams, but because of the effects of the defendant’s conduct on society as well. The sum of punitive damages here was 97 times the size of the compensatory damages awarded, thereby far exceeding Campbell’s single digit ratio rule of thumb. The U.S. Supreme Court therefore ordered the Court of Appeals of Oregon to reconsider the award, and in so doing, the latter affirmed the $79.5 million punitive damages award, reasoning that the defendant’s conduct against so many different smokers exacerbated the reprehensibility of the wrongdoing and justified the 97:1 ratio.

The case returned to the U.S. Supreme Court. Here, some of the queries raised in this paper’s historical and conceptual analysis emerged, at least implicitly. Let us begin by revisiting the potential incommensurability of the guideposts. What if the defendant’s conduct is arguably so reprehensible (as was suggested in Philip Morris), that a punitive damages award that is 97 times larger than the compensatory award is warranted, but the ratio of punitive to compensatory damages should generally be no greater than 9:1? The Court had, as noted, stated in BMW that the degree of reprehensibility was to be the most important indicium of the reasonableness of punitive damages – does the Campbell single-digit ratio approach then mean that reprehensibility is only the most important indicium, so long as the ratio does not exceed 9:1? And, if the ratio is greater than 9:1, and the plaintiff must therefore overcome a certain presumption of unconstitutionality, then does reprehensibility cease to be the key indicium at that point?

Perhaps then, we might say that if the ratio of punitive to compensatory damages is equal to or less than 9:1, then as per BMW, reprehensibility is the key guidepost. If the ratio is 10:1 or greater, then

72 Supra note 4, at 574-5.
it would seem that the ratio becomes as important a guidepost, if not more so, than reprehensibility. Yet, even a general rule of thumb that suggests a ratio of 10:1 or greater is likely violative of due process, seems to be rather arbitrary. Equally troublesome, is that once we enter the territory of 10:1 ratios and greater, what sorts of considerations, in principle, would overcome the supposed presumption of unconstitutionality? Of course, we can say that the answer depends upon a so called weighing of the facts. But logically, as we have seen, it is difficult to conceive of such facts that could possibly enable us to compare two different considerations which lack a common unit of measurement. While we might simply declare that, generally, reprehensibility takes priority over ratio (in the range of 1:1 to 9:1), and that generally, ratio takes priority over reprehensibility (in the range of 10:1 and greater), what facts could possibly enable reprehensibility to prevail over ratio in the latter range, and vice versa? The proposition assumes that some facts could exist that might enable a jury to measure reprehensibility against ratio, and in so doing, determine that the former should take priority. But, absent such a common unit of measurement, how might a juror properly prioritize one consideration over the other?

The Supreme Court, however, was able to avoid addressing this dilemma in Philip Morris v. Williams. Rather than determine whether the punitive damages here were excessive, the Court held that a defendant cannot be punished for harm done to non-parties. Indeed, doing so would, the Court reasoned, be tantamount to a taking of private property without due process. While this does not solve the incommensurability problem, and it likewise does not speak to the single-digit ratio dilemma, this non-party harm rule is at least useful in addressing a sub-issue involving the interplay of tort and criminal law.

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73 Supra note 69, at 349.
74 Id.
That is, the ability to award punitive damages affords juries in private law cases potentially tremendous power to punish. Indeed, if a jury is empowered with the ability to award punitive damages that are dozens, or even hundreds of times greater than compensatory damages, then such a jury could in effect render punishments that truly resemble criminal sanctions. Absent the non-party harm rule, juries could possibly, on occasion, have an improper means of overcoming the single-digit ratio barrier, and thus escape certain boundaries that the Court has set to temper the power of juries in the civil realm. To be sure, the non-party harm rule, as the Court suggests, is designed to help guard against fairness-related problems and ensure that juries base decisions on the right questions.75 Indeed, it would seem highly problematic to empower juries in private law cases with the ability to award unlimited punitive damages, since the defendant does not enjoy any of the added protections that an accused person has in a criminal proceeding.

With this in mind, many difficulties persist, and it is perhaps unfortunate that the Court qualified the non-party harm rule by holding that a jury could still consider the risk of harm to non-parties in determining whether the defendant’s conduct was reprehensible (as opposed to punishing the defendant directly for harm to non-parties).76 Justice Stevens dissented, arguing that there was no real distinction here77, and indeed, he may be right.

Let us briefly recap here with the following table:

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75 Id. at 354.
76 Id. at 355.
77 Id. at 360.
Evidently, the path towards clarity has not been, so to speak, a straight line. The interplay issues that punitive damages introduce are not only highly complex, but they are difficult to manage. Efforts to enunciate guideposts, a rule of thumb about ratios, and a principle about harm to non-parties might seem, overall, to represent progress. And, in certain respects, these measures do at least help to moderate the power of juries in private law cases, which is important when the defendant lacks important safeguards and could otherwise be unduly vulnerable to harsh, criminal-like punishment. Yet problematic tensions between the tenets of tort law and criminal law persist. Consequently, there is a distinct risk that this path towards managing punitive damages, ultimately, might not lead us to clarity, but rather to a jurisprudential dead end.

III. From incommensurability to indeterminacy: an interplay quandary

As punitive damages have evolved, growing immensely in size, the need to manage them, as we have seen, has grown proportionately. The development of the Supreme Court’s approach, however, has signaled that once certain criminal law elements are allowed into the private law setting, troublesome complications can arise. Before proper compensation for intangible harms existed,

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78 In Philip Morris USA Inc. v. Williams, 129 S. Ct. 1436 (2009) (No. 07-1216), the Supreme Court concluded the Philip Morris saga by withdrawing its decision to hear the case at this point, when the case later came back to it from the Supreme Court of Oregon.
plaintiffs were perhaps similar to patients in need of a transplant; the solution chosen then, was to transplant a certain set of characteristics from the criminal law to the private law. Yet, since, as noted, punitive damages in that earlier epoch were essentially compensatory in nature, issues concerning the defendant’s due process rights did not arise. Now that plaintiffs may be compensated for intangible harms, it is as though the transplant from the criminal realm is being rejected. As indicated, attempts to build guideposts seem to have had a modicum of success insofar as they have been reigning in exorbitant, blatantly problematic punitive damage awards, and they have perhaps added some constraints to the power of juries; but, they seemed to have failed to eliminate much confusion. The single-digit ratio rule of thumb from *Campbell* appears to have been a response to some of that confusion. However, this single-digit ratio approach, it is argued here, has only compounded the problem.

The dilemma here seems to be similar to a classic Sorites paradox.\(^79\) The Sorites paradox asks us to consider a heap of sand, from which we remove grains, one by one. Once only one grain remains, it asks whether we still have a heap? If not, then when did our heap become a non-heap? Similarly, if we have punitive damages that are 500 times larger than the sum of compensatory damages and thus deemed to be grossly excessive under the Due Process Clause, and then we proceed to remove a portion of those punitive damages, one multiple at a time, then at what point will the ratio of punitive-to-compensatory damages not be grossly excessive? Indeed, this is somewhat of a trick question. The reason here is that the Sorites paradox essentially has no answer. Rather, it serves to illuminate the phenomenon of vagueness and indeterminacy.\(^80\)

It seems, likewise, that such vagueness and indeterminacy inheres in current attempts to delineate constitutional limits on punitive damages. Whether a punitive to compensatory ratio of 500:1,


\(^80\) *Id.*
or 9:1, or even 1:1 is violative of the Due Process Clause seems unclear, and the attempt to limit, or even constrain, punitive damage awards to a certain ratio seems about as arbitrary as pointing to a particular moment at which a heap becomes a non-heap. Indeed, the concept of a heap does not have sharp boundaries, and the concept of punitive damages, likewise, seems to have a certain inherent vagueness. Not only do punitive damages today straddle the border separating criminal law from civil law, but punitive damages are largely predicated upon a highly indeterminate measure: the degree of reprehensibility of the defendant’s conduct. The difficulty in managing this quasi-criminal, private law remedy then, seems to be merely symptomatic of a far deeper problem.

In order to discern this underlying problem, it is useful here to turn back to the seminal tort case, *Palsgraf v. Long Island Railroad Co.* Here, Justice Cardozo famously wrote, “The risk reasonably to be perceived defines the duty to be obeyed and *risk imports relation*.” (emphasis added) This statement about the relational nature of risk, tort scholar Ernest Weinrib explains, points to a far broader proposition about the conceptual fabric of the private law. That is, Cardozo’s reasoning in *Palsgraf* signifies the deep underlying logic that girds the private law – a framework in which punitive damages seem to have an ill fit. Weinrib suggests that the relational nature of risk signifies that, in the private law in general, parties are correlatively situated. This suggests a bilateral structure of the private law, within which rights and duties are understood as correlatives of each other. As the

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81 Notably, the Court in *Exxon Shipping Co. v. Baker* recently limited the ratio of punitive to compensatory damages in maritime cases to a 1:1 maximum. 128 S. Ct. 2605, 2611 (2008).
83 *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (NY CA 1928).
84 Id. at 100.
86 As Weinrib puts it, “Risk is not intelligible in abstraction from a set of perils and a set of persons imperiled... [R]isk extends from the defendant’s creation of... potentialities to their actualization in the plaintiff’s injury. In Cardozo’s view, the same wrongful risk must qualify both the defendant’s action and the plaintiff’s injury”. Id. at 160.
proposition in *Palsgraf* suggests and as Weinrib explains, a court, under this conception of the private law, may only find a defendant liable in cases where he violated the rights of a plaintiff to whom he owed a duty.\(^{88}\) When the defendant does violate the rights of a plaintiff to whom he owed a duty, the private law nullifies the wrongdoing by having that *particular* defendant compensate that *particular* plaintiff for that *particular* harm that the former did to the latter. It is in this way that the private law functions coherently, for as Weinrib posits, subjecting the defendant to this remedy for the plaintiff’s benefit nullifies the injustice, and in so doing, the private law “links both the plaintiff to the defendant and the injustice to the remedy”.\(^{89}\)

As such, Weinrib suggests, that “…[the] private law is a distinct form of practical reason…”\(^{90}\) If the private law is somewhat “distinct”, then how does a quasi-criminal remedy such as punitive damages cohere with the integrated structure of the private law? If we agree that a defendant ought to only be held liable for wrongful conduct he did to a plaintiff to whom he owed a duty, and if we recognize that this proposition regards the defendant’s duties and plaintiff’s rights as correlatives, then how could punitive damages fit in? In short, it does not. Compensation integrates here, because it consists in, as noted, the particular defendant making the particular plaintiff whole after the latter suffered a particular harm caused by the former. Punitive damages, as the case law shows\(^{91}\), by contrast, involve a one-sided consideration of the defendant’s reprehensible conduct. Whereas considerations of the plaintiff’s harms are addressed through compensatory damages, punitive damages are instead intended to address the defendant’s conduct rather than the plaintiff’s harms, and so punitive damages, in this respect, represent (as noted) a windfall for a plaintiff.\(^{92}\) Indeed, as previously detailed, one cannot

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\(^{88}\) *Supra* note 85, at 160.  
\(^{89}\) *Supra* note 87, at at 60.  
\(^{90}\) *Id.* at 103.  
\(^{91}\) See, for instance, *BMW* supra note 4, at 575.  
\(^{92}\) *Id.* at 559, “It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should *only* be awarded if the defendant’s culpability, after having paid compensatory damages,
logically claim a personal entitlement to a windfall, so why should a defendant be made to give such an award to a plaintiff? Additionally, why should a defendant who has fully compensated a plaintiff for all harms, tangible and intangible, then be made to pay further damages? Such full compensation would seem to function to undo the breach of the defendant’s duty (and logically, if it does not fully undo the breach, then it cannot be considered to be full compensation), and requiring the defendant to pay out more than full compensation would therefore seem to be tantamount to requiring the defendant to go over and above his duties here.

To be sure, requiring a defendant to go over and above his duties not only seems less than fair, but it is also begs questions about how far over must that defendant go for justice to be done (supposing, for the moment, that justice might require that a defendant go over and above his duties)?

It seems hard if not impossible to answer that question, for there is no determinate measure here to guide us. Indeed, the problem of indeterminacy seems to be pervasive in the area of punitive damages, for earlier, we saw that a different framing – the degree of reprehensibility – is also plagued by indeterminacy. To be sure, indeterminacy represents a serious dilemma, for it is not only embedded in the very concept of punitive damages, but it translates, as we have seen from an examination of the case law, into an inability to develop clear guideposts, principles, and rules for managing punitive damages. Logically then, the integrated structure of the private law perhaps leaves no room for punitive damages, for such a remedy not only erodes the historic distinction between tort and crime, but in so doing, seems to inescapably produce vexing outcomes.

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*is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence*. (emphasis added)

93 It is perhaps tempting to argue here that a defendant owes a duty to society, but such an argument would be contrary to Justice Cardozo’s ruling in *Palsgraf*, which prevails today. For instance, the *Campbell* non-party harm rule, which prevents a defendant from being directly punished for harm to non-parties, seems to be somewhat of an analogue of Cardozo’s proposition that a private law defendant does not owe a duty to the public at large.
IV. Conclusion

Punitive damages have gone through a long and complex evolution, from a comparatively rudimentary concept in the Code of Hammurabi to a highly complicated remedy in the courts of the United States. The rise of mass tort litigation in the 1960s transformed this remedy from its humble beginnings as a form of compensation for certain unrecoverable intangible harms, to a large and aggressive award routinely requested from American civil juries. Indeed, some might view this evolution as something positive, for, in a sense, there is a natural inclination to want to punish persons whose conduct has been particularly reprehensible. Yet, as this paper’s analysis of the historical arc of punitive damages has attempted to demonstrate, the growth of modern, non-compensatory punitive damages has resulted in the continual erosion of the historic distinction between tort and criminal law, and this seems to be quite problematic.

The shift in focus away from the defendant’s duty to a particular plaintiff, to the defendant’s reprehensible conduct has ushered in a new set of concerns, for the latter is not bounded by the comparatively determinate limits of the victim’s harm, but rather by the more amorphous degree of the egregiousness of the tortfeasor’s actions. This development in punitive damages during the past fifty years has led to huge punitive awards, dozens and even hundreds of times the amount of a plaintiff’s compensatory damages, and has thus implicated the defendant’s constitutional rights. Attempts to manage these damages in an effort to temper the power of juries and protect the rights of defendants have highlighted the complications that result from conflating elements of the private and criminal law realms. And, although the Supreme Court’s various measures, including guideposts, the single-digit ratio rule of thumb, and the non-party harm rule do seem to have been reigning in the tremendous size of some punitive awards, each measure is problematic, as we have seen, in its own way.
A revisiting of the first principles of modern American tort law reveals that the problems with these above measures seem to be symptomatic of a deeper dilemma. The integrated bilateral structure of the private law, consisting in the plaintiff’s and defendant’s correlative rights and duties, appears to leave little room for criminal law elements such as punishment. The interplay issues resulting from punitive damages create deep tensions, and it seems difficult, if not logically impossible, to conceive of any measures that could ease them. Indeed, then, it might be preferable to abandon the project of punitive damages, rather than construct unstable or unsound constitutional limits around them. A failure to clarify the distinction between tort and crime here, as Ernest Weinrib has notably indicated, might well result in the law becoming “more flexible but less just”. 94

94 Supra note 87, at 103.