

Touring the Punitive Damages Forest: A Proposed Roadmap

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Abstract. Punitive damages have for years been one of the most hotly debated legal topics around the common law world. In recent years, however, the interest in this subject seems to be shared increasingly by continental scholars. The scholarly literature on punitive damages is immense. It covers almost every aspect of the punitive damages phenomenon, from almost every angle (doctrinal, conceptual, philosophical, political, economic, historical, empirical, constitutional, and comparative). Surprisingly, however, there has been little academic effort to systematically organize the punitive damages field. What seems to be especially lacking is a roadmap which would be able to encapsulate the various aspects of the problem and to demonstrate the connection – or lack thereof – between these aspects. In this article, the author aims to offer the reader such a roadmap. The starting point is the author's claim that forming an opinion on whether or not a doctrine of punitive damages may ever be justified and, if so, in which form, requires the posing and answering of a series of interrelated – but distinct – questions. The present article is an endeavor to present these questions and to discuss possible answers to them. It thus offers both continental and common law lawyers a draft roadmap, which might be of assistance to anyone willing to become more acquainted with, and more involved in, the punitive damages debate.

Keywords: punitive damages, civil punishment, remedies, torts, civil liability, compensation, deterrence, retribution.

I. Introduction

Around the common law world, and especially in the United States, punitive damages have for years been one of the most hotly debated legal topics. In recent years, however, the interest in this subject seems to be shared increasingly by continental scholars¹. This is far from surprising. Punitive damages

¹ See e.g.: Helmut Koziol, *Punitive Damages – A European Perspective*, 68 *La. L. Rev.* 741 (2007-2008); Pablo Salvador Coderch, *Punitive Damages and Continental Law*, 9 *Zeitschrift für Europäisches Privatrecht* 604 (2001); Giulio Ponzanelli, *I punitive damages nell'esperienza nordamericana*, *Riv. Dir. Civ.* 1983, I, 435; Giuseppe Carella, *I punitive damages e la riparazione del danno morale in diritto internazionale*, 67 *Rivista di Diritto Internazionale* 751 (1984); V. Zeno-Zencovich, *Il problema della pena privata nell'ordinamento italiano: un approccio comparatistico ai «punitive damages» di «common law»*, 137 (4) *Giurisprudenza Italiana* 12

challenge our understanding of the law. Their very existence in certain legal systems calls into question our most entrenched dichotomies: the distinction between damages and punishment, civil law and criminal law, private law and public law. To think about punitive damages is therefore both an enjoyable intellectual exercise and a very rewarding one, for it obliges us to rethink, reevaluate and ultimately reformulate our convictions regarding the functions of the legal system as a whole, and the interrelationship between its various branches.

The scholarly literature on punitive damages is immense. It covers almost every aspect of the punitive damages phenomenon, from almost every angle (doctrinal, conceptual, philosophical, political, economic, historical, empirical, constitutional, comparative, etc.). In this article I do not directly join any of these important endeavors. Nor do I aim to defend any specific position in the punitive damages debate². Rather, I would like to contribute to this debate by offering a systematic way of thinking about the many problems and questions which arise with regard to punitive damages. Surprisingly, there has been little academic effort to systematically organize the punitive damages debate. What seems to be especially lacking is some kind of roadmap to encapsulate the various aspects of the problem and to demonstrate the connection – or lack thereof – between them. In my view, in the absence of such a roadmap it is impossible to fully assess the validity of arguments for and against punitive damages, much less so to take a firm stance in this debate. For example, one might recognize the need to punish and deter reprehensible violations of private rights (which punitive damages typically target) and yet deny the legitimacy of deterrence as a goal for private law. Alternatively, one may accept retribution and deterrence as legitimate goals for private law, but fail to see in what way the awarding of extra-compensatory

(1985); Pietro Sirena, *Il risarcimento dei c.d. danni punitivi e la restituzione dell'arricchimento senza causa*, Riv. Dir. Civ. 2006, VI, 531; Giulio Ponzanelli, *I danni punitivi*, in Nuova Giur. Civ. Comm. 2008, II, 25; A.R. Fiebig, *The Recognition and Enforcement of Punitive Damage Awards in Germany*, 22 Georgia J. Int'l & Comp. L. 635 (1992); Benjamin W. Janke, Francois-Xavier Licari, *Enforcing Punitive Damage Awards in France after Fountain Pajot*, 60 Am. J. Comp. L. 775 (2012); Jean-Sebastien Borghetti, *Punitive Damages in France*, in Punitive Damages: Common Law and Civil Law Perspectives, 55 (Koziol and Wilcox eds., 2009). This valuable book contains surveys on punitive damages from England, France, Germany, Hungary, Italy, Scandinavia, Spain, South Africa, United States and the European Union, in addition to special reports on various perspectives on the subject. Another comprehensive research is J. Morsdorf-Schulte, *Funktion und Dogmatik U.S. – Amerikanischer Punitive Damages* (Tübingen, 1999).

² That being said, I do believe that civil punishment, under certain defined conditions, could play a vital role in any modern society. This will most probably become obvious to the reader by the end of this article, so I might as well confess right at the outset.

sums to plaintiffs can serve that goal. Then again, one might support, in principle, the imposition of punitive civil awards for the sake of either deterrence or retribution, and still be concerned by the seemingly undeserved windfall punitive damages bestow upon the private plaintiff. Forming an opinion on whether or not a doctrine of punitive damages may ever be justified, and if so, in which form, may therefore require the posing and the answering of a series of different questions. The present article is an endeavor to draw a draft roadmap in the forest of punitive damages.

II. Preliminaries: definition and taxonomy

Any analysis of punitive damages requires a definition of this legal phenomenon. However, as we shall later see, the very understanding of what punitive damages are and what goal they serve has evolved over the years and is still under debate. Yet, I believe that most common lawyers today would accept, as a fairly accurate statement, the following definition: Punitive damages are a monetary award which a civil court may impose on a defendant in favor of a plaintiff, with the explicit intention of punishing the defendant for his exceptionally reprehensible conduct.

This definition of punitive damages (also known around the Commonwealth as «exemplary damages») immediately reveals the theoretical obstacles which any theory of punitive damages must face. It is submitted that the most serious of these difficulties are the following three³. First, in modern liberal democracies, punishment is considered an extreme form of control requiring strong justification before it can be safely implemented by any branch of the State. If punitive damages are indeed a form of state punishment, as their name testifies, any attempt to justify them must address a series of questions with which any theory of state punishment must grapple. These include, first and foremost, the following question: Is there ever a need to punish the punitive damages defendant, and for exactly which type of conduct?⁴

³ It is submitted that this tripartite taxonomy of the main problems associated with punitive damages is original. Most scholarly discussions of punitive damages avoid any attempt at channeling the various problems with punitive damages into a systematic framework. A typical analysis would most often present the major supposed justifications for the doctrine, as well as the arguments against it, without pointing out the analytical interrelationship between these justifications and their respective roles in a full-fledged theory of punitive damages. The methodological separation of the many aspects of the punitive damages debate into three clearly distinguished fundamental concerns allows for a more systematic – and thus more comprehensive – analysis of the various aspects of the punitive damages phenomenon.

⁴ The question is addressed *infra*, part IV.

Formidable as it is, this problem is only the first theoretical obstacle facing any endeavor to provide a normative justification for the institution of punitive damages. A second difficulty concerns the civil nature of punitive damages, namely, the fact that they are imposed at the conclusion of a civil trial instigated by one private individual against another. The fundamental problem here is this: Even assuming that the types of wrongdoing which punitive damages target require a punitive response, what is the sense of allocating this task to the civil-private law rather than to the criminal-public law (or, alternatively, administrative law)? Given that in modern times the punishing of offenders is considered to be the exclusive domain of the State, what could be the justification for resorting to the mechanism of private litigation in order to achieve the same goal?⁵

Finally, a third theoretical difficulty confronts anyone eager to fully appreciate the phenomenon of punitive damages. This is the «windfall problem», i.e., the difficulty arising from the fact that unlike other typical forms of state punishment, including criminal and administrative fines, punitive damages are awarded not to the state treasury or to any public authority, but are traditionally paid to the individual victim's pocket. Indeed, even if certain forms of wrongdoing deserve punishment, and even assuming that achieving this goal necessitates the imposition of extra-compensatory civil awards, why should the individual victim of the wrong be entitled to receive these awards which, by definition, are not aimed at remedying his or her private injuries?⁶

In my view, any serious effort to take a stance in the debate over the desirability or the legitimacy of punitive damages as a private law institution must include a systematic examination of these three fundamental problems. As we shall see, each of them raises a host of secondary questions for which arguments and counter arguments can be offered. However, before delving into these serious problems, we must first consider a further preliminary problem.

III. Do punitive damages punish or compensate?

A. The attractiveness of the compensatory theory of punitive damages

In my view, the first fundamental question to be confronted in the context of the punitive damages debate, and which analytically precedes all others, concerns the nature of the sanction or burden which punitive damages im-

⁵ The civil punishment problem is addressed *infra*, part V.

⁶ See *infra*, part VI.

pose on the punitive damages defendant. More concretely, are punitive damages really a form of punishment, as their common definition presumes, or might they be understood as merely a form of enhanced compensation for some kind of non-compensable but nevertheless actual loss?

The question is fundamental and preliminary since, if punitive damages are not really punitive but rather compensatory in nature, then all of the three major theoretical obstacles outlined in the previous chapter seem to fade away: If the defendant is not really being punished but is merely forced to make reparation to his victim, then there is no need to look for a special justification for punishing him. Similarly, there is no difficulty with seeking punitive damages in the framework of a civil trial, since these are merely compensatory damages, which are the primary private law remedy. Finally, and in the same vein, if they are in essence nothing but covert compensatory damages, there seems to be no reason to regard punitive damages as bestowing a windfall upon the victim which seeks them.

It is therefore not surprising that throughout the history of the doctrine of punitive damages there have been many attempts to interpret and explain the doctrine in terms of compensation for actual loss⁷. As we shall soon see, these compensatory theories differ significantly from each other. However, they all share the desire to rescue the doctrine from the immense difficulties associated with awarding truly punitive damages. A brief survey of the compensatory theory of punitive damages seems, therefore, indispensable to understanding and evaluating the punitive damages debate.

B. Separating punishment from compensation: the historical perspective

The compensatory theory of punitive damages maintained a strong foothold in English jurisprudence for a very long period of time. This is due mainly to the historical fact that since their very inception and throughout most of their history, punitive damages were awarded to tort victims not as a separate and independent remedy, but rather as part of a single damage award. So long as this practice continued, it was impossible to clearly distinguish the part of the damage award which reflected a candid appreciation by the jury of the extent of the victim's loss from the part reflecting the jury's will to punish and condemn the defendant's reprehensible conduct. In this state of affairs, courts could easily justify what were alleged (usually in appeal

⁷ See e.g. Julius Stone, *Double Count and Double Talk, the End of Exemplary Damages?* 46 Australian L.J. 311 (1972) (proposing to abolish punitive damages, since their aim can be better fulfilled through the use of «aggravated damages»).

cases) to be exaggerated sums of compensation by employing a punitive reasoning, a compensatory reasoning, or a combined reasoning which made reference to both ideas.

For example, in an early nineteenth century case, the court approved a jury award of 500 £ against a violent trespasser reasoning that such a large award was justified both as a form of compensation for a grave non-pecuniary injury to the plaintiff, and as a deterrent to the defendant. The court said:

[Are we] to lay it down as a principle that the jury are not justified in giving more than the absolute pecuniary damages that the plaintiff may sustain? [...] *would that be a compensation?* [...] I wish to know, in a case where a man disregards every principle which actuates the conduct of gentlemen, *what is to restrain him* except large damages⁸.

And so, in England, the homeland of the doctrine, at least until 1964 no clear distinction existed between exemplary (punitive) damages on the one hand, and aggravated or enhanced compensatory damages on the other hand. This was explicitly acknowledged by the House of Lords in the seminal case of *Rooks v. Barnard*, where the distinction between exemplary-punitive damages and compensatory-aggravated damages for enhanced mental distress was first clearly established in English law. Examining the cases in which supposedly punitive damages were awarded before 1964 the Court said:

When one examines the cases in which large damages have been awarded for conduct of this sort [...] it is not at all easy to say whether the idea of compensation or the idea of punishment has prevailed⁹.

Having established a clear doctrinal distinction between exemplary (punitive) and aggravated damages, the House of Lords in *Rooks v. Barnard* went further to recommend that from now on courts should instruct juries in punitive damages cases to clearly separate the punitive element of the award (i.e., exemplary damages) from all other types of damages¹⁰.

⁸ *Merest v. Harvey* [1814] 128 Eng. Rep. 761, 761. The multifaceted nature of enhanced damage awards was admitted in the very first English punitive damages cases. «A jury have it in their power to give damages for more than the injury received. Damages are designed not only as a *satisfaction to the injured person*, but likewise as a *punishment to the guilty*, to deter from any such proceeding for the future, and as a *proof of the detestation of the jury* to the action itself». *Wilkes v. Wood*, [1763] 98 Eng. Rep. 489, 498-499.

⁹ *Rooks v. Barnard* [1964] A.C. 1129, 1221 (H.L.) (per Lord Devlin). Compare H. Street, *Principles of the Law of Damages*, 30 (London, 1962): «Certainly, it is difficult to find an English case where an award of exemplary damages could not equally well have been justified as aggravated damages».

¹⁰ *Id.*, at 1228.

In my view, it is doubtful whether aggravated damages can or should properly be distinguished from ordinary non-pecuniary damages¹¹. Having said that, there is no doubt that, following *Rooks v. Barnard*, most modern courts today do indeed separate the punitive and the compensatory elements of the damage award¹². This important development has encouraged courts and commentators around the commonwealth to rationalize punitive damages not as a rule affecting the assessment of compensatory damages, but as an independent extra-compensatory legal remedy. This, in turn, has led to the development of a more coherent and self-conscious body of punitive damages jurisprudence¹³.

In the United States of America, this development occurred much earlier. In part due to the relatively liberal approach of the American courts to the awarding of compensatory damages for non-pecuniary loss, the punitive nature of claims for what were called «exemplary», «punitive» or «vindictive» damages became evident much earlier than in England. As early as the middle of the nineteenth century, a widespread consensus established itself among American courts and scholars that the true goal of these awards was indeed to punish defendants, not to compensate their victims for any specific kind of injury. This understanding is reflected in the following words of the United States Supreme Court, which as early as 1851 stated:

It is a well established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view *the enormity of his offence rather than the measure of compensation to the plaintiff* [...] By the common as well as

¹¹ Such was the conclusion of the English law commission, which proposed abolishing aggravated damages altogether and thus absorbing it into the doctrine of damages for mental distress. The Law Commission (Law Com. No. 247): *Aggravated, Exemplary and Restitutionary Damages* (London, 1997), para. 2.42.

¹² See e.g. *Whiten v. Pilot Insurance Co.* [2002] 1 S.C.R. 595, where the Supreme Court of Canada approved a \$ 318,252 compensatory damages judgment and reinstated a one million dollars punitive damage verdict. For an analysis of this leading punitive damages case see Yehuda Adar, *Whiten v. Pilot Insurance Co.: The Unofficial Death of the Independent Wrong Requirement and Official Birth of Punitive Damages in Contract*, 41 *Canadian Business Law Journal* 247 (2005).

¹³ The leading English cases since *Rooks v. Barnard* are *Cassel & Co. Ltd. v. Broome* [1972] A.C. 1027 (H.L.) and *Kuddus v. Chief Constable of Leicestershire Constabulary* [2001] 2 W.L.R. 1789 (H.L.). The leading New-Zealand cases are *Fogg v. McNight* [1968] N.Z.L.R. 330 and *Taylor v. Beere* [1982] 1 N.Z.L.R. 81. For an Australian perspective see *Uren v. Fairfax & Sons Pty. Ltd.* (1966) 117 C.L.R. 118; B.W. Collins, *Tort and Punishment – Exemplary Damages: The Australian Experience*, 70 *Australian L.J.* (1996) 47. For Ireland see *Conway v. Irish National Teachers' Organisation* [1991] I.L.R.M. 497. The leading Canadian on punitive damages case is *Whiten v. Pilot Ins. Co.*, *supra* note 12.

by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and *the damages, inflicted by way of penalty or punishment*, given to the party injured¹⁴.

Indeed, as a natural corollary to the clear theoretical distinction which was relatively early established, American courts were quick to adopt a practice of sharply separating the punitive element from any other part of the jury verdict¹⁵. This, in turn, enabled the quick development of a rich judicial and academic debate over the theoretical and pragmatic concerns of this form of civil punishment.

C. Contemporary theories of compensatory punitive damages

Notwithstanding the developments outlined above, the compensation theory of punitive damages was never completely abandoned by American jurisprudence. To begin with, in two states (Connecticut and Michigan) punitive damages have been officially interpreted by the highest courts as a form of compensation for officially noncompensable elements of loss rather than as a form of punishment. Therefore, in these states, the sum awarded as punitive damages must never exceed the maximum estimated losses suffered by the plaintiff (including non-pecuniary loss and litigation expenses)¹⁶.

Second, a number of authors claimed that punitive damages could be understood as an attempt of the legal system to make wrongdoers pay for the indirect, widespread or diffuse harms which are suffered by third parties

¹⁴ Day v. Woodworth 54 U.S. 363, 371 (1851). For an even more explicit rejection of the compensation rationale see e.g. Voltz v. Blackmar 64 N.Y. 440, 444 (1876): «[I]f the defendant, in committing the wrong complained of, acted recklessly, or willfully, and maliciously, with a design to oppress and injure the plaintiff, *the jury, in fixing the damages, may disregard the rule of compensation*, and beyond that may, as a punishment to the defendant, and as a protection to society against a violation of personal rights and social order, award such additional damages as in their discretion they may deem proper».

¹⁵ As early as 1931 an important American tort scholar noted that «[T]he punitive damages verdict is usually found separately from the “compensatory” damage verdict». Clarence Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, fn. 3. (1931). This practice is today codified in the Model Jury Instructions of most American states. For a comprehensive survey see J.D. Ghiardi and J.J. Kircher, *Punitive Damages Law and Practice* ch. 11 (N.Y., Cumulative Supplement, 1998) (hereinafter Ghiardi and Kircher); K. Redden and L. Schulter, *Punitive Damages* vol. II, 292-324 (Charlottesville, 3rd ed., 1995) (hereinafter Redden and Schulter).

¹⁶ For citations see Ghiardi and Kircher, *id.*, at sec. 4.03, 4.04; Redden and Schulter, *id.*, vol. 1, at 27, fn. 1 and vol. 2, sec. 21(A)(7), (22). In New Hampshire, until its abolishment by statute in 1986, punitive damages were allowed only as a form of aggravated compensatory damages. See *Fay v. Parker* 53 N.H. 342 (S.C. 1873).

or by society more generally, and which under traditional rules of damages remain uncompensated¹⁷.

Finally, the most common economic-analysis explanation of punitive damages regards them as a judicial effort to overcome the problem of underenforcement, which makes the remedy of compensatory damages (even when it includes all elements of loss) insufficient as a means of forcing wrongdoers to internalize the full cost of their acts. Punitive damages can correct this systematic failure, so long as they are assessed in an amount equal to the loss caused to the plaintiff, multiplied by the probability of detection and enforcement¹⁸. Under this account, punitive damages are extracompensatory only from the standpoint of the particular tort victim who brought the punitive damages action. However, from a societal point of view they are compensatory, not punitive. This is so, for their intention is not to harm defendants *per se* or to prevent them from undertaking a certain specific course of action but rather to make sure that they are forced to pay for the full social cost of their activity¹⁹.

Intellectually stimulating as they are, all of these compensatory theories seem to clearly fail as explanatory or justificatory theories of the modern doctrine of punitive damages. The most fundamental deficiency shared by all of these theories is that they ignore – or at least underemphasize – the clearly punitive reasoning by which lawyers, juries and ultimately courts are required to justify punitive damage awards. As long as punitive damage awards are isolated, as they indeed are in most jurisdictions, from any other judicial remedy – and especially from compensation – they cannot be coherently rationalized as a form of compensatory damages.

¹⁷ E.J. Grube, *Punitive Damages: A Misplaced Remedy*, 66 Cal. L. Rev. 839 (1993): «[I]f punitive damages were to be paid to the state, they would serve to compensate society for societal harm inflicted by defendants' outrageous conduct». Along the same lines see more recently, Catherine Sharkey, *Punitive Damages as Societal Damages*, 113 Yale L.J. 347 (2003): «Societal damages advance the fairness and corrective justice goals embedded in our compensatory torts system». For a critique see Michael B. Kelly, *Do Punitive Damages Compensate Society?* 41 San Diego L. Rev. 1442 (2004).

¹⁸ Thus, if the defendant caused a loss of 100,000 \$, and the probability of his being brought to justice is 1:4, he should be made to pay 400,000 \$, that is, 100,000 \$ as compensation for the plaintiff's actual loss and another 300,000 \$ as punitive damages, to reflect the losses caused by similar wrongdoing by the same defendant which have gone (or will go) undetected. One of the first to propose this account of punitive damages is Robert Cooter, *Economic Analysis of Punitive Damages*, 56 S. Cal. L. Rev. (1982) 79. See also A.M. Polinsky and S. Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 870 (1998).

¹⁹ For a call to reform tort law so that it can guarantee that all injurers are made to pay for the full (i.e. direct and indirect) costs of their activity see T.C. Galligan, *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 Louisiana L. Rev. 3 (1990). Notably, unlike the conventional economic analysis of punitive damages, this author has not argued that this role should or can be carried out by the traditional doctrine of punitive damages.

Furthermore, it is not only the rhetoric, but also the actual practice of the courts in most Anglo-American jurisdictions, which is clearly inconsistent with the rationale offered by the compensatory theories of punitive damages. In the first place, the availability of punitive damages is determined by reference to the culpability of the defendant's conduct²⁰. It does not depend on whether or not the plaintiff's feelings were severely hurt (aggravated punitive damages), on whether or not the defendant's wrongful conduct was easily detectable (economic punitive damages), or on whether or not any indirect social loss was proven to result from that conduct (societal punitive damages)²¹.

Second, under the doctrine of punitive damages as it is employed in practice, the magnitude of the punitive award does not depend exclusively on factors such as the extent of the plaintiff's emotional loss (which by definition has already been compensated for), the chances of the defendant escaping liability in similar cases, or the scope of the losses suffered by entities other than the plaintiff. Needless to say, all of these factors can be taken into account insofar as the court regards them as affecting the overall gravity of the defendant's anti-social conduct. However, there seems to be no indication that in the actual practice of the courts (either at first instance, or on appeal) punitive damages are assessed solely or even primarily on the basis of any of these considerations²².

All in all, therefore, the theory of punitive damages as compensation for real, actual loss, does not seem very appealing from an analytical point of view²³. To appreciate the complexities associated with the recognition of punitive damages as an independent private law remedy, an endeavor should

²⁰ The exact content of this faulty conduct is discussed *infra*, IV.B.

²¹ The compensatory theory of punitive damages has been criticized for this reason by one of America's greatest treatise writers, who about a hundred and twenty years ago wrote: «The opponents of the rule have attempted to explain away the authorities in its favor in a variety of ways, but without much success. [...] A vast body of decisions exists, in which the recovery could only be *in poenam*; and the inquiry is always made, not as to the effect of the defendant's malice, but as to its motive». Theodore Sedgwick, *A Treatise on the Measure of Damages*, 516 (N.Y., 8th ed., 1891).

²² Rather, the primary consideration is the blameworthiness of the defendant. Other relevant factors include the vulnerability of the plaintiff, the extent to which the defendant was enriched by the wrong, the need for deterrence, and the extent of harm or potential harm to the plaintiff. For systematic presentations of these considerations see e.g. Whiten, *supra* note 12, at para. 112-126. See also *B.M.W. of North America, Inc. v. Gore* 517 U.S. 559, 574-585 (1996) (the actual harm is explained as an important factor alongside the degree of reprehensibility and the size of comparable statutory fines for the same type of conduct).

²³ This, of course, is not to suggest that the compensatory theories of punitive damages cannot be normatively attractive. However, if they are, that would mean that the doctrine of punitive damages cannot be justified or explain in its own terms, and should be reformed so as to become a substantially different legal doctrine.

be made to explain the practice as it is, not as it should or could be designed or as it may have functioned in the past, when punitive and aggravated damages were indistinguishable. Understanding the practice of awarding punitive damages requires us not to ignore their punitive nature, but to acknowledge it and then to confront the very difficult problems which inevitably ensue. This is what we shall now proceed to do.

IV. Why punish the defendant and for which conduct?

A. An under-researched question

The controversy over punitive damages is often channeled into a debate over the role of punishment within tort law or within private law more generally²⁴. This is no doubt a pivotal question, which lies at the heart of the controversy. However, it is not the only problem which the concept of punitive damages raises, nor is it the only major one. Furthermore, from an analytical or methodological point of view, the problem of civil punishment is, in my view, a secondary question, in the sense that it implicitly presupposes a positive answer to a more basic one, namely: Why should the punitive damages defendant ever be punished, and for which conduct?

Surprisingly enough, this fundamental question is not very often confronted in the punitive damages literature, at least not in a sufficiently direct and systematic manner²⁵. Many courts and commentators assume, often implicitly, that certain aggravated forms of wrongdoing may well justify some kind of punitive reaction. On the basis of this intuitive presumption, those courts and commentators frequently reiterate that the purpose of punitive damages is to punish, deter or express the disapproval and indignation of the court or the jury at the defendant's conduct²⁶. And yet, the question of which conduct exactly is it that the courts are seeking to punish and deter through the imposition of punitive damages is often overlooked and is rarely subjected to vigorous scrutiny. I wish to shed light on exactly this question. I believe

²⁴ See e.g., in this volume, Helmut Koziol, *Some Reflections on Punitive Damages*, *infra* at 341-343.

²⁵ A rare exception is Dorsey D. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 20-21, 34-37 (1982). See also David G. Owen, *Civil Punishment and the Public Good*, 56 S. Cal. L. Rev. 103, 106-108 (1982).

²⁶ «Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future». Restatement (Second) of Torts (St. Paul, 1977) (hereinafter: Rest. Torts). See also the citation from *Day v. Woodworth*, *supra* note 14.

that without first defining the punishable conduct for which punitive damages are sought and awarded, deliberations over the alleged justifications for subjecting defendants to punitive damages are much less constructive. If we are not sure which conduct may trigger an award of punitive damages, how can we be sure if there is any need for punitive damages in the first place?

B. Which type of conduct do punitive damages punish?

Anglo-American courts use a wide variety of expressions to describe the criteria which determine the availability of punitive damages. Among other terms employed in the case law and in legislated jury instructions the most common seem to define the punishable conduct as one that is «outrageous», «reprehensible», «malicious», «callous», «fraudulent» or «oppressive». Other phrases which are frequently employed, depict the defendant's conduct as such that reflects a «conscious», «reckless», «willful» or «wanton» disregard of the rights of others²⁷. This diverse vocabulary has been criticized for being too vague and hence also inefficient as a means of providing adequate guidance to courts and juries exercising their discretion on whether or not to award punitive damages²⁸.

In my view, while the terminology is indeed vague and varied, it nevertheless covers a number of important – and very meaningful – restrictions on the availability of punitive damages. Looking into many cases where punitive damages have been considered and awarded, it became quite clear to me that the availability of this remedy depends on a two-layer test. This test combines a set of relatively well defined preconditions, together with a vaguer standard which is employed as an ultimate and final check. I believe that the combination of these two tests provides a considerable degree of elasticity on the one hand, which is crucial for achieving the doctrine's social goals, and on the other hand, a sufficiently stable and rigid backbone so as to guarantee that punitive damages are directed only against the «right» type of wrongdoing.

²⁷ See e.g.: Rest. Torts, *id.*, s. 908: «[C]onduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others»; «[Exemplary damages] are awarded [...] because the defendant has wronged the plaintiff in a manner which is outrageous, anti-social, high-handed, or otherwise reprehensible». Michael J. Tilbury, *Civil Remedies* vol. 2, 258 (Sydney, 1990). Other epithets of the punishable conduct include the following: «high-handed», «arrogant», «anti-social», «tortuous», «willful», «shocking», «callous», «contumelious», «insolent». However, the use of these terms is much less common.

²⁸ Ellis, *supra* note 25, at 37-53 (arguing that the combination of vague terminology and wide jury discretion has serious drawbacks from both a fairness and an efficiency perspective).

The first set of preconditions is neatly encapsulated in the widespread epithet «reckless disregard of the rights of others». This simple phrase, I believe, encapsulates not less than five cumulative preconditions, all of which must be established by the plaintiff before an award of punitive damages can even be considered by a court or a jury:

1) The defendant has infringed a legal right of the plaintiff (most commonly, by committing a tort)²⁹.

2) There was no legal justification or excuse for the violation (i.e., no recognized defense, such as necessity, self-defense, *force majeure*, etc.).

3) The violation created a substantial risk of harming the plaintiff or other people (whether or not the risk eventually materialized)³⁰.

4) At the time the violation took place, the defendant acted consciously, i.e. was aware of the acts and circumstances which constituted the wrong against the plaintiff, as well as of the significant risk it imposed on the plaintiff or on other people (precondition 3 above)³¹.

5) In addition to precondition 4, the defendant was aware, when committing the wrong, of the legal significance of his misconduct, i.e., was aware that his conduct fulfills preconditions 1 & 2 above.

²⁹ Punitive damages have not traditionally been allowed in purely contractual actions. However, this rule has never been without exceptions, which have significantly expanded over the years. This has happened especially in the United States and in Canada. I offer a systematic survey of the availability of punitive damages in contract actions in England, Canada and the U.S. in Yehuda Adar, *The Punitive Award as A Sanction in Contract* 43-82 (LL.D dissertation, Hebrew University of Jerusalem, 2004) (in Hebrew). See also, for Canadian law, Adar, *supra* note 12.

³⁰ In most jurisdictions (though admittedly not all), proof of actual compensable loss is not a precondition for the award of punitive damages. See e.g. Rest. Torts, s. 908: «Punitive damages are today awarded when there is substantial harm and when there is none [...] it is not essential to the recovery of punitive damages that the plaintiff should have suffered any harm, either pecuniary or physical». When no actual harm to the plaintiff is proven the award will, however, most often be accompanied by a symbolic award of nominal damages, to represent the violation of the plaintiff's right.

³¹ Admittedly, a number of jurisdictions regard «gross negligence» as sufficiently serious misconduct to justify an award of punitive damages. However, in practice this term is interpreted so as to indicate negligence which is so high in degree, that it inevitably implies an attitude of conscious disregard for the rights of others who may be affected by it. See e.g. *Bailey v. Graves* 411 Mich. 510, 513 (1980), where it was explained that gross negligence in the context of punitive damages is «negligence so great as to indicate a reckless disregard of the rights or safety of others». The same rule applies in Canada. See e.g. *Jackson v. Canadian Pacific Ry. V.* (1915) 24 D.L.R. 380, 387 (Alta. S.C. App. Div.): «In [...] [actions based on] negligence [...] punitive damages cannot be recovered unless there was such entire want of care as to raise a presumption that the defendant was conscious of the probable consequences of his carelessness and was indifferent, or worse, to the danger of the injury to other persons»; K.D. Cooper-Stephenson, *Personal Injury Damages*, 963 (Toronto, 1981): «There must be [...] at least, a conscious wrongdoing».

The importance of these cumulative preconditions cannot be overstated: Together they provide a threshold below which no person should be exposed to the risk of being punished by an award of punitive damages. That threshold combines a very «bad act», i.e., an act which is both harmful (condition 3) and unlawful (conditions 1 & 2) together with a very «bad mind», i.e., a clear awareness of both the harmfulness and the unlawfulness of the act (conditions 4 & 5)³².

However, as mentioned earlier, even the combination of these five preconditions does not necessarily justify an award of punitive damages unless the unequivocal impression of the jury is that overall the defendant's behavior can properly be defined as «outrageous», «reprehensible» or the like. This latter test seems to act as an additional filtering device. It enables the court to take into account any mitigating circumstances³³, as well as any aggravating circumstances³⁴, so as to make sure that punitive damages are only imposed for «extreme departures from reasonable standards of conduct»³⁵.

C. Why punish? The deontological perspective

1. Preliminary observations

Having clarified the nature of the conduct which might trigger an award of punitive damages, we can now proceed to consider on the strength of the two most predominant justifications for subjecting defendants to punitive damages, namely: Retribution and Deterrence³⁶.

³² «The activity [deserving punitive damages] [...] however it is phrased, requires an intersection of two factors: a bad act and a bad state of mind». *Linscott v. Rainier Nat'l Life Ins. Co.*, 606 P.2d 958, 962 (S.C. Idaho, 1980).

³³ *E.g.*: the defendant acted under pressure; reacted to a preceding improper act of the plaintiff; or expressed true regret following the violation.

³⁴ *E.g.*: repetition of the same or similar conduct, or the acting with full intention to harm the plaintiff (which is not a precondition for an award of punitive damages!).

³⁵ *Linscott*, *supra* note 32, at 962. For a similar formulation in Canada see *Vorvis v. Insurance Corp. of British Columbia* (1989) 58 D.L.R. (4th) 193, 208 (S.C.C.): «[T]he conduct must be extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment». Arguably, this filtering device fulfills an important role not only in terms of fairness towards potential punitive damages defendants, but also in terms of efficiency, in the sense that when the defendant's intentional tort is not sufficiently serious, there is no economic justification for investing in the punitive damage litigation. For support see David G. Owen, *The Moral Foundations of Punitive Damages*, 40 Ala. L. Rev. 705, 730 (1989): «The extreme departure concept [...] precludes punishment for deliberate, but petty, wrongdoing, for which punishment is too expensive».

³⁶ Another interesting and arguably important justification, which will not be discussed here, is that of education. Under this rationale, the true aim of punishment, and of punitive

In assessing the arguments from retribution and deterrence, one must recall that under the taxonomy I propose, these rationales are, to begin with, only partial justifications for the doctrine. That is, they only serve to explain and justify one feature of the doctrine, namely, the imposition of a punitive monetary sanction on the defendant. They are not, in this context, aimed at explaining or justifying the two other features of punitive damages, namely, that they are imposed in a civil trial and paid to the victim rather than to the State. Nonetheless, as we shall see, the goals of retribution and deterrence may have some relevance, though less obvious and direct, to the resolution of these last two problems as well³⁷.

A further preliminary observation goes to terminology. It is noteworthy that while the term «punishment» had traditionally been employed to denote the retributive rationale of punitive damages³⁸, it is widely recognized today that a clear distinction must be kept between punishment in the wide sense (i.e., the institution of punishment) and «punishment» in the narrow sense, i.e., retribution as a specific justification for the general institution of punishment³⁹. As has been widely recognized in the criminal law literature, the same term must not be used to denote both the practice of punishment itself (i.e., the intentional infliction of suffering on offenders) and the possible justifications for that practice (retribution, deterrence, rehabilitation, etc.). We therefore propose to substitute the term «retribution» for «punish-

damages in particular, is not retribution or deterrence (understood as an external means to discourage wrongdoing) but rather the sending of an educational message to wrongdoers, victims, and the public at large. The education theory of punishment developed mainly in the criminal law literature. One of the first supports of the theory was A.C. Ewing, *The Morality of Punishment* (1929, rev. ed., 1970, Monclair, N.J.), ch. 4 («Punishment as a Moral Education»). See also W.H. Moberly, *The Ethics of Punishment*, 80 (London, 1881, rep. 1968): «[P]unishment works, not only by way of threat, but also as an instrument of moral education». For more recent discussion see, e.g.: P.D. Carrington, *The Moral Quality of the Criminal Law*, 54 *Nw. U. L. Rev.* (1959) 575; Jean Hampton, *The Moral Education Theory of Punishment*, 13 *Phil. & Pub. Affairs* 208 (1984). In the punitive damages literature and case law education is rarely proposed as a justification for punitive damages, although it is sometimes implied when courts mention that punitive damages are intended to denounce or condemn. See e.g. Whiten, *supra* note 12, at para. 43. «the three objectives [of punitive damages] should perhaps better be referred to as retribution, deterrence and denunciation». For a relatively rare recognition of the educational role of punitive damages see e.g. David F. Partlett, *Punitive Damages: Legal Hot Zones*, 56 *Louisiana L. Rev.* 781, 804 (1996): «[Money payment] does service by way of reprobation. [...] [T]he punitive award asserts the values of society in bringing home to the wrongdoer correct values. To levy punitive damages is to educate in the coin of commerce».

³⁷ See esp. the discussion *infra*, text to notes 103-110, of the advantages of civil punishment over criminal punishment.

³⁸ See e.g. *supra*, note 26.

³⁹ For support see, e.g. Owen, *supra* note 35, at 705, fn. 1.

ment», whenever these terms are used to connote the rationales for awarding punitive damages.

2. *Punitive damages as retribution*

Under the retributive theory, punishment can only be justified if it is a reaction to a morally blameworthy act of the person subject to punishment. Hence, it cannot be justified by reference to any consequentialist idea (e.g.: prevention of further wrongdoing, education or rehabilitation of offenders, economic efficiency, etc.). Rather, the only legitimate goal of punishment is to respond in a morally appropriate manner to the immoral act of the offender. By making the offender suffer hard treatment, the act of punishment presumably annuls the offence, as it demonstrates its moral evil, as well as its lack of sense from the standpoint of the offender himself⁴⁰.

Surprisingly enough, and notwithstanding its status as the most predominant justification courts have offered for awarding punitive damages, the retributive justification is rarely fully developed in the punitive damages literature⁴¹. However, the retributive case for punitive damages is fairly simple and intuitive, and may be briefly summarized as follows. Certain forms of wrongdoing, including those captured under the criteria for awarding punitive damages, are not only injurious and dangerous to potential victims, but also inherently reprehensible, as they reflect a clear denial («reckless dis-

⁴⁰ For a succinct formulation of this Kantian idea see e.g. Arthur Ripstein, *Equality, Responsibility and the Law*, 140 (Cambridge, 1998): «[Retributive] Punishment is a response to crime [...] [it] serves to vindicate public standards [...] It seeks to cancel the crime by canceling its apparent advantage from the point of view from which the criminal acted». For the original Hegelian version of the argument see Georg Friedrich Hegel, *Philosophy of Right* (1821) (Oxford, 1952, Trans. by Knox), at p. 70: «The injury [the penalty] which falls on the criminal is [...] an embodiment of his freedom, his right [...]; [...] [H]is action [...] implies that it is something universal and that by doing it the criminal has laid down a law which he has explicitly recognized [...] and under which in consequence he should be brought [...] [by the act of punishment]».

⁴¹ Serious considerations of the retributive case for punitive damages have been sparse. Even those few sometimes neglect the very basic question of why punitive damages are deserved, turning instead to examine the question of how, under retribution theory, one can explain the participation of the victim in the process of punishing the defendant. See, e.g. Bruce Chapman and Michael Trebilcock, *Punitive Damages: Divergence in Search of A Rationale*, 40 *Ala. L. Rev.* 741, 779-798 (1989) (offering two arguments in favor of victim involvement). For a rare and important contribution to the retributive analysis of punitive damages see Owen, *supra* note 35, at 708-713 (analyzing punitive damages in terms of infringement of freedom and retributive punishment). A raw version of this argument was first presented by the same author in a previous article. See Owen, *supra* note 25, at 109-111.

regard») of the protected interests of other citizens, including the plaintiff. When the law is faced with such conduct, which one author has described as a form of «theft»⁴², subjecting the wrongdoer only to the traditional remedies (i.e. compensatory damages, injunctions, and in certain cases restitution of unjust enrichment) may not represent a sufficiently strong retributive response. The need for an additional retributive sanction is especially felt whenever a serious wrong has resulted in a financial benefit to the wrongdoer which is larger than the sum of compensation to which the plaintiff is entitled. In such cases the wrongdoer will perceive no impairment even if forced to pay full compensatory damages. The wrongful conduct will thus remain beneficial from the viewpoint of the actor, and the principle of retributive punishment – violated.

By imposing on the offender an additional (extra-compensatory) monetary sanction, punitive damages are intended to strip the wrongdoer of any benefit he might have derived from his blameworthy conduct. Furthermore, they ensure that the wrongdoer recognizes a loss, which he (and others) can attribute to his own misconduct. This way the evilness and irrationality of disregarding the rights of other people is demonstrated. In addition, the normative equality between the tortfeasor and the victim, which the former denied, is restored and vindicated⁴³.

3. *Main objections*

A full consideration of the retributive case for punitive damages is not possible within the ambit of the current article. Nonetheless, a few major objections to the retributive theory of punitive damages must be briefly mentioned. While the first two are intimately linked to the retributive theory itself, the other three raise fairness concerns which may be relevant to any moral theory of punishment.

First, as already mentioned, it has been argued that the vague standards under which the availability of punitive damages is determined might lead to the imposition of punitive damages on defendants whose conduct, although unlawful, does not justify punishment⁴⁴. Such a result runs counter to what

⁴² Owen, *supra* note 25, at 110; Owen, *supra* note 35, at 709-710.

⁴³ See, along the same line of thought, Owen *supra* note 35, at 711: «When one person intentionally violates the rights [...] of another he «steals» the victim's autonomy, manifesting the idea that the thief is more worthy than the victim [...] punishment serves to restore the equality of the victim in relation to the thief by diminishing the worth and freedom of the thief».

⁴⁴ See e.g. Ellis, *supra* note 25, at 22-23 (arguing that the «reckless conduct» criterion may lead to the punishment of negligent wrongdoers).

may be called the «fault principle», under which only sufficiently blameworthy conduct may justify retributive punishment⁴⁵.

Second, a powerful critique of punitive damages regards them as inconsistent with the principle of proportionality, which forms an integral part of the retributive theory⁴⁶. Since the size of the punitive damage award is subject to the wide discretion of the jury, and is not prescribed by statute, the imposition of punitive damages might often reflect an exaggerated and thus undeserved punishment⁴⁷. Indeed, in the famous case of *B.M.W. v. Gore*⁴⁸, the United States Supreme Court ruled that an award of two million dollars was largely exaggerated in terms of just deserts, and thus violated the eighth amendment prohibition on «excessive fines»⁴⁹. The Court ruled that proportionality must be kept between the size of the punitive award on the one hand, and, on the other, the three following factors: 1) the gravity of the defendant's fault; 2) the size of the compensatory award; and 3) the size of statutory fines (either criminal or civil) which prohibit the same kind of conduct for which the defendant was punished (or similar conduct)⁵⁰.

Third, and in close connection to the proportionality objection, it has been suggested that whenever punitive damages are awarded for conduct which amounts to a criminal offence, there is always the concern that the defendant will be punished twice for the same conduct. This, in turn, will violate the constitutional ban against double punishment and double jeopardy, as well as other procedural guarantees (e.g., proof beyond reasonable doubt, right against self-incrimination, right to remain silent, right of inspection, etc.) which are essential for the moral legitimacy of any form of state punishment⁵¹.

⁴⁵ In Germany, the fault principle («*Schuld Prinzip*») is a fundamental principle in the theory of criminal responsibility, and is considered a constitutional value. See e.g. Mordechai Kremnitzer and Khalid Ghanayim, *Book Review: of Hans-Heinrich Jescheck & Thomas Wigend Lehrbuch des Strafrechts Allgemeiner Teil [The General Part of the Criminal Law]* 34 *Isr. L. Rev.* 302, 306-309 (2000).

⁴⁶ For a classical presentation of the principle of proportionality and its justifications see e.g. A. von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 *Crime & Justice* 55 (1992).

⁴⁷ For this critique see e.g. M. Brandwen, *Punitive-Exemplary Damages in Labor Relations Litigation*, 29 *Un. Chic. L. Rev.* 460, 466-468 (1962): «At best, such [punitive damages] awards generally are haphazard. [...] [S]uch awards may reflect excesses and injustice rather than reasonable admonition [...] Twelve men, deliberating secretly, have the vast power of fixing dollar punishment, which in criminal law is left to legislatures and judges». See also J.B. Sales and K.B. Cole, *Punitive Damages: A Relic That Has Outlived it's Origins*, 37 *Vand. L. Rev.* 1117, 1159 (1984).

⁴⁸ *Supra* note 22.

⁴⁹ For discussion see e.g. B.J. McKee, *The Implications of BMW v. Gore for Future Punitive Damages Litigation: Observations from a Participant*, 48 *Ala. L. Rev.* 175 (1996).

⁵⁰ *B.M.W.*, *supra* note 22, at 574-585.

⁵¹ See discussion *infra*, part V.c.

Finally, similar yet slightly different from the first objection mentioned is the claim that punitive damages violate the «fair warning principle», i.e., the moral principle that no one should be punished unless given a proper warning in advance. If, as argued, the standards determining the availability of punitive damages are indeed vague, this principle is violated whenever punitive damages are awarded⁵². Similarly but again not identically, it has been argued that the principle of legality is also infringed, since all punitive sanctions must be authorized by statute (*nulla poena sine lege*)⁵³.

In sum, opponents of punitive damages regard them as offensive to established moral principles which govern State punishment in most liberal states. Under this view, even if punitive damages targeted only sufficiently blameworthy defendants, the punitive method the doctrine employs makes it an unfair form of state punishment.

4. Feasible lines of defense

Although no attempt will be made here to fully address the serious fairness concerns outlined above, a few contra-arguments must be mentioned, before moving on to examine the deterrence rationale for punitive damages.

To begin with, the fear of imposing retributive punishment on insufficiently blameworthy defendants seems largely exaggerated. Indeed, any flexible legal standard can be abused or ignored. However, if juries and courts are considered competent to determine guilt in criminal trials (and to review such determinations on appeal) using vague standards such as malice, unlawfulness, reasonableness, etc., it seems equally reasonable to assume that they are also able to apply the standards under which liability for punitive damages is determined.

⁵² The view that punitive damages contradict the due process principle and thus the 14th amendment of the American Constitution was upheld in the Supreme Court by the minority opinion (but rejected by the majority) in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Writing for the minority, Justice O'Connor said: «The state [of Alabama] offers no principled basis for distinguishing those tortfeasors who should be liable for punitive damages from those who should not [...]; As is typical, the trial court's instructions in this case provided no meaningful standards to guide the jury's decision to impose punitive damages or to fix the amount. Accordingly, these instructions were void for vagueness» *Id.*, at 46, 43 (O'Connor J. dissenting). For academic support see e.g. T.A. Ford, *The Constitutionality of Punitive Damages in The Case Against Punitive Damages* 15, 21 (Milwaukee, Hirsh and Poulos ed., 1969): «The Punitive damages doctrine violates the fundamental principle of due process [...] which require all criminal conduct and sanctions to be clearly defined and described».

⁵³ See e.g. in this volume Koziol, *infra* at 343.

Furthermore, if my observations regarding the nature of the conduct punishable under the doctrine are correct, namely, that the liability to pay punitive damage depends on a number of preconditions which can be clearly defined, there seems no reason to fear that defendants will be punished for violations committed without full awareness⁵⁴. For essentially the same reason, I believe that the fair warning critique is unconvincing. If punitive damages may be awarded only against people who knowingly, and without any reasonable legal or moral excuse choose to violate the right of others, than a defendant's claim that he or she are being punished for violating a prohibition of which they did not and could not have known, seems very frail. Any citizen must be taken to know that there is a general duty not to infringe the rights of others. A citizen must also be taken to know that if he consciously chooses to breach this duty, he might be subject to a severe legal sanction. Indeed, it is exactly the role of the doctrine of punitive damages to make this point unequivocally clear.

All the same, given that in modern times the principle of *nulla poena sine lege* has gained a universal status, and taking into account the vagueness of some of the judicial formulae mentioned earlier, any initiative to provide a more solid statutory basis for the doctrine of punitive damages seems to me not only welcome and useful, but indeed indispensable from a liberal point of view.

The concern for excessive punishment seems to me also largely exaggerated. It is true that under the doctrine of punitive damages there are no strict caps on the size of punitive damage awards, which means that from time to time juries (and courts) may levy punitive awards that are excessive from a retributive point of view. However, jury awards are always subject

⁵⁴ Indeed, while appeal courts seem to frequently interfere with jury determinations of the extent of punitive liability, they rarely interfere with jury determination of liability itself. Extensive and relatively consistent empirical findings show that punitive damages in the United States are awarded in a relatively small percentage of litigated cases (around 6%), a percentage which seems to be consistent with the requirement of an extreme departure from any standard of reasonable conduct. I leave aside the difficult question of corporate vicarious liability for punitive damages. At least from a retributive point of view, such liability must depend on proof of either a personal fault of an organ of the corporation or an authorization of the punishable conduct of an employee. This is indeed the law in most American jurisdictions. See e.g. *Albuquerque Concrete Coring Co. v. Pan Am. World Serv. Inc.* 879 P.2d 772, 775 (N.M. S.Ct, 1994): «It is a well established rule [...] that a principal may be held liable for punitive damages when the principal has in some way authorized, ratified, or participated in the wanton, oppressive, malicious, fraudulent, or criminal acts of its agent». The academic field is here rich. See e.g. Note, *The Assessment of Punitive Damages Against An Entrepreneur for the Malicious Torts of His Employees*, 70 *Yale L.J.* 1296 (1961); R.B. Grave, *Bad Faith Denial of Insurance Claims: Whose Faith, Whose Punishment? An Examination of Punitive Damages and Vicarious Liability*, 65 *Tul. L. Rev.* 395 (1990).

to review on appeal, and appellate review is capable of affecting the practice of lower courts. Furthermore, empirical work has shown that the number of huge punitive damage awards is much smaller than one could expect given the media coverage of these cases, and that the widespread belief that punitive damages in the United States are «out of control» is largely a myth⁵⁵. Finally, it should be noted that although punitive damages were traditionally awarded by juries, this feature of the doctrine is not necessarily indispensable for the realization of the goals of punitive damages. Indeed, a number of states have adopted a regime under which only a judge is authorized to decide whether or not to award punitive damages and to determine their extent. If the problem is the uncontrolled and unguided discretion of the jury, this is a difficulty that can be remedied through an appropriate law reform⁵⁶.

Finally, I believe that the last two fairness concerns mentioned in the previous section do indeed present a challenge to any advocate of punitive damages. However, since meeting this challenge requires an examination of the special interrelationship between criminal and civil law, these objections will be discussed in conjunction with the problem of civil punishment⁵⁷.

D. Why punish? The consequentialist perspective

1. *Scope of the analysis*

Deterrence, by its very definition, is a consequentialist idea. As such, it finds its justification not in theories of justice, most of which are backward look-

⁵⁵ See e.g.: S. Daniels and J. Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1 (1990) (showing that huge punitive damage verdict are the exception rather than the rule, the size of the median sum awarded being close to a half of the median compensatory damage award). This conclusion was largely supported by later empirical studies. See e.g. T. Koenig, *The Shadow Effect of Punitive Damages on Settlements* vol. 1998 Wis. L. Rev. 169, 20: «Punitive damages verdicts, especially the largest awards, are frequently reduced or eliminated post-trial. Plaintiffs may settle for less than their award because of their justified fear of appellate review»; T. Eisenberg, N. LaFountain, B. Ostrom, D. Rottman and M.T. Wells, *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 Cornell L. Rev. 743 (2002). For a series of empirical works in this field see C. Sunstein, R. Hastie, J.W. Payne, W.K. Viscusi, *Punitive Damages - How Juries Decide* (Chicago, 2002).

⁵⁶ This is the law in most commonwealth jurisdictions, as well as small number of American states. For an analysis of this problem see L.M. Sharkey, *Judge or Jury: Who Should Assess Punitive Damages?* 64 U. Cin. L. Rev. (1996) 1089; A.H. Scheiner, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 Colum. L.Rev. (1991) 142.

⁵⁷ See *infra* part V.

ing, but in its effect on the future state of affairs which it can bring about⁵⁸. A deterrence theory of punitive damages must seek to provide an answer to at least two questions. First, what moral or social good is served by the deterrent effect of punitive damages? Second, how, if at all, do the concrete rules governing the award of punitive damages promote that goal, i.e., how efficiently do they deter?

The following discussion does not purport to offer a detailed examination of these two questions. Rather, the aim is to present the rudimentary case for punitive damages in terms of deterrence, to outline the main objections to this basic argument, and to propose certain lines of defense against these common criticisms. However, first we must add a brief note on the meaning of deterrence.

2. *Two kinds of deterrence*

At the outset, it is necessary to distinguish between two types of deterrence, which are often confounded in the punitive damages literature. The first type, which is the one presupposed by the mainstream economic analysis of punitive damages, may be called «internalizing deterrence». The presumption here is that the aim of punitive damages is – or should be – to make wrongdoers internalize, that is perceive and take into account, the full social costs of their behavior. In this respect punitive damages do not differ essentially from compensatory damages or even from criminal fines. Rather, they aim to correct certain deficiencies in the ordinary regime of compensation, whenever there is a fear of under-enforcement⁵⁹.

Thus, under the conventional economic analysis of punitive damages, if a wrongdoer is brought to justice only once every four times he injures a victim, then full compensatory damages in a particular case will leave 75% of the loss uncompensated. However, if the court takes into account this deficiency and orders the defendant to pay four times the amount of compensatory damages, the latter is forced to internalize the full social cost of his acts, and other (rational and informed) potential injurers will take this into account.

⁵⁸ For consequentialism in general see, e.g.: *Consequentialism and Its Critics* (Samuel Scheffler ed., 1988); *Consequentialism* (Stephen Darwall ed., 2003); Julia Driver, *Consequentialism* (2009). For an attempt to incorporate deontological constraints into the economic analysis of law see Eyal Zamir and Barak Medina, *Law, Morality and Economics: Incorporating Moral Constraints into Economic Analysis*, 96 Cal. L. Rev. 323 (2008).

⁵⁹ See *supra* note 18 and text.

Elegant and simple as it may seem, this interpretation of the role of punitive damages has nothing to do with the traditional concept of deterrence as used by courts and juries in real life cases. Under the doctrine of punitive damages, not every injurious act, nor even every wrongful act is subject to punitive damages but only the most outrageous or reprehensible forms of wrongdoing, i.e., those which reflect a reckless disregard of another citizen's protected interests. More importantly, as the practice and rhetoric of the courts clearly demonstrate, the purpose of the award is not to force the defendant to internalize any concrete tangible loss he may have caused (or may cause in the future) to other victims. Indeed, no attempt is usually made to prove or estimate the extent of those actual or potential losses. Rather, the award aims to deter, i.e., to *completely discourage* the punitive damages defendant – and others like him – from ever repeating the same objectionable conduct. In other words, *the deterrence which punitive damages seek to achieve aims to eradicate or eliminate specific patterns of behavior*. It is not the optimal deterrence of the sort that legal economist often have in mind when analyzing the deterrent effect of legal rules.

To conclude, the deterrent effect of punitive damages, if ever it exists, lies not in their ability to make sure that injurers internalize the full costs of their legitimate actions before they act, but in their alleged ability to make certain injurers realize that certain actions are illegitimate and as such the law will simply not tolerate them. This intolerance is demonstrated by imposing on the defendant a monetary sanction which will make sure that he derives no profit from his wrongdoing⁶⁰.

3. *Punitive damages as deterrence*

The traditional presumption of the cases in which punitive damages were awarded has always been that such awards serve to deter undesirable conduct. This, however, presupposes a positive answer to two preliminary questions, which were rarely addressed in the earlier sources. First, what good goal is to be served by preventing people from acting in what is perceived by the courts as a morally reprehensible manner? Second, assuming that such a need does exist, why are the traditional civil remedies, in particular compensatory damages, insufficient as a means to achieve such deterrence?

⁶⁰ For an illuminating critique of the conventional economic analysis of punitive damages, which supports our distinction between the two kinds of deterrence see Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 Georgetown. L.J. 421 (1998).

The first of these two questions is rarely discussed in the punitive damages literature. In my view this void supports the inference that the judicial theory of punitive damages as deterrence is not a utilitarian but rather a non-utilitarian, moral theory. Under a utilitarian concept, it is not at all obvious that a morally reprehensible act should be discouraged. This must depend on a cost-benefit analysis of its overall effects on the welfare of the perpetrator on the one hand, and on that of his victims on the other hand. Indeed, the standard economic theory of punitive damages regards the reprehensibility requirement as being at odds with the goal of economic efficiency⁶¹.

In this article I will not examine the possible justifications for punitive damages in terms of a utilitarian moral theory⁶². The following analysis will be based on the traditional presumption that the conduct punishable under the doctrine is never socially or morally desirable and as such should, at least ideally, absolutely be discouraged.

Accepting this premise, it is not difficult to concede that imposing a monetary sanction for reprehensible violations of private rights will increase the cost of such wrongdoing compared to an alternative legal regime in which wrongdoers are faced only with the threat of having to pay compensatory damages (or even restitution gain-based damages, if available).

And yet the question which must still be answered is this: Why – and under which circumstances – is the award of compensatory damages insufficient to deter reprehensible violations of private rights? Quite surprisingly, this question has not been directly addressed in the early case law and literature on punitive damages, probably due to the relatively late stage at which the notion that compensatory damages also deter has become prominent in legal thought⁶³.

In any event, the answer to the question seems to me fairly straightforward and *prima facie* convincing: In many cases, and for many reasons, the threat of having to pay compensatory damages *ex post* will not create a sufficiently strong incentive to refrain from violating another person's rights *ex ante*. This problem – which is due to various factors including the phenomena of under-compensation, under-enforcement and insurance – is especially acute in punitive damage cases. Here, *ex hypothesis*, the defendant acts deliberately, that is, with full notice of the factual and legal significance

⁶¹ See e.g. Polinsky and Shavell, *supra* note 18, at 905-910.

⁶² Elsewhere I have undertaken such an endeavor. See Adar, *supra* note 29, at 147-179.

⁶³ Gary Schwartz has criticized this judicial void: «[T]hose opinions [mentioning the deterrent effect of punitive damages as their justification] are rendered almost useless by their obliviousness to the basic point that ordinary civil damages – in the course of providing compensation – concurrently function to deter». Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. Cal. L. Rev. 133, 137 (1986).

of his acts. Such a wrongdoer will typically take into account the overall benefits to be derived from the wrongful act and will weigh them against the magnitude of the risk of being exposed to legal sanction. In such cases the threat of having to pay compensatory damages (or even disgorgement damages) may not be sufficiently high to discourage the conscious wrongdoer from acting. In order to convey to potential wrongdoers the message that conduct of this sort is not worthwhile and to make this message reliable, an extra-compensatory remedy (or even an extra-restitutionary remedy) is often required⁶⁴.

4. *Main objections*

Being strongly intuitive and in line with parallel theories of criminal punishment, the deterrence rationale for punitive damages is rarely challenged in the literature. However, to round out the picture, two of the most common

⁶⁴ This line of reasoning has gained wide support from both courts and academia. See e.g. Morris, *supra* note 15, at 1185: «[W]hile “compensatory” damages provide a financial smart for a defendant who has not gained anything by his wrong, they may merely result in the payment of a bargain sale price for an advantage when the defendant has acted to further his own interests»; Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 522 (1957): «The need for deterrence is particularly obvious in those torts, such as conversion, which involve wrongful gains to the defendant, since compensatory damages will at most restore the wrongdoer to the status quo ante and may even leave him with a profit». Noteworthy is the fact that under English law one of the only two general categories under which a court may award punitive damages consists of cases where «the defendant’s conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff [...] it is necessary to teach a wrongdoer that tort does not pay». *Rooks v. Barnard*, *supra* note 9, 1226-1227. This logic has guided the California Supreme Court in the famous case of *Grimshaw v. Ford Motor Co.* 174 Cal. Rptr. 348 (1981), where the punitive damage award (in the amount of 125 million dollars) was assessed taking into account the net profits gained by the defendant corporation from failing to correct a safety defect in the oil tanks of the cars it produced and marketed (thus risking the lives of its customers). The Alabama Supreme Court went even further, making it clear that «If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss». *Green Oil Co. v. Hornsby* 539 So. 2d. 218, 223 (Ala. 1989) affirmed in *Pacific v. Haslip*, *supra* note 52, at 22. See also in Canada: «A traditional function of punitive damages is to ensure that the defendant does not treat compensatory damages merely as a license to get its way irrespective of the legal or other rights of the plaintiff». *Whiten v. Pilot Insurance Co.*, *supra* note 12, at para. 124. Interestingly, the notion that compensatory damages are not sufficient for the sake of deterring intentional wrongdoers seems to have appealed to Plato, who said: «[O]ur cure for injustice proceeds in [...] making it so that whatever injustice, great or small, someone might commit, the law will teach and compel him in every way [...] never again to dare voluntarily to do such a thing [...]; this is *in addition to paying compensation for the injury*». Plato, *The Laws*, book IX, s. 862c-d (N.Y., 1980, Trans. by Pangle).

arguments raised by opponents of punitive damages in this context will be briefly mentioned.

First, a few authors have questioned the assumption that punitive damages have a significant deterrent effect. Initially, the common basis for this objection was that there is no reliable evidence of the alleged deterrent effect of the remedy⁶⁵. More recently, however, this general statement seems to have been abandoned in favor of a more restricted claim, namely, that punitive damages are unable to deter corporate conduct, *inter alia* because the cost of paying them is absorbed not by the real offenders (management, employees) but rather by the stakeholders⁶⁶.

According to a different – and *prima facie* more convincing argument – punitive damages cannot deter efficiently, since they depend on the accrual of a private law cause of action, which in turn requires that the plaintiff suffer actual loss. Therefore, they cannot deter in cases where a defendant's conduct, though deserving of punishment, did not result in any compensable loss to the plaintiff⁶⁷.

Last, but not least, the most common criticism voiced against the deterrent effect of punitive damages is that this effect is too strong, that is, it leads to over-deterrence. This is so, the argument goes, because the fear of unlimited extra-compensatory damages has a chilling effect on entrepreneurs which discourages them from taking legitimate risks, thus resulting in a net loss to society⁶⁸.

⁶⁵ See e.g. J.D. Ghiardi, *Should Punitive Damages Be Abolished? An Answer for the Affirmative* in Insurance, Negligence and Compensation Law 282, 288 (Chicago, 1966): «[This] [deterrence] rationalization is strictly in the realm of fiction. Few persons, if any, have any knowledge and understanding of what punitive damages are [...] [T]he vague public policy [...] [of deterrence] is not supported by any empirical facts»; Brandwen, *supra* note 46, at 465: «Despite the repeated ritualistic invocation of the term “deterrence”, there is little reliable evidence to establish that punitive-exemplary damages do, in fact, deter»; Sales and Cole, *supra* note 47, at 1161-1164 (same). These suspicions have at times gained judicial support. See e.g. *Sinclair Oil Corp. v. Columbia Casualty Co.* 682 P2d 975, 981 (Wyo. 1984): «The notion that the specter of punitive damages serves as a warning and deterrent is pure speculation. It has never been demonstrated».

⁶⁶ E.D. Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 Ala. L. Rev. 1053, 1061 (1989): «Does anyone believe that there is less corporate misbehavior around today than in the past as a result of the increase in punitive damages?». For an empirical work partially supporting this claim see W.K. Viscusi, *The Social Costs of Punitive Damages against Corporations in Environmental and Safety Torts*, 87 Georgetown L.J. 285 (1998).

⁶⁷ Koziol, *infra* in this volume at 340.

⁶⁸ For basic formulations of the over-deterrence argument see e.g. Ellis, *supra* note 25, at 46-50; Sales and Cole, *supra* note 47, at 1154-1158. See also D.D. Ellis, *Punitive Damages, Due Process, and the Jury*, 40 Ala. L. Rev. 975, 988 (1989): «uncertainty as to potential liability induces overinvestment in liability avoidance, or worse, suppresses innovations». The argument

5. Feasible lines of defense

With no intention to exhaust the discussion, I would like to offer a few contra-arguments which may be made in response to the objections presented. The argument that punitive damages do not deter seems counter intuitive, and has not been empirically proven⁶⁹. On the contrary, empirical work has shown that at least in the field of corporate conduct, the threat of punitive damages has a significant impact on management, mainly because punitive damage verdicts may severely harm the reputation of a company and, as a consequence, reduce its value and profitability⁷⁰.

The argument that punitive damages are inconsistent with the goal of deterrence because they depend on proof of actual loss is also only partially convincing. First, as noted earlier, in most jurisdictions an award of compensatory damages is not a precondition for an award of punitive damages⁷¹. Second, even where such a limitation does apply or when absent loss there is no infringement (e.g., when the cause of action is an alleged tort of negligence), potential wrongdoers will still take into account the threat of punitive damages, for they can never be sure that the risk created by their unlawful conduct will not materialize. Furthermore, if punitive damages are targeted only at dangerous patterns of conduct which impose unreasonable risks on people, as I believe is the case⁷², it is most likely that such conduct will result in a tangible loss (either pecuniary or emotional) to at least one of the defendant's potential victims.

Finally, the common concern over the counterproductive chilling effect of punitive damages seems largely exaggerated, and in any event is not an insoluble problem. As pointed out above, punitive damages can only be awarded against defendants who recklessly disregard the rights of their fellow citizens, that is, only against people (or entities) acting with full aware-

has gained judicial support: «The threat of such enormous awards has a detrimental effect on the research and development of new products». *Browning-Ferris, Indus., Inc. v. Kelco Disposal Inc.* 492 U.S. 257, 282 (1989) (O'Connor J. dissenting); see also *Smith v. Wade* 461 U.S. 30, 59 (1983): «the alleged deterrence achieved by punitive damages awards is likely outweighed by the costs – such as the encouragement of unnecessary litigation and the chilling of desirable conduct [...] at least when the standards on which the awards are based are ill-defined».

⁶⁹ M. Wells, *Comments on Why Punitive Damages Don't Deter Corporate Misconduct*, 40 Ala. L. Rev. 1073 (1989). See also David Luban, *A Flawed Case against Punitive Damages*, 87 Georgetown L.J. 359 (1998), as well as Eisenberg et al., *supra* note 55, both sharply criticizing the methodology and conclusions of Viscusi, *supra* note 55.

⁷⁰ J.M. Karpoff and J.R. Lott, *On the Determinants and Importance of Punitive Damages Awards*, 42 J. L. & Econ. 528 (1999).

⁷¹ See *supra* note 30 and accompanying text.

⁷² For this precondition see *supra*, text to note 30.

ness that their action is both wrongful and dangerous (to others). This should mean that no action, risky as it may be, can lead to punitive liability, as long as it is committed in good faith, that is, under the belief – even if mistaken – that it is legally permitted⁷³. In any event, the cost of over-deterrence of a small number of actors (who, for example, may be unaware of the restrictive criteria for awarding punitive damages) seems to be outweighed by the benefits to society from discouraging the most reprehensible forms of social interaction⁷⁴.

V. Why civil punishment?

A. Background to the controversy

There is no doubt that this problem has always stood at the heart of the punitive damages debate, and that it represents the most intense battlefield between the opponents of punitive damages and their supporters. Indeed, even if one accepts the idea that conduct manifesting a reckless disregard for the rights of others deserves punishment, one may still wonder – as many courts and commentators have – what could possibly justify the practice of inflicting such punishment within the framework of a civil trial instigated by one private individual against another?

To give the reader an idea of the levels of antagonism that this peculiar feature of punitive damages once aroused within the Anglo-American legal community, it is enough to quote the following lines, taken from a judgment rendered by an influential American judge in 1873, a time by which the doctrine had already established a firm foothold in the vast majority of American states. In this learned and thorough judgment, in which exemplary damages, understood as a form of civil punishment, were abolished in the State of New Hampshire, Justice William Foster, speaking for the Supreme Court, summarized the case against civil punishment in these crushing words:

⁷³ For support see *Greenwood and others v. C-D Inv. Co.* 18 Cal Rptr. 2d. 144 (1993); Prosser and Keeton *On Torts* (St. Paul, 1984, 5th ed, Keeton ed). A further «safety device» is the requirement that the punishable conduct reflect an extreme departure from reasonable standards of ordinary behavior. See *supra*, text to note 35.

⁷⁴ See, in support of this claim, David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1257, 1283, n. 135 (1976): «[T]he gap between “negligent” and “reckless” behavior is probably wide enough to protect the manufacturer who acts in good faith [...] the chilling effect of the standard’s vagueness should not be too great [...] This economic sacrifice, however, should be considerably more than offset by the decrease in excessive injuries prevented by the threat of punitive damages awards».

What is a civil remedy but *reparation* for a wrong inflicted? [...] How could the idea of punishment be deliberately and designedly installed as a doctrine of civil remedies? Is not punishment out of place, irregular, anomalous, exceptional, unjust, unscientific, not to say absurd and ridiculous, when classed among civil remedies? What kind of a civil remedy for the plaintiff is the punishment of the defendant? The idea is wrong. It is a monstrous heresy. It is an unsightly and unhealthy excrescence, deforming the symmetry of the body of the law [...] Where shall be the limit to the confusion and absurdity involved in the attempt to reconcile the doctrine of vindictive and punitive damages, in a civil suit, with the sense, the reason, the logic, the symmetry of the science of jurisprudence?⁷⁵

Underlying this fierce opposition to the idea of civil punishment in general, and of punitive damages in particular, are two distinct lines of argument which, although intimately connected, are theoretically independent and thus deserve separate analysis. The first objection may be called the conceptual objection, and is based on a fundamental premise that punishment is alien to private law and in particular to the idea of civil liability. The other objection highlights the moral problems which inevitably ensue when this theoretically inconsistent amalgam of ideas is implemented in practice.

While arguments of the first type have characterized much of the American debate over punitive damages in the nineteenth century, the twentieth century has witnessed a shift away from of this conceptual discourse toward a more substantive and pragmatic dialogue. The emphasis now is on the fairness concerns, as well as the efficiency aspects, of civil punishment. The conceptual controversy was, however, partly revived in recent decades. In the Anglo-American world, this is manifested in a growing line of scholarly writing which attempts to provide a coherent theory of punitive damages⁷⁶. At about the same time, continental courts and lawyers facing petitions to enforce foreign judgments containing a punitive element, were drawn into a debate over the legitimacy of punitive damages as well as over the role of punishment and deterrence more generally in private law⁷⁷.

In this setting it would be presumptuous to undertake any systematic analysis of this fundamental problem, which had puzzled generations of the

⁷⁵ *Fay v. Parker*, *supra* note 16, at 382, 397, 392 (S.C. 1873) (per Foster J.). Interestingly, the opinion mentions and relies heavily on renown continental scholars, such as Grotius, Pufendorf and Domat.

⁷⁶ See e.g. Benjamin Zipursky, *A Theory of Punitive Damages*, 84 *Texas L. Rev.* 105 (2005); Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 *Iowa L. Rev.* 957 (2007); Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 *Cornell L. Rev.* 239 (2009).

⁷⁷ See sources enlisted *supra* note 1. For a recent collection of essays on the role of deterrence in private law see *La funzione deterrente della responsabilità civile* (Pietro Sirena ed., 2011).

most able scholars and philosophers – and which most likely will continue to do so in the future. Instead, I would like to briefly restate the strongest arguments which have been voiced against the civil punishment carried out by punitive damages, and to suggest some feasible lines of defense against these criticisms.

B. The conceptual perspective

The conceptual case against punitive damages regards the idea of allowing punishment to be implemented within private law as a logical error, which undermines the coherence and integrity of private law in general, and of tort law in particular (punitive damages have been traditionally awarded mainly in tort actions). This objection can be based on two complementary arguments.

First, it is often presumed that the exclusive goal of the law of tort (or even private law more generally) is to compensate for wrongful loss. If that is the case, any civil remedy which obliges a tortfeasor to do anything more than to compensate the victim for his full loss must, by definition, be illegitimate⁷⁸.

Second, it is often claimed that punishment, which for many centuries was inseparable from compensation, has in modern times been intentionally separated from the realm of private law⁷⁹. In the modern liberal State, the infliction of punishment in response to anti-social behavior is not the role of any individual citizen, but rather the exclusive function of the State, acting through its official agents as the representative of the public interest. Private law, on the other hand, is aimed solely at preserving and protecting the private interests of individual people from infringements by other individuals, a goal which – especially under tort law – is carried out primarily through the awarding of compensatory damages for proven loss.

In other words, it is the exclusive function of private law to redress «private wrongs» (i.e., infringements upon private interests), just as it is

⁷⁸ See e.g. Koziol, *infra* in this volume at 340: «According to *continental legal systems* [...] the primary aim [of tort law] is the idea of *compensation* as the claim for damages always requires that the claimant suffered a loss and as damages have to be calculated in correspondence to the *loss* suffered by the victim. [...] If the main aim of tort law is to grant the victim *compensation* for his loss under certain conditions, this indicates therefore that the claim *cannot exceed* the loss» [emphasis in original]. Although the author describes compensation as a «primary» rather than an «exclusive» goal, the claim that a tort victim is entitled to no more than compensation implies that compensation is the *only* legitimate purpose.

⁷⁹ See e.g. Koziol, *infra* in this volume at 339.

the exclusive function of public law (mainly through the criminal law or more recently through administrative law) to protect and redress «public wrongs»⁸⁰. Because retribution and deterrence (or even rehabilitation, when relevant) are perceived, in modern theory, as ideas that are public in their very nature, that is, they are means for redressing public wrongs rather than private wrongs, then the necessary logical conclusion is that punishment cannot assist courts in resolving private law disputes.

Finally, a modern and arguably more sophisticated version of the previous two objections, emphasizes not so much the distinct social purposes of public and private law (or of tort law in particular), but rather the analytical inconsistency of the concept of punishment (either for retribution or for deterrence) with the formal structure of civil liability. Under this view, the single most distinctive feature of civil liability has always been that of correlativity, that is, the demand for complete correlation between the rationale for subjecting a defendant to the legal sanction imposed on him if found liable towards the plaintiff, and the rationale for granting the plaintiff a legal remedy for the same violation⁸¹. In short, any liability imposed on a defendant must be a liability towards the claimant and therefore, as a corollary, any sanction imposed on the former must be awarded to the latter. Since punishment (understood as retribution or deterrence) responds not to any individual infringement but rather to the anti-social nature of the defendant's conduct, it cannot constitute a remedial right of the private plaintiff which he holds as against the defendant. Any imposition of punishment within a civil trial therefore inevitably disrupts the correlativity between sanction and remedy, which lies at the heart of private law adjudication⁸².

⁸⁰ In the common law, this idea is traced back to Blackstone: «Wrongs are divisible into two sorts or species; *private wrongs*, and *public wrongs*. The former are an infringement or privation of the private or civil rights belonging to individuals [...] the latter are a breach and violation of public rights and duties, which affect the whole community». W. Blackstone, *Commentaries on the Laws of England* (Oxford, 1768, rep. London, 1966) Book III (Of Private Wrongs) p. 2.

⁸¹ The idea of correlativity was developed and emphasized by Ernest Weinrib, who perceives it as a cornerstone in his theory of corrective justice. See e.g. Ernest J. Weinrib, *Tort Law: Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 *Theoretical Inq. L.* 107, 129 (2001). The same idea has been emphasized by continental scholars such as Bydlinski and Canaris, using the somewhat different terminology of «mutual justification for legal consequences». See e.g. Koziol, *infra* in this volume at 342, text to fn.16, citing, inter alia, F. Bydlinski, *System und Prinzipien des Privatrechts*, 92 (1996) and C.-W. Canaris, *Grundprobleme des Schuldnerverzugs nach dem BGB*, in *Festschrift für Helmut Koziol* 45, 69 (2010).

⁸² Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 *Chic-Kent L. Rev.* 55 (2003); Allan Beever, *The Structure of Aggravated and Exemplary Damages*, 23 *Oxford J. Leg. Stud.* 87 (2003). See also Koziol, *infra* in this volume at 342, text to fn.16.

Notwithstanding these powerful objections, I believe there are nevertheless some quite persuasive contra-arguments which are worth mentioning in this context. First, the presumption that the sole aim of private law (or tort law) is compensation for actual loss is questionable. It seems to be refuted by the very existence of traditional civil remedies such as injunctions, restitution and declarations, which are not meant to compensate for any loss suffered, but rather to prevent further loss from occurring, to remove unjust enrichment and to clarify the legal situation⁸³. Compensation is no doubt an important tort remedy, perhaps even the most important one, at least in the sense that it is the most universally recognized and the most frequently used. It is, however, by no means the only remedy which tort law recognizes. If modern private law accepts – as it clearly does – the possibility of awarding a tort victim (or, more controversially, a contract victim) monetary restitution which is not limited by the extent of the plaintiff's loss, then there should be no *a priori* objection to the introduction of other non-compensatory remedies into tort law or private law generally. The same is true, of course, if compensation is taken to be only a primary goal of tort law rather than its only goal, in which case the question of which secondary goals may be appropriately pursued and by which sanctions and remedies, remains absolutely open to debate.

The claim that punishment in particular is an illegitimate goal for private law to pursue is more difficult to refute. Nonetheless, a few heretic thoughts may well deserve attention. The notion that punishment is not the function of private law is open to attack on various grounds. First, it must be acknowledged – as it often is – that the fundamental distinction between private law and public law is a modern phenomenon. Throughout most of the history of humanity, the goals of compensation or restitution to individual victims and punishment of offenders were carried out in a single legal process which was ordinarily instigated by the complaint of the victim against the offender. The experience of no more than a few centuries should not lead to stagnation of the legal mind, and to a blind belief that what is axiomatic today may not be questioned or even abandoned in the future.

Second, it must also be acknowledged that in many contexts the strict separation between private and public law has been eroded, so that the claim that legal proceedings instigated by a private individual are never intended to remedy a social wrong (and vice versa) can no longer be supported, at least not as a universal truth.

⁸³ The notion of objective compensation, which is often reflected in compensatory awards which are based in a theory of objective value, is also not very much in line with the proposition that damages always intend to compensate for loss actually suffered.

Third, and more to the point under debate, the claim that punitive considerations are foreign or alien to modern tort law or even to modern contract law is incorrect. Numerous rules and doctrines of private law, both judicial and statutory, can only be explained by reference to punitive notions. This is clearly true for the Anglo-American common law of torts, where the admonitory and even retributive function of some rules of tort law has been widely recognized⁸⁴. However, it seems to hold true even with respect to continental systems, in which notions of fault, good faith, reasonableness and the like are central both to the establishment of civil responsibility for loss and to the determination of its extent⁸⁵. If this claim is true, then punishment cannot be regarded as an idea or principle which is wholly alien to private law. The most that can be said is that in the context of punitive damages this idea is manifested in a much more explicit manner than it is within the framework of other established doctrines. But if so, the question of whether or not to recognize this form of civil punishment ceases to be a question of pure logic, and becomes a normative question. This question should be answered on the basis of a normative analysis rather than on the basis of any conceptual objection to the introduction of punitive considerations into the realm of private law⁸⁶. As the writer of an influential article on punitive damages once concluded:

⁸⁴ See e.g. Ronen Perry, *The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory*, 73 *Tenn. L. Rev.* 177 (2006) (surveying a wide range of doctrines which take the retributive factor either in mitigation or in aggravation of tort liability); S.H. Reisberg, *In Defense of Punitive Damages*, 55 *N.Y.U. L. Rev.* 303, 306-331 (1980) (same); Ralph S. Bauer, *The Degree of Moral Fault as Affecting Defendant's Liability*, 81 *U. Pa. L. Rev.* 586 (1933); Ralph S. Bauer, *The Degree of Defendant's Fault as Affecting the Administration of The Law of Excessive Compensatory Damages*, 82 *U. Pa. L. Rev.* 583 (1934).

⁸⁵ To mention just one example, in more than one continental codification, the scope and extent of liability in compensatory damages depends on whether the wrongdoer acted merely unlawfully (i.e., with *culpa*) or also with bad faith (*dolus*). See e.g. in Spain, *Código Civil*, § 1107; in Italy *Codice Civile*, § 1223, 1225. Many authors have argued that this is also true for legal systems which do not explicitly recognize such a distinction, as well as in contract law. See e.g. P.D.V. Marsh, *Comparative Contract Law*: England, France, Germany 328 (Aldershot, 1994): «In theory the court should not take into account the degree of fault involved in deciding the question [of remoteness] but in practice it seems that it is used as a means of moderating the damages» (relating to French law).

⁸⁶ Noteworthy is the fact that distinguished scholars and courts have gone even further to suggest that the very basic duty to compensate for wrongful loss (rather than the extent of this duty) is founded upon retributive and deterrence notions. For example, Arthur Corbin, the great American contract master, said that: «All damages are in some degree punitive and preventive, but they are not so called unless they exceed just compensation for the harm that is actually suffered». Arthur L. Corbin, *Corbin on Contracts* 437-438 (St. Paul, 1964). Cf. Salmond *On Jurisprudence*, 103 (London, 12th ed., 1966, Fitzgerald ed.): «The compensation of

So punishment in tort actions is not anomalous (if anomalous means unusual); and punitive damage practice is only one of many means of varying the size of money judgments in view of the admonitory function⁸⁷.

Finally, the presumption that punishment can address only public rather than private wrongs is also open to criticism. The fact that a wrong committed with *mens rea* (in the context of punitive damages – with a reckless disregard for the rights of the victim or of others) is an anti-social form of conduct which endangers the stability of the whole legal order, does not mean that it is not also a very offensive private wrong to the specific individual victim. Therefore, there is nothing illogical or anomalous in the notion that, apart from any public punitive proceedings aimed to redress the wrong against society (i.e., a criminal trial), there needs to be a way of vindicating, through punishment, the uniquely private grievance caused by the defendant to the victim's dignity. Under this interpretation, punitive damages may be properly understood as responding to exactly this private aspect⁸⁸. If this is so, then the final objection – that punitive damages fail to reflect the correlative structure of private law liability – also fades away. This is so, for if private punishment can be distinguished from public punishment, and if private retribution is the entitlement of only the individual victim, then the problem of correlativity (or of mutual justification) simply does not exist: whatever is taken from the defendant under the private law doctrine of punitive damages is only what he owes the individual victim (and *vice versa*: All that is awarded to the victim is something which the defendant owes directly to him)⁸⁹.

In sum, whereas one can agree that as a descriptive matter modern theories of punishment have regarded it a «public law» device, there is no *a priori*

the plaintiff is [...] the instrument which the law uses for the punishment of the defendant». The punitive effect of purely compensatory damages has been accepted by the courts of the highest authority. Thus, the Canadian Supreme Court in *Whiten v. Pilot Insurance Co.*, *supra* note 12, at para. 123 said: «Compensatory damages also punish. In many cases they will be all the “punishment” required» (per Binnie, J.). The plausibility of this interesting proposition will not be pursued here, though it definitely deserves more attention than it has been given in modern private law scholarship.

⁸⁷ Morris, *supra* note 15, at 1177.

⁸⁸ This kind of interpretation seems to be much in line with the punitive damages theories offered by Zipurski and by Sebok, *supra* note 76.

⁸⁹ A theory which seems very much in line with this reasoning is the one advanced by Colby. See Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 Minn. L. Rev. 583 (2003). For a restatement see Thomas B. Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 118 Yale L.J. 392 (2008). The argument made in the preceding paragraphs of the text is more fully developed in Yehuda Adar, *Retributive Corrective Justice* (2009, unpublished manuscript, on file with author).

inconsistency in a theory which would regard punishment as a means of redressing both public and private wrongs. The assumption that retribution (or even deterrence) cannot be coherently pursued within the framework of a private law dispute may be true or false, but it cannot be taken as a given.

As an epilogue, the perspectives of an eminent English Judge and a renowned French scholar may be illuminating. They said

It cannot be lightly taken for granted, even as a matter of theory, that the purpose of the law of tort is compensation [...] or that there is something inappropriate or illogical or anomalous [...] in including a punitive element in civil damages⁹⁰.

[T]he domains of penal and of civil law – which have been gradually distinguished in the course of civilization – are not absolutely separated categories [...] it is proper in some cases to establish a private penalty (punitive damages)⁹¹.

C. The normative perspective

Interesting as it may be, the conceptual debate over the role of punishment in private law is to a large extent merely a reflection of a deeper ideological controversy over the moral legitimacy of civil punishment and its desirability. Indeed, opponents of punitive damages do not usually content themselves with pointing out the incoherence of the doctrine; rather, they most often condemn it for being offensive to established moral and constitutional principles which must govern any punitive legal proceeding in a liberal democratic society.

In assessing the moral or liberal objection to civil punishment and to punitive damages in particular, it is methodologically convenient to distinguish between two versions of this claim. The first is a sweeping argument against any form of civil punishment. The argument is based on the idea that in a liberal and free society, a strict separation should be maintained between the public and the private spheres. When acting in the private sphere, individuals should be free to interact without the fear of being punished by the State⁹². On the other hand, when acting in the public sphere, e.g., when an individual's conduct amounts to a wrong against society as a whole, the institution of punishment is a necessity which may, under certain condi-

⁹⁰ *Cassell v. Broome*, *supra* note 13, at 1114.

⁹¹ René Demogue, *Validity of the Theory of Compensatory Damages*, 27 *Yale L.J.* 585, 592 (1918).

⁹² «Classical American jurisprudence reflected liberal influences [...] The function of private law was not to regulate individual behaviour, but merely to create “zones of free conduct”. Angela P. Harris, *Rereading Punitive Damages: Beyond the Public/Private Distinction*, 40 *Ala. L. Rev.* 1079, 1098 (1989).

tions and limits, be excused or even justified. Under this sweeping version of the liberal argument, punitive damages inflict punishment on a defendant merely for committing a private wrong, and therefore inevitably contravene the stated principle. This is so, regardless of the manner in which this form of punishment is carried out and regardless of the degree of moral reprehensibility of the defendant's conduct⁹³.

In its less extreme version, the liberal argument against punitive damages does not flatly reject civil punishment *per se*, but rather points out the impossibility – or at least difficulty – of carrying out such punishment without jeopardizing fundamental principles of fairness and fair play towards the punitive damage defendant. In particular, the argument emphasizes the fact that while in criminal law the defendant enjoys a wide range of procedural and substantive guarantees, none of these guarantees are offered to the punitive damages defendant. Thus, even if a civil punitive process could be morally conceivable, it would have to be structured differently than it is under the current doctrine of punitive damages. Especially disturbing in this respect is the lack of any consideration of the possibility that a single outrageous violation might be prosecuted and even punished twice – once through a criminal trial and again within the framework of a civil suit for punitive damages. Equally disturbing is the moral price paid when punishment is inflicted without establishing the defendant's fault beyond reasonable doubt, a basic evidentiary requirement in any criminal trial. These and other procedural guarantees are absent from the civil punitive process and their absence allegedly undermines its entire moral and constitutional legitimacy⁹⁴.

⁹³ A classic formulation of this extreme version of the liberal case against punitive damages is to be found in *Fay v. Parker*, *supra* note 16, where the Court said: «[T]he idea of punishment is wholly confined to the criminal law [...]; [...] infliction of pecuniary punishment [in a civil case] [...] is theoretically more obnoxious [...] than that [view] which considers damages merely as a compensation [...] It would also seem to savor somewhat of judicial legislation in a criminal department» *Id.*, at 382, 362 (per Foster J., citing Judge Bouvier's Law Dictionary).

⁹⁴ «Punitive damages destroy every constitutional safeguard within their reach. [...] [They] demolish the plainest guaranties [...] and explode the very foundation upon which constitutional guaranties are based» *Fay v. Parker*, *supra* note 16, at 397. Similar concerns were expressed by the English House of Lords in *Cassel v. Broome*, *supra* note 13, at p. 1087 (per Lord Reid): «[T]o allow pure punishment in this way contravenes almost every principle which has been evolved for the protection of offenders». The academic debate over the constitutionality of punitive damages has produced dozens of scholarly articles. For basic readings see Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. Chi. L. Rev. 408 (1967); Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269 (1983).

The liberal argument in its extreme version must, I believe, be rejected. The separation between the private and the public spheres, while an essential structural feature of any modern legal system, does not mirror a factual dichotomy between physical acts which are «private» and those which are «public». Indeed, most forms of criminal conduct, which under criminal law are treated as offenses («public wrongs»), are at the same time also torts against an individual («private wrongs»). Furthermore, even a keen libertarian must concede that acts which constitute only «private wrongs» (e.g. some negligent acts) also entail official legal sanctions which curtail the wrongdoer's liberty. It is therefore an illusion to think of private law as some kind of isolated territory, bounded by either time or space, in which an individual is safe from any state intervention⁹⁵.

In its moderate version, however, the liberal argument seems to deserve serious consideration. Here, it can be useful to distinguish between two possible reactions. The first approach would accept the premise that no matter how and where it is inflicted, punishment must never be imposed without the accused being granted the full battery of constitutional guarantees which are provided by criminal law. At first sight, this approach seems to result in a flat rejection of punitive damages. However, this is not necessarily the case. In theory at least, one can envision a law reform which will make punitive damages available as a civil remedy provided that all the relevant procedural safeguards are provided to the punitive damages defendant. Under this approach, punitive damages can be legitimate if the defendant's outrageous conduct is proven beyond reasonable doubt, if the defendant is entitled to remain silent (or to avoid self-incrimination), if he is granted a right to be represented and, above all, if he or she is protected from the prospect of double punishment and double jeopardy in a subsequent (or preceding) criminal (or administrative) trial. Such an approach, if implemented to the full extent, would of course make the civil punitive trial much more complex and much more expensive. However, at least in theory, such a possibility should not be overruled. It should be seriously considered, taking into account the social

⁹⁵ For a general critique of the distinction between public law and private law see e.g. C. Harlow, «Public» and «Private» Law: *Definition without Distinction*, 43 *Modern L. Rev.* 241 (1980). For an attempt to rethink the distinction see Peter Cane, *Public Law and Private Law: A Study of the Analysis and Use of a Legal Concept* in *Oxford Essays in Jurisprudence* (Oxford, 3rd Series, 1987 Eekelaar and Bell eds.) 57. See also R.H. Mnookin, *The Public/Private Dichotomy: Political Disagreement and Academic Repudiation*, 130 *U. Pa. L. Rev.* 1429 (1982) (pointing out the gap between the strong public-political image of the distinction, and its declining status among academics). The distinction is sometimes criticized even by the judiciary. See e.g. *Tuttle v. Raymond* 494 A.2d 1353, 1356 (Me. 1985): «The bright line [...] between the civil and criminal law is in fact artificial».

costs of implementing such a dramatic reform of the rules of civil (punitive) procedure, and weighing those against the social and moral costs of abolishing punitive damages altogether, thus leaving many forms of heinous wrongdoing beyond the reach of the law⁹⁶.

An alternative approach to the problem of civil punishment is to flatly reject the analogy between criminal punishment and civil punishment and hence, as a corollary, the conclusion that punitive damages are unfair to the defendant absent the traditional procedural guarantees of the criminal law. This approach, which I find more convincing, emphasizes a few important distinctions between criminal and civil punishment.

First, the nature of the risk to which a defendant is exposed once a criminal indictment is brought against him is qualitatively different from the risk imposed on defendants against whom punitive damages are sought. To begin with, no punitive verdict ever results in the incarceration of the defendant nor does it result in any other physical restriction of the defendant's liberty. Then again, the stigmatizing effect of a punitive damage verdict, though potentially harmful to one's reputation or good will⁹⁷, is far weaker than that of an ordinary criminal conviction. A criminal conviction, of which most governments hold an official record for dozens of years, may severely and permanently harm a defendant's social and familial relationships, may jeopardize his work opportunities, may prevent him from holding a public office and may curtail his involvement in the life of the civil society. A punitive damage award, on the other hand, as painful and as stigmatizing as it may be, shares none of these traits with the typical criminal conviction, even when the only tangible penalty by which the conviction is accompanied is a monetary fine.

Second, one should recall that a prime justification for the granting of criminal guarantees is the libertarian fear that the immense imbalance between the general prosecution, as a branch of the government, and the indicted individual, might be abused. This gap, which results from the overwhelming superiority of the State over the individual in terms of access to information, legal expertise, economic power and political influence, is absent from the punitive damages context. Moreover, in the latter context often the opposite is true, namely, civil punishment is sought against a powerful defendant (e.g., a corporation) who took advantage of the vulnerability of the plaintiff⁹⁸.

⁹⁶ See also *infra*, text to notes 105-107.

⁹⁷ See *supra*, text to note 70.

⁹⁸ The argument is powerfully articulated by Mark Galanter and David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 Am. U. L. Rev. 1393, esp. at 1456-1458 (1993).

All in all, therefore, there seems to be little justification to equate a civil claim including a punitive damage element with a criminal prosecution. The nature and magnitude of the risks involved, as well as the power imbalance between the parties are extremely different. Therefore, a blind exportation and transplantation of the traditional criminal safeguards into the civil punitive process is clearly unjustified⁹⁹.

Whichever of the two approaches presented one adopts, it should be remembered that acknowledging the fairness concerns associated with civil punishment does not necessitate a complete rejection of the idea of civil punishment. Rather, such acknowledgement merely requires the legal system to make sure that the civil punishment is not being carried out without full attention to these concerns.

I would like to conclude the discussion of this problem by adding two final remarks. First, on the plainly informative level, noteworthy is the fact that the approach calling for a dramatic reform of the rules of civil procedure as a precondition for an award of punitive damages has not, in recent decades, been endorsed by any of the legal systems in which the doctrine of punitive damages is recognized. Most Anglo-American courts facing constitutional challenges to punitive damages verdicts on this basis have not been willing to fully equate civil punishment with criminal punishment, not in the context of punitive damages, nor even in the context of civil or administrative proceedings, in which the government seeks to extract a fine from a private citizen for a violation of the latter's obligations towards the state. Nonetheless, in a number of States, either through legislation or via judicial effort, certain procedural safeguards have indeed been introduced in order to overcome certain perceived moral deficiencies of the doctrine. For example, a number of American states have adopted, either by statute or by judicial legislation, the rule that the elements which form the basis of the claim for punitive damages must be proven and established with «clear and convincing evidence»¹⁰⁰ or even «beyond reasonable doubt»¹⁰¹. The United

⁹⁹ For support see e.g., Kenneth Mann, *Punitive Civil Sanctions: The Middleground between Criminal and Civil Law*, 101 Yale L.J. 1795, 1870 (1992): «[P]unitive civil sanctions do not demand equally strict procedures [as criminal sanctions do]»; Comment, *supra* note 94, at 409: «Commentators [...] ask why the punitive damages defendant is not afforded the safeguards which protect the criminal defendant [...] this anomaly is only superficial; the lack of criminal safeguards may be the consequence of important differences between criminal punishment and its supposed civil counterpart».

¹⁰⁰ This is the rule in Indiana, Alabama and Idaho. See e.g. Ind. Code § 34-51-3-2. See also *Cheatham v. Pohle* 789 N.E.2d 467, 472 (S.C. Ind. 2003): «The facts warranting punitive damages must be established by clear and convincing evidence. [...] Proof is required by a clear and convincing standard rather than a preponderance of the evidence standard».

¹⁰¹ This is the rule in Colorado. See Colo. Rev. Stat. Ann. § 13-25-127(2).

States Supreme Court expressed its support of the intermediate standard, but ruled that the ordinary evidentiary standard in civil cases (i.e., that of «preponderance of the probabilities») does not violate the due process of law requirement¹⁰². In other jurisdictions, courts have ruled that a claim for punitive damages is barred whenever the defendant has already been convicted and punished for a criminal offence arising from the same conduct for which the punitive damages are sought¹⁰³. These developments may indicate that while sweeping proposals to reform the procedural rules concerning punitive damages are not likely to gain much support, more moderate suggestions may indeed, in due course, become more pervasive in punitive damages jurisdictions.

A second comment addresses the normative level of the debate. When deciding whether or not a civil-punitive mechanism such as punitive damages should be adopted (or alternatively, abolished), policy makers must consider not only the problems which the idea of civil punishment inevitably creates, but also its potential benefits, from both a social (or utilitarian) and a moral (deontological) point of view. With no intention to cover all relevant aspects, one must mention at least three important advantages of civil punishment over criminal (or even administrative) punishment. First, it is an undisputed fact that in most modern states the ability of the police to detect and prosecute crime is largely limited due, *inter alia*, to perpetual budget constraints. In this state of affairs, the ability to supplement the governmental effort to prosecute crime with that of private litigants (mostly at their expense) is a clear advantage which should not be underestimated¹⁰⁴.

¹⁰² *Pacific v. Haslip*, *supra* note 52, at 23.

¹⁰³ In Australia, «substantial punishment» following a criminal trial will bar the possibility of awarding punitive damages in a subsequent civil trial. When the criminal trial is not over by the time the civil verdict is given, the court should adopt a rebuttable presumption that the criminal trial will result in substantial punishment of the defendant. *Gray v. Motor Accident Commission* [1998] (Aus. H.Ct.) 158 A.L.R. 485. This is not the customary rule in Canada and in the United States, although a few states (e.g., Indiana) have embraced it. In most Canadian and U.S. jurisdictions, whether or not to take into account a past (or future) conviction is wholly at the discretion of the court. The strictest rule has been adopted in New Zealand, where even an acquittal bars the possibility to award punitive damages. See *Daniels v. Thompson*, [1998] 3 N.Z.L.R. 22, which provides a detailed survey of the case law around the commonwealth.

¹⁰⁴ The under-enforcement of the criminal law might also encourage victims to retaliate, a phenomenon which the prospect of bringing suit for punitive damages may, to a certain degree, reduce: «Without a meaningful tort remedy [...] victims of criminal-type conduct too minor to engage the interest of the district attorney are more likely to retaliate» Richard A Posner, *Economic Analysis of Law*, 228 (N.Y., 5th ed., 1998).

Second, one should recall that the punitive damage doctrine addresses many different forms of anti-social conduct which, even in theory, are out of the reach of the criminal law. In particular, criminal law does not often prohibit the intentional (and unjustified) infliction of economic or emotional loss by one citizen upon another¹⁰⁵. It is also ill suited to deal with personal injuries which are the result not of direct and immediate violence but of an intentional violation of some legal norm (e.g., a producer's reckless disregard of safety regulations or reasonable safety standards, resulting in bodily injury, disease, etc.)¹⁰⁶. Even assuming that these traditional limitations on the scope of the criminal law were justified (which may well be the case), it is nonetheless unclear why such types of anti-social conduct should not call for a less severe, but still meaningful form of punishment.

¹⁰⁵ This is a focal insight, which has not been sufficiently emphasized in the literature. See e.g. Peter Cane, *Exceptional Measures of Damages: A Search for Principles in Wrongs and Remedies in the Twenty-First Century* 301, 308 (Oxford, 1996, P. Birks ed.): «There may be certain types of conduct which we think too unacceptable to be the subject only of civil remedies [...] but not unacceptable enough to be subject to the stigma of criminalization». See also Owen, *supra* note 74, at 1288: «The assistance [of punitive damages] is important, for many serious misdeeds deserving of punishment are beyond the reach of the criminal law». However, the unique role of punitive damages in this respect has been pointed out in the American case law. See e.g. *Hopkins v. The Atlantic and Saint Lawrence Railroad* 36 N.H. 9, 18 (S.C. 1857): «Where the wrong done to the party partakes of a criminal character, though not punishable as an offence against the State, the public may be said to have an interest that the wrong doer should be prosecuted and brought to justice in a civil suit [for exemplary damages]»; *M'Bride v. M'Laughlin*, 5 Watts' R. 375 (S.C. Pa. 1836) 376: «There are offences against morals, to which the law has annexed no penalty as public wrongs, and which could pass without reprehension, did not the providence of the courts permit the private remedy [of exemplary damages] to become an instrument of public correction»; *Kink v. Combs*, 135 N.W. 2d 789 (Wis. 1965) 798: «[Punitive damages bring] to punishment types of conduct that though oppressive and hurtful to the individual almost invariably go unpunished by the public prosecutor [...] by this device a quasi-criminal action is promoted»; *Brown v. Coates* 253 F. 2d 36, 40 (D.C. Cir., 1958): «[Punitive damages are proper] particularly [...] in areas of conduct where the acts committed, while reprehensible, may fall short of rendering the wrongdoer subject to criminal prosecutions». The need for punishing non-criminal conduct was recently emphasized by the Canadian Supreme Court in *Whiten v. Pilot Insurance Co.*, *supra* note 12, at para. 37, where the court said: «Punitive damages serve a need that is not met either by the pure civil law or the pure criminal law. In the present case, for example, no one other than the appellant could rationally be expected to invest legal costs of \$ 320,000 in lengthy proceedings to establish that on this particular file the insurer had behaved abominably» (per Binnie, J.).

¹⁰⁶ This explains the rise of the use of punitive damages in the field of products liability, to protect consumers against reckless (or even intentional) conduct of producers and sellers of defective products: «Governmental safety standards and the criminal law have failed to provide adequate consumer protection against the manufacture and distribution of defective products». *Grimshaw v. Ford*, *supra* note 64, at 382. See also: Owen, *supra* note 74, at 1288-1289; J.P. Mallor and B. Roberts, *Punitive Damages: Toward a Principled Approach*, 31 *Hastings L.J.* 639, 655-656 (1980).

Third, the idea that there is only one legitimate form of state punishment must be rethought, even by lawyers and policy makers in jurisdictions where punitive damages have never been officially recognized¹⁰⁷. Civil punishment is also a form of state punishment, as it is administered by a court of justice, at its full discretion. As such, it may necessitate special rules of procedure, such as an increased burden of proof and a mechanism for avoiding double punishment. And yet, the mere fact the punitive damage claim is brought to the court at the initiative of a private citizen, should not in my view be seen as a complete privatization of the institution of punishment. Punitive damages are imposed not at the discretion of the individual plaintiff, but by the state, through its court system.

Last, but not least, there are important practical and moral advantages to civil punishment compared to the traditional criminal process. One clear advantage is that a punitive damages claim will most often supplement an already existing civil claim for compensatory damages (or for other ordinary remedies). In such cases, it would very often be much less expensive for society to conduct such a punitive trial than to conduct a full-fledged criminal (or even administrative) process. For example, if a fraudulent misrepresentation or an intentional trespass or defamation took place, the additional costs of a judicial inquiry into the mental state and attitude of the defendant in order to assess the appropriateness of punitive damages would most probably be much less costly than a parallel criminal trial (if such would ever be opened)¹⁰⁸.

Another advantage is that the stigmatizing effect of the civil-punitive process is less devastating than that of a criminal conviction (or even the very instigation of a criminal trial)¹⁰⁹. From a liberal perspective, this makes civil punishment a preferable punitive tool. Indeed, why not regard civil punishment as the default preference, leaving the criminal process to deal only with the most aggravated forms of anti social conduct?

To conclude, there is no doubt that the civil punishment carried out within the doctrine of punitive damages raises many difficulties, both conceptual and normative. The question is whether these outweigh the many advantages that the civil punishment is able to offer society, and whether a sophisticated and carefully designed legal regime (preferably statutory) can maximize these advantages without jeopardizing basic notions of fairness

¹⁰⁷ The appropriateness of using administrative proceedings to vindicate moral values and to denounce anti-social conduct is a question which cannot be dealt with in the ambit of this article. However, it does deserve further reflection.

¹⁰⁸ For support see e.g. Mark Galanter, *Punishment: Civil Style*, 25 Isr. L. Rev. 759 (1991).

¹⁰⁹ See *supra*, text following note 97.

to defendants. As one of the many keen supporters of punitive damages has put it:

Civil suits are simply a mechanism whereby the state authorized private parties to enforce the law. Viewed in this light [...] there is nothing extraordinary or oppressive about most punitive damages awards. Such awards should be common when the *legislature* has decided that it wants people to comply with the law, as opposed to tolerating the efficient breach [of it]. [...] In civil litigation it is time to stop worrying about the punitive nature of the damage award, and to start getting serious about enforcing the law¹¹⁰.

VI. The windfall problem: why should the plaintiff benefit?

A. The objections

The final challenge to be met by any theory of punitive damages is to explain why the plaintiff, rather than anyone else, should be entitled to receive the punitive damage award. Secondary as this feature of the doctrine may seem compared to its two other main features (i.e., the punitive feature and the civil feature), this characteristic is responsible for much of the antagonism that punitive damages have aroused. Even writers who acknowledge the possibly legitimate role of punitive damages as a sanction for intentional wrongdoing, often clearly oppose to granting them as a remedy to the plaintiff. In the words of a leading European tort scholar:

Even if there are very strong arguments for imposing a *sanction* on the defendant, these arguments alone *cannot justify awarding the plaintiff an advantage*¹¹¹.

The objection to the punitive damages plaintiff receiving them can be founded upon three distinct arguments. First, on the pure conceptual level, it has been argued that it makes no legal sense to award the plaintiff, who *ex hypothesis* has been fully compensated for any compensable wrongful loss inflicted upon him by the defendant, anything more than compensation (or restitution, if available). Indeed, under the principle of *restitution in integrum*, it is the role of civil remedies to put the plaintiff in as good a position as he would have been in, had he not been wronged by the defendant. However, following an award of punitive damages a plaintiff is put in a better position

¹¹⁰ E.L. Rubin, *Punitive Damages: Reconceptualizing the Runcible Remedies of the Common Law* vol. 1998 Wis. L. Rev. 131, 154-155 (1998).

¹¹¹ Koziol, *infra* in this volume at 342.

than the one he occupied prior to the wrong, a result which contradicts the same established principle just mentioned. Furthermore, awarding such an additional remedy to the plaintiff for the sake of punishing the defendant presents a logical contradiction, since it violates the principle of correlativity (or mutual justification) between sanction and remedy¹¹².

These coherence arguments found favor with nineteenth century American courts which expressed deep concern over this puzzling feature of the doctrine:

Who will undertake to give a valid reason why plaintiff, after being fully paid for all the injury inflicted upon his property, body, reputation and feelings, should still be compensated, above and beyond, for a wrong committed against the public at large? The idea is inconsistent with sound legal principles, and should never have found a lodgment in the law¹¹³.

Second, and intimately linked to the first line of reasoning, is the moral version of the argument. This critique emphasizes that absent any legal basis for receiving the punitive award, it would be morally repugnant to allow private victims to be enriched at the expense of either the defendant or worse, at the expense of the public, on behalf of which the punishment was carried out. If anyone at all deserved to keep the punitive monetary award, it should be the State rather than the plaintiff¹¹⁴.

Finally, commentators have expressed concerns, that the large windfalls which punitive damages plaintiffs often receive, create exaggerated incen-

¹¹² For this principle *see supra* text to notes 81-82. For this objection *see* Koziol, this volume, *infra* at 342, text to fn.16.

¹¹³ *Murphy v. Hobbs* 7 Colo. 541, 545-546 (1884). *See, similarly, Bass v. The Chicago & Northwestern R'y Co.* 42 Wisc. 654, 672-673 (1877): «It is difficult on principle to understand why, when the sufferer by a tort has been fully compensated for his suffering, he should recover anything more. And it is equally difficult to understand why, if the tortfeasor is to be punished by exemplary damages, they should go to the compensated sufferer, and not to the public in whose behalf he is punished». More recently *see Rosenbloom v. Metromedia, Inc.* 403 U.S. 29, 74 (1971) (Harlan J. dissenting): «[F]rom the standpoint of the individual plaintiff such [punitive] damage awards are windfalls. They are, in essence, private fines levied for purposes that may be wholly unrelated to the circumstances of the actual litigant».

¹¹⁴ «[T]he plaintiff, by being given more than on any view could be justified as compensation, was being given a pure and undeserved windfall at the expense of the defendant». Cassel v. Broome, *supra* note 13, 1086 (per Lord Reid); «Victims of tortuous conduct should receive due compensation for their injuries, not windfalls at public expense». *Kuddus v. Chief Constal*, *supra* note 13 para. 121 (per Lord Scott). In the scholarship *see e.g.* J.E. Duffy, *Punitive Damages. A Doctrine which Should Be Abolished*, in Defence Research Institute: The Case Against Punitive Damages, 8 (Milwaukee, Hirsh and Poulos ed., 1969): «[S]uch overcompensation is repugnant to every sense of justice»; Andrew S. Burrows, *Remedies for Torts and Breach of Contract*, 283 (London, 2nd ed., 1994): «[T]he rightful recipient of monetary punishment should be the state, and not a plaintiff».

tives to litigate punitive damages cases, distort potential victims' incentives to take precautions (as well as encourage risk-seeking behavior), create serious imbalance in bargaining power between the parties which plaintiffs might abuse, and encourage frail suits in cases where punitive damages are not deserved¹¹⁵.

B. Some feasible lines of defense

The windfall problem is no doubt an intriguing one. However, contrary to what is commonly presumed, a number of interesting arguments may be offered in justification of the plaintiff's right to receive the punitive damage award.

A first line of defense emphasizes the often overlooked public service rendered to society by the winning victim who prosecuted and brought the punitive damages defendant to justice. For this effort the plaintiff deserves much more than mere reimbursement for his attorney's fees and other tangible legal costs. Granting him the right to extract the punitive award from the defendant is not only a symbolic act of victory over the victim¹¹⁶, but reflects society's gratitude to the victim for his important public service¹¹⁷. The argument has been beautifully formulated by an English scholar:

The plaintiff has taken the risk of litigating to ensure that the defendant is punished. [...] Is not the plaintiff, who has risked his own resources a more deserving recipient than any other? [...] the metaphor of the plaintiff receiving a windfall is without justification [...]: the plaintiff had to shake the tree to obtain the fruit of justice; and, in so doing, he risked a large branch landing on his head rather than an apple¹¹⁸.

An alternative moral theory, which might support giving the punitive award to the plaintiff rather than to the State, is based on the theory of punitive damages as private retribution – as distinguished from the public retribution

¹¹⁵ J.A. Breslo, *Comment: Taking the Punitive Damage Windfall Away from the Plaintiff: An Analysis*, 86 Northwestern Un. L. Rev. 1130, 1151-1166 (1992); Note, *An Economic Analysis of the Plaintiff's Windfall from Punitive Damage Litigation*, 105 Harv. L. Rev. 1900 (1992).

¹¹⁶ See *infra*, text to notes 119-120.

¹¹⁷ «Punitive damages are punishing damages and are awarded to the injured party as a reward for his public service in bringing the wrong-doer to account». *Neal v. Newburger Co.* 154 Miss. 691, 700 (S.C. 1929); see also *Fowler Butane Gas Co. v. Varner*, 244 Miss. 130, 151, (1962). This reasoning gained the support of Peter Birks, who expressed the view that :«[punitive damages] can also be regarded as a reward for vindicating the strength of the law». Peter Birks, *Editor's Preface*, in *Wrongs and Remedies in the 21st Century*, viii, ix (Oxford, 1996, Birks ed.).

¹¹⁸ G.S. Pipe, *Exemplary Damages after Camelford*, 57 M.L.R. 91, 99 (1994).

secured by criminal law. Under this view, which has already been mentioned above¹¹⁹, because punitive damages are intended to symbolize the private victory of the plaintiff over the defendant, it is only natural that the victim rather than anyone else will extract the fine from the defendant¹²⁰.

A rather different line of defense emphasizes the consequential advantages of awarding punitive damages to the plaintiff. The reason should be fairly obvious. To establish the punitive liability of a defendant (who often will have taken efforts to conceal his faulty conduct) is a fairly difficult and costly task. In addition, punitive damages are always subject to the wide discretion of the courts, so the plaintiff can never be certain if they will ever be awarded¹²¹. Under these circumstances, investing resources in a punitive damage claim is always an insecure undertaking. If the legal system is serious about deterring reprehensible wrongdoing, there must be a substantial incentive for victims to seek punitive damages in cases where they are deserved. This incentive is especially needed where the compensatory damage claim is insecure due to difficulties of proof, or due to the nature of the loss (e.g., when the harm is emotional or otherwise intangible). The alleged «windfall» given to a winning punitive damages plaintiff is therefore nothing more than the price which society must be willing to pay individual victims, if it wants the punitive damage doctrine to fulfill its social and moral goals¹²².

¹¹⁹ See *supra* text to notes 88-89.

¹²⁰ For support of this line of thought see e.g. Report on Exemplary Damages, 34 (1991) Ontario Law Reform Commission: «[A] victim does have a special and direct interest, beyond mere vengeance, in seeing that *justice is done in what, in a very real sense, is her case*». Cf. Birks, *supra* note 117, at viii: «[It] is impossible to avenge contempt unless the court can award *the victim* a sum which satisfies the need, not to compensate the loss, but to *condemn and avenge the outrage*».

¹²¹ «[P]unitive damages, under the law, are not given to the party injured as a matter of right; such damages are not awarded for the benefit of the particular party injured because of an absolute right in him thereto, but upon the principle that they may have a deterrent effect and protect the public against the repetition of similar offenses». Neal v. Newburger, *supra* note 117, at 699-700.

¹²² «[E]xemplary damages may in such cases encourage prosecutions where a mere compensation for the private injury would not repay the trouble and expense of the proceeding». Hopkins v. The Atlantic, *supra* note 105, at 18. For scholarly support see Owen, *supra* note 74, at 1285, 1287: «[T]he remedy supplies an additional financial incentive to both the victim and his attorney to uncover and prove the proscribed behaviour»; see also *id.*, at p. 1287: «[T]his criticism [the windfall objection] overlooks the important fact that this prospective windfall motivates many reluctant plaintiffs to press their claims. And as the litigation of such claims increases, misconduct is increasingly punished and deterred». See, similarly, Cooter, *supra* note 18, at fn. 9: «Why give the money to the victim, instead of to the state as with a fine? The answer is that the plaintiff requires a reward for undertaking the additional burden of proving that the injurer's fault was intentional. [...] It is desirable for the plaintiff to undertake this burden, since it saves the state the cost of a criminal trial».

As regards the purely conceptual objection, two possible answers can be offered. First, one can argue – as some writers indeed have – that coherence arguments cannot override substantive arguments (either deontological or consequential)¹²³. Under this approach, even if it were incoherent or illogical to award the plaintiff something that in logic belongs to someone else (i.e., the State), this logic should not prevent law from adopting a solution which is justifiable on substantive grounds (e.g., the need to incentivize private enforcement).

Second, if the substantive moral arguments supporting the right of the victim to collect punitive damages are convincing, then the coherence objection to this feature seems to fade away. Under the private retribution theory, there is clearly no correlativity problem, since the award merely represents a uniquely private demand of the victim as against the defendant. Alternatively, under the theory of punitive damages as a State reward, the punitive verdict can be interpreted as ordering the defendant to pay his debt to society (through punishment) and, simultaneously, ordering the State to transfer this amount to the winning victim as a reward (e.g., on a restitutionary basis). Under either theory, the correlativity (or «mutual justification») problem is resolved.

Finally, even if neither of these arguments is found totally convincing as a justification for awarding the plaintiff the full amount of the award, I believe their accumulative weight does indeed justify granting the victim at least a substantial part of the punitive sanction imposed on the guilty defendant. The appropriate division of the sum between the individual and the State (or any public entity which the law may define) is a different question, and one which can be either addressed by statute or left to the discretion of the court¹²⁴.

VII. Conclusion

Punitive damages have for years been one of the most hotly debated topics in contemporary tort law. Tort scholars, private law theorists, practicing

¹²³ For an assessment of the role of coherence arguments see Joseph Raz, *The Relevance of Coherence*, 72 B.U.L.R. 273 (1992); B. Levenbook, *The Role of Coherence in Legal Reasoning*, 3 L. & Phil. 355 (1984).

¹²⁴ Legislative reforms opting for this solution were adopted in a number of American states. For a survey see E. Lee, *Casenote: Mack Trucks, Inc. v. Conkle: The Georgia Supreme Court Tells The Legislature to Keep on Truckin' when Appropriating Punitive Damage Awards to The State Treasury*, 45 Mercer L. Rev. 1439 (1994), esp. at 1441, fn. 25. See also Grube, *supra* note 17, fn. 10; M. Kahan and B. Tuckman, *Special Levies on Punitive Damages: Decoupling, Agency Problems, and Litigation Expenditures*, 15 Int. R. L. & Econ. 175 (1995), fn. 1. Cf. J.L. Shores, *A Suggestion for Limited Tort Reform: Allocation of Punitive Damages Awards to Eliminate Windfalls*, 44 Ala. L. Rev. 61 (1992) (suggesting that courts should be able to divide punitive damage awards between the victim and the State even absent legislative reform).

lawyers and lawmakers, in common law as well as non common law jurisdictions, continue to question their legitimacy and to debate the appropriate conditions under which they might best fulfill their goals. This article did not aim to develop any specific theory of punitive damages, nor did it advance any single winning argument which might turn the scales in one direction or another. Its modest aim was to propose an analytical roadmap which might be of assistance to those involved in this ongoing debate, as well as to those interested in becoming acquainted with its many aspects.

The main propositions of the article may be summarized as follows:

- Any effort to assess the phenomenon of punitive damages must start from an appropriate definition of the phenomenon, which highlights its main distinguishing features, including its punitive nature.

- The idea of compensation for actual loss, though of great importance to the understanding of the historical development of the institution, is unable to provide a satisfactory explanation of the current practice.

- In order to fully assess the normative strength of the doctrine of punitive damages, at least three fundamental problems must be addressed. The questions are: why punish the defendant, why do so in a civil trial, and why let the plaintiff benefit from such punishment.

- Although the theoretical, moral and pragmatic concerns the three fundamental features of the doctrine raise are substantial, feasible lines of defense can be offered to justify each of these features.

- The implementation of the idea of civil punishment through punitive damages has significant advantages from both a moral and a pragmatic social perspective. These gains should be seriously considered before the idea of punitive damages as a civil sanction for aggravated violations of private rights is completely rejected.

- Even if certain features of the doctrine of punitive damages cannot be completely justified, the idea of civil punishment for intentional wrongdoing should not be flatly rejected. Rather, the rules governing this form of civil punishment should be reformulated so as to better adjust punitive damages to modern notions of fairness and utility.

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