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# A Theory of Punitive Damages

Benjamin C. Zipursky\*

*A contemporary theory of punitive damages must answer two questions: (1) What place, if any, do punitive damages have in the civil law of tort, given that they appear to involve an idea of criminal punishment? (2) Why are punitive damages subject to special constitutional scrutiny, as in the Supreme Court's decision in BMW v. Gore, if they really are part of the civil law of tort? The article offers a theory that can answer both of these questions. Punitive damages have a double aspect, corresponding to two senses of "punitive." Insofar as they pertain to the state's goal of imposing a punishment upon a defendant who merits deterrence or retribution, they have a criminal aspect. Insofar as they pertain to the plaintiff's "right to be punitive," they have a civil aspect. Drawing upon the theory of civil recourse that the author has developed as a challenger to corrective justice theory, the article explains what a "right to be punitive" means. It then uses the recourse theory of punitive damages to support a rational reconstruction of the Supreme Court's constitutional jurisprudence of punitive damages. When a case can be understood as involving principally a plaintiff's right to be punitive, heightened constitutional scrutiny is not appropriate. However, where, as in BMW v. Gore, the state is essentially imposing punishment, the excessiveness of a damages award is properly scrutinized under heightened constitutional standards.*

## I. Introduction

### A. The Need for a Theory of Punitive Damages

What does the word "punitive" mean in the phrase "punitive damages"? The standard answer is that punitive damages are intended to *punish* a defendant who has engaged in a form of tortious conduct that is particularly egregious. Courts routinely state that the "punishment" delivered by punitive damages is justified by both deterrent and retributive concerns.<sup>1</sup> Indeed, in an area of law that sometimes seems cluttered with statistics and statutory

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\* Professor of Law, Fordham University. I am grateful to Fordham University for its Research Fellowship support; to Alison Lucas, Michael Samalin, and John Rue for research assistance; to Anita Bernstein, Curtis Bridgeman, Jules Coleman, Matthew Diller, Jill Fisch, Mark Geistfeld, John Goldberg, Abner Greene, Thomas Lee, Eduardo Penalver, Dan Richman, Catherine Sharkey, Kenneth Simons, Alex Stein, and Norman Williams for helpful comments on this project, and to participants in workshops at Cornell Law School, Florida State University, Fordham University, NYU (NYC Tort Theory Workshop), and UCLA (UCLA Legal Theory Workshop). My casebook co-authors, John Goldberg and Anthony Sebok, have been ongoing interlocutors about punitive damages for the past several years and have contributed greatly to my thinking about this subject.

1. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (stating that unlike compensatory damages, which are aimed to redress concrete loss due to wrongful injury, "punitive damages . . . are aimed at deterrence and retribution").

developments, the mantra of “deterrence and retribution” as applied to punitive damages has the comforting ring of familiarity.

Yet it is precisely this focus on punishment that leads to the greatest perplexities in punitive damages law. This is for two interrelated reasons, one sounding in constitutional law, the other in tort. Within constitutional law, what is most puzzling is that courts are as *unintrusive* as they are with regard to punitive damages. State courts are open about their reasons for imposing punitive damage awards. Litigants on both sides, as well as the constitutional courts receiving challenges to these cases, go right ahead and concede the punitive nature of the remedy sought. Most jurisdictions’ state-of-mind standard for punitive damages approaches something like criminal scienter.<sup>2</sup> Many states hold punitive damages to be uninsurable as a matter of public policy, just as criminal fines are.<sup>3</sup> And some even demand a higher evidentiary standard—“clear and convincing evidence”—in light of the “quasi-criminal” nature of punitive damages.<sup>4</sup> Yet until the 1990s, punitive damages triggered virtually no constitutional protection whatsoever, and even now such protection remains quite minimal—certainly a far cry from that afforded even the most minimal criminal sanction. The reason for the near-immunity from scrutiny for punitive damages awards has been, of course, that punitive damages are nominally civil and nominally part of private tort cases. But in a legal system that regularly cautions against elevating form over substance, it is peculiar that there has been near-immunity for what are openly labeled forms of “punishment.”

The constitutional puzzle leads us back to a more basic question in torts: Why are punitive damages part of tort law at all? Isn’t tort law about compensation, making victims whole, or corrective justice? Even from an economic point of view, isn’t it about deterrence by cost-internalization, or about insurance? Why is this criminal-seeming treatment found within our private law, our tort system?

This article offers a theory of punitive damages to answer these difficult questions in both tort and constitutional law. The theory takes root at the question with which the article opened: What does the word “punitive” mean in the phrase “punitive damages”? The answer is that the word “punitive” has two connotations. One meaning—as already indicated—is that punitive damages are intended to punish a defendant who has acted egregiously. But a more fundamental meaning within tort law is that punitive damages are permitted in light of our legal system’s recognition that the plaintiff has a right to *be punitive*. Drawing from the model of rights, wrongs, and

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2. See DAN B. DOBBS, *THE LAW OF TORTS* § 381, 1064 (2000) (“Some courts insist upon malice, ill-will, and intent to injure, evil motive or the like, while others have found it sufficient that the defendant engages in wanton misconduct with its conscious indifference to risk.”).

3. See *infra* note 152 and accompanying text.

4. See, e.g., *Cheatham v. Pohle*, 789 N.E.2d 467, 472 (Ind. 2003) (citing Ind. Code § 34-51-3-2 (1998)) (asserting wide legislative discretion in modifying “quasi-criminal sanctions” such as punitive damages).

recourse—a tort theory I have developed in several prior articles<sup>5</sup>—I shall argue that it is the plaintiff’s right to be punitive, not the system’s need to punish the defendant, that explains the special status of punitive damages within American tort law.

The plaintiff’s right to be punitive constitutes the core of a civil aspect of punitive damages, while the state’s goal of inflicting punishment upon the defendant is the root of a criminal aspect. Punitive damages are a tricky subject because they have this double aspect, both civil and criminal. They belong firmly within tort law insofar as they involve, at root, the plaintiff’s right to be punitive. But in the past century, particularly in recent decades, the criminal aspect of punitive damages has taken an increasingly large role within what is still nominally the civil law of torts. In other words, punitive damages law within state tort law today is not entirely about the plaintiff’s right to be punitive; it is also about the need to punish a defendant whose conduct requires deterrence and retribution, according to the state.

This “double aspect” of punitive damages law explains both its enduringly controversial nature within tort law and its increasingly tentative constitutional status. Insofar as punitive damages are basically civil, and not about criminal punishment, they do not merit the special constitutional scrutiny afforded to criminal defendants. Insofar as they are criminal, they do merit such scrutiny. The Supreme Court’s peculiar progression in its punitive damages case law reflects a tension between these two images. Ultimately, I shall argue that its leading punitive damages decision, *BMW v. Gore*,<sup>6</sup> can be fruitfully reconstructed once we understand the two senses of “punitive” in “punitive damages.” And more generally, a variety of questions within tort law and policy about the need for, or wisdom of, punitive damages reform will come into focus once we see more clearly what punitive damages are about.

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5. See Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003) [hereinafter Zipursky, *Civil Recourse*] (arguing that by its own standards, the corrective justice theory is inferior to the civil recourse theory as an explanation of tort law); Benjamin C. Zipursky, *Philosophy of Private Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 623 (Jules Coleman & Scott Shapiro eds., 2002) [hereinafter Zipursky, *Private Law*] (constructing a social contract theory basis for the theory of civil recourse in private law and displaying the Lockean and Blackstonian ideas upon which it is founded); Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1 (1998) [hereinafter Zipursky, *Rights*] (introducing the model of “rights, wrongs, and recourse” as a general theory of tort law and arguing that it is interpretively superior to leading accounts of law and economics and corrective justice theory). See also John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. (forthcoming 2005) (arguing that the concept of civil recourse has a fundamental place in our constitutional structure and derives from the liberal political theory of Blackstone, Locke, and their predecessors). Professor Goldberg and I have applied civil recourse theory jointly in several works. See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625 (2002) (explaining injury and causation requirements of negligence law in terms of civil recourse theory).

6. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

### B. *Methodological Preliminaries*

Two methodological preliminaries are in order. First, the theory offered here is interpretive in a sense that, even if difficult to pin down, is nevertheless quite usual and well understood. It is not simply historical or doctrinal, and it is not exactly a matter of moral or political philosophy, either.<sup>7</sup> I am not aiming to provide a history of punitive damages as they have been, or to argue from a first-order normative point of view about what punitive damages should be or whether we ought to have them. I am arguing that punitive damages in tort law today represent a certain constellation of ideas, principles, and concepts. The goal is to explain how these ideas might fit together and be embodied in our legal system in a manner that is roughly coherent and largely harmonizes with the history, structure, and language of the area, while nevertheless permitting some critical distance. I have elsewhere called this approach “pragmatic conceptualism,” and written extensively to explain and defend it.<sup>8</sup> Here, I simply aim to use it.

Second, while the article has a rather broad goal—a theory of punitive damages—it also has a narrower goal: the interpretation of the Supreme Court’s decisions on punitive damages, and in particular, of its decision in the singularly important case *BMW v. Gore*. The pursuit of the narrower goal is, as I have constructed the article, a means of pursuing the broader. In part, the selection of this rather roundabout route is driven by a general predilection on my part to utilize “great cases” or “chestnuts” of torts in order to get a grasp of difficult theoretical questions.<sup>9</sup> But there is a more particular reason why *Gore* is so well suited to this enterprise, one which my introductory discussion presaged. *Gore* was the case, within American tort law, that pushed the envelope too far, the case in which the anomaly of what appeared to be punishment within a simple tort case could no longer be tolerated by our highest court. And so, as a practical matter, it is the case that

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7. Note that three leading scholars in tort theory—Richard Posner, Jules Coleman, and Ernest Weinrib—have advocated interpretive methodologies that satisfy this description; they try to capture the normative ideas underlying the system, without necessarily arguing that the system is right from a first-order moral point of view. See, e.g., JULES L. COLEMAN, *RISKS AND WRONGS* 2 (1992); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 2 (1995); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 31–32 (1972).

8. See Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457, 484–85 (2000) (explaining how conceptual theory may nevertheless be practice-based, nonmetaphysical, and practical).

9. See Zipursky, *Rights*, *supra* note 5, at 90–93 (utilizing *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928), to explain the basic structure of tort law); John C. P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1745–52 (1998) (utilizing *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916), to explain the duty element in negligence law); Goldberg & Zipursky, *supra* note 5 (utilizing *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997) to explore the emotional harm doctrine); Arthur Ripstein & Benjamin C. Zipursky, *Corrective Justice in an Age of Mass Torts*, in *PHILOSOPHY AND THE LAW OF TORTS* 214, 231–44 (Gerald J. Postema ed., 2001) (utilizing *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980), to explain the consistency of the causation requirement with marketshare liability).

finally demands a theory of punitive damages that comes clean on what punitiveness is really about.

### C. *Introduction to Gore*

In 1992, Dr. Ira Gore bought a \$40,000 BMW whose only flaw was cosmetic and invisible.<sup>10</sup> However, because he happened to spend more money on the BMW to have it detailed, he learned that it had once had some discoloration from acid rain that had been painted over and rendered invisible to him.<sup>11</sup> Upset at BMW's failure to disclose this fact to him prior to purchase, he sued for fraud under Alabama law.<sup>12</sup> Because of this invisible flaw, Gore won a jury verdict of \$4,000 in compensatory damages and, citing a pattern of similar behavior by BMW across the country, \$4 million in punitive damages against BMW.<sup>13</sup> The trial court entered judgment and the Alabama Supreme Court affirmed, reducing the punitive damages award to \$2 million.<sup>14</sup>

BMW turned for relief to the United States Supreme Court, arguing not only that this \$2 million award for an invisible flaw was unjust, but that it violated the United States Constitution. For a 5–4 majority, Stevens reversed, but did not rely on the Eighth Amendment or on any particular defect of Alabama civil procedure.<sup>15</sup> Rather, he simply decided that there were notice difficulties implicating the Fourteenth Amendment's Due Process Clause for a verdict that was so excessive relative to plausible guideposts of reprehensibility, proportionality to (or disparity from) actual or potential harm suffered, and comparable statutory sanctions.<sup>16</sup> Breyer added a nuanced concurring opinion, focusing on the arbitrariness of the jury award.<sup>17</sup> Scalia dissented bitterly with characteristic bravado, offering the powerful if well-worn complaint that a due process critique is incoherent if it lacks any criticism of process; the idea that the award turned out to be excessive is not a due process idea.<sup>18</sup> The case's complement of academic curiosities is rounded out by a surprise pairing of Ginsburg and Rehnquist, who respectfully but forcefully asserted that the Court should restrain itself and let other branches of government solve the mounting problem of punitive damages.<sup>19</sup>

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10. *Gore*, 517 U.S. at 563.

11. *See id.* at 563 & n.1 (indicating that the top, hood, trunk, and quarter panels of Dr. Gore's car were repainted and that the damage was likely the result of acid rain).

12. *Id.* at 563.

13. *Id.* at 564–65.

14. *BMW of N. Am., Inc. v. Gore*, 646 So. 2d 619, 629 (Ala. 1994).

15. *Gore*, 517 U.S. at 586.

16. *Id.* at 575.

17. *Id.* at 586 (Breyer, J., concurring).

18. *Id.* at 598 (Scalia, J., dissenting).

19. *Id.* at 607 (Ginsburg, J., concurring).

*Gore*'s three-pronged test for gross excessiveness under the Fourteenth Amendment is now clearly the law. The Court followed up *Gore* two years later with *Cooper v. Leatherman*, where it held that a de novo review of excessiveness was appropriate for appellate courts.<sup>20</sup> And in June of 2003, the Court decided by a 6–3 margin to engage in a very aggressive punitive damages reduction under a due process theory, holding in *State Farm v. Campbell* that ordinarily an award more than nine times compensatories will be excessive as a matter of constitutional law.<sup>21</sup>

#### D. Outline of the Article

Part II lays out the progression of the Supreme Court's punitive damages decisions from its inception through *Gore*. Part III articulates the theoretical problem of describing the civil and criminal aspects of punitive damages and explains why the solution to that problem is likely to help us understand *Gore*, and also why it is difficult to address the problem within contemporary tort theory. Part IV explores several recent articles on punitive damages that can be understood as addressing the double aspect problem, but then argues that none succeed. Part V explains the model of rights, wrongs, and recourse, which I have developed in several prior articles.<sup>22</sup> Part VI is the heart of the article. It utilizes the model of rights, wrongs, and recourse to solve the double aspect problem, and then returns to our initial questions: (1) What place, if any, do punitive damages have in the civil law of tort, given that they appear to involve an idea of criminal punishment? (2) Why are punitive damages subject to special constitutional scrutiny, as in the Supreme Court's decision in *BMW v. Gore*, if they really are part of the civil law of tort? Part VII uses this framework to suggest a means of reconstructing *BMW v. Gore* in a more defensible light.

## II. The Peculiar Path of Punitive Damages at the Supreme Court

### A. The Arrival of Constitutional Punitive Damages Law at the Supreme Court

In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,<sup>23</sup> the Supreme Court opened up what has become an important domain of case law on the constitutionality of punitive damages. Numerous academics at the time had written articles asserting that large punitive damages were unconstitutional,<sup>24</sup> and yet the Court took a negative approach.

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20. 532 U.S. 424, 436 (2001).

21. 538 U.S. 408, 425 (2003).

22. See *supra* note 5.

23. 492 U.S. 257 (1989).

24. See, e.g., Gerald W. Boston, *Punitive Damages and the Eighth Amendment: Application of the Excessive Fines Clause*, 5 T.M. COOLEY L. REV. 667 (1988) (arguing that the Excessive Fines Clause should limit punitive damage awards that are disproportionate to the injury caused); John

It rejected the claim that a large punitive damages award violated federal common law, and more importantly, rejected the assertion that it was a proper basis for a claim under the Eighth Amendment's Excessive Fines Clause.<sup>25</sup> Noting the long history of punitive damages within both English and American tort law (including at the time of the ratification of the Eighth Amendment) and emphasizing the distinction between damages paid to private plaintiffs versus fines paid to the state, the Court declined to open an Eighth Amendment avenue for defendants seeking a reduction in punitive damages:

We think it clear, from both the language of the Excessive Fines Clause and the nature of our constitutional framework, that the Eighth Amendment places limits on the steps a government may take against an individual, whether it be keeping him in prison, imposing excessive monetary sanctions, or using cruel and unusual punishments. The fact that punitive damages are imposed through the aegis of courts and serve to advance governmental interests is insufficient to support the step petitioners ask us to take. While we agree with petitioners that punitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law, we fail to see how this overlap requires us to apply the Excessive Fines Clause in a case between private parties. Here, the government of Vermont has not taken a positive step to punish, as it most obviously does in the criminal context, nor has it used the civil courts to extract large payments or forfeitures for the purpose of raising revenue or disabling some individual.<sup>26</sup>

The Court left open the question of whether the Due Process clause might be a basis for a constitutional challenge—a question that Justices Brennan and Marshall, in concurrence, suggested they would likely answer affirmatively.<sup>27</sup>

Justice O'Connor—clearly the Court's most fervent voice in favor of punitive damages scrutiny—concurred that petitioners had no federal common law argument, and concurred in the view that a due process claim was not properly presented, but wrote a strong dissenting opinion adopting the position of the petitioner and its amici on the Excessive Fines Clause issue.<sup>28</sup> She argued that the Excessive Fines Clause incorporated principles within

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Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986) (suggesting that repetitive punitive awards for a single course of conduct may violate the Excessive Fines Clause); Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233 (1987) (contending that the Excessive Fines Clause should apply to punitive damages in civil cases); Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269 (1983) (arguing that punitive damages should be subject to limitation by the Fourth, Fifth, and Sixth Amendments).

25. *Browning-Ferris*, 492 U.S. at 280.

26. *Id.* at 275.

27. *Id.* at 280 (Brennan, J., concurring).

28. *Browning-Ferris*, 492 U.S. at 282 (O'Connor, J., concurring in part and dissenting in part).



the Magna Carta that closely resembled rejection of large and entirely discretionary monetary penalties.<sup>29</sup> Following the historical account generated by Gerald Boston, John Jeffries, Jr., and Calvin Massey, Justice O'Connor pointed out that the concept of a "fine" was a descendant of the "amercement."<sup>30</sup> Amercements were discretionary monetary sanctions imposed by the Crown and paid to the Crown or to feudal lords.<sup>31</sup> These awards were probably best characterized as lying between the civil and the criminal, Justice O'Connor remarked,<sup>32</sup> although she observed that Blackstone regarded them as "civil."<sup>33</sup> The thrust of her fairly detailed argument is that when the Excessive Fines Clause was enacted, it reflected an adoption of Article Ten of the English Bill of Rights (prohibiting excessive fines), which in turn incorporated the idea of the Magna Carta's prohibition of disproportionate amercements.<sup>34</sup> Notably, Justice Stevens, the author of the Court's opinion in *Gore*, was the only Justice signing onto O'Connor's opinion.<sup>35</sup>

Despite the 7-2 configuration of *Browning-Ferris*, the Justices' apparent openness to the due process claim quickly spurred further constitutional litigation. In *Pacific Mutual Life Insurance Co. v. Haslip*,<sup>36</sup> the Court directly addressed the argument that a large punitive damages award violates the Fourteenth Amendment's Due Process Clause. In a somewhat vague opinion for the Court, Justice Blackmun reasoned:

So far as we have been able to determine, every state and federal court that has considered the question has ruled that the common-law method for assessing punitive damages does not in itself violate due process. In view of this consistent history, we cannot say that the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be *per se* unconstitutional. . . .

This, however, is not the end of the matter. It would be just as inappropriate to say that, because punitive damages have been recognized for so long, their imposition is never unconstitutional. We note once again our concern about punitive damages that "run wild."

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29. *Id.* at 288.

30. *Id.* at 286-89 (citing Gerald Boston, *Punitive Damages and the Eighth Amendment: Application of the Excessive Fines Clause*, 5 COOLEY L. REV. 667 (1988); John Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986); Calvin Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233 (1987)).

31. *Browning-Ferris*, 492 U.S. at 287-88 (O'Connor, J., concurring in part and dissenting in part).

32. *Id.* at 288.

33. *Id.* (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 378 (Edward Christian ed., A. Strahan 15th ed. 1809)).

34. *Browning-Ferris*, 492 U.S. at 287-92 (O'Connor, J., concurring in part and dissenting in part).

35. *Id.* at 282.

36. 499 U.S. 1 (1991).

Having said that, we conclude that our task today is to determine whether the Due Process Clause renders the punitive damages award in this case constitutionally unacceptable.<sup>37</sup>

Justice Blackmun went on to approve the award, noting that:

[The defendant] thus had the benefit of the full panoply of Alabama's procedural protections. The jury was adequately instructed. The trial court conducted a post-verdict hearing that conformed [to Alabama's decision establishing post-trial procedures for scrutinizing punitive awards.<sup>38</sup>] The trial court specifically found that the conduct in question "evidenced intentional malicious, gross, or oppressive frauds" and found the amount of the award to be reasonable in light of the importance of discouraging insurers from similar conduct. Pacific Mutual also received the benefit of appropriate review by the Supreme Court of Alabama.<sup>39</sup>

In a concluding passage that presages the Court's approach in succeeding opinions, especially *Gore*, Justice Blackmun offered these half-apologetic remarks:

We are aware that the punitive damages award in this case is more than 4 times the amount of compensatory damages, is more than 200 times the out-of-pocket expenses of respondent Haslip, and, of course, is much in excess of the fine that could be imposed for insurance fraud under [Alabama statutory law]. Imprisonment, however, could also be required of an individual in the criminal context. While the monetary comparisons are wide and, indeed, *may be close to the line*, the award here did not lack objective criteria. We conclude, after careful consideration, that in this case it does not *cross the line into the area of constitutional impropriety*. Accordingly, Pacific Mutual's due process challenge must be, and is, rejected.<sup>40</sup>

What is striking in this passage—and comes back to dominate Justice Stevens's thinking—is the concept of a "line" of "constitutional impropriety" that must not be crossed. The line metaphor is perhaps inappropriate, and certainly ironic, in light of the fact that *Browning-Ferris* had expressly shut the door only two years earlier on a constitutional provision that would have focused the Court's attention on a question of "excessiveness." *Haslip* is the case that begins to employ a provision—the Due Process Clause—that has no apparent relation to a form of thinking that involves judging whether a "line" has been crossed.

Justice Scalia's concurrence in *Haslip* is famous for its adoption of a rigid, purely historicist account of the procedures required by the Due

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37. *Id.* at 17–18 (internal citations omitted).

38. *Hammond v. City of Gadsden*, 493 So. 2d 1374, 1378–79 (Ala. 1986).

39. *Haslip*, 499 U.S. at 23 (internal citations omitted).

40. *Id.* at 23–24 (emphasis added) (internal citations omitted).

Process Clause.<sup>41</sup> While he has frequently referred back to the framework developed in this opinion both in reproductive rights and personal autonomy cases, making no mystery of his broader negative agenda on substantive due process, he has also applied it generally in procedural due process cases.<sup>42</sup> Moreover, as noted above, while the other Justices protested the exclusivity of Justice Scalia's reliance on history,<sup>43</sup> the majority opinion comfortably gave presumptive weight to history in its due process analysis. And, indeed, in a separate concurrence, Justice Kennedy suggested that the Court was ill-situated to second-guess state courts on punitive damages and that, therefore, the presumptive weight given to the historical pedigree should win the day.<sup>44</sup>

In a powerful, unjoined dissenting opinion, Justice O'Connor articulated a straight, two-barreled procedural due process argument for striking down the punitive damages award in *Haslip*.<sup>45</sup> First, she exposed the extraordinary degree of discretion given to juries under Alabama law and applied a void-for-vagueness argument rooted in *Giaccio v. Pennsylvania*,<sup>46</sup> a 1966 due process decision.<sup>47</sup> *Giaccio*, which struck down a statute permitting a jury to use its discretion in deciding whether to assess costs against an acquitted criminal defendant, held that "one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce."<sup>48</sup>

In unusually crisp prose, Justice O'Connor reasoned that the application of *Giaccio* (and related decisions) to the punitive damages case before the Court yielded a straightforward answer:

The vagueness question is not even close. This is not a case where a State has ostensibly provided a standard to guide the jury's discretion. Alabama, making no pretensions whatsoever, gives civil juries

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41. *Id.* at 24 (Scalia, J., concurring).

42. *See, e.g.,* Dep't of Revenue v. Kurth Ranch, 511 U.S. 767, 791 (1994) (Scalia, J., dissenting); Weiss v. United States, 510 U.S. 163, 199 (1994) (Scalia, J., concurring in part and concurring in judgment); Schad v. Arizona, 501 U.S. 624, 650 (1991) (Scalia, J., concurring in part and concurring in judgment).

43. *See Haslip*, 499 U.S. at 17 (noting that it would be inappropriate to refuse a due process inquiry simply because of the historical recognition of punitive damages); *id.* at 60 (O'Connor, J., dissenting) (approving of the Court's rejection of Scalia's notion of a purely historical due process analysis).

44. *Id.* at 40 (Kennedy, J., concurring). Justice Kennedy not only joined the majority in *Gore*, he subsequently authored *Campbell*, the Court's most aggressive strike at punitive damages. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559; *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

45. 499 U.S. at 42 (O'Connor, J., dissenting).

46. 382 U.S. 399 (1966).

47. *Haslip*, 499 U.S. at 44-48 (O'Connor, J., dissenting).

48. *Id.* at 403.

complete, unfettered, and unchanneled discretion to determine whether or not to impose punitive damages. Not only that, the State *tells* the jury that it has complete discretion. This is a textbook example of void-for-vagueness doctrine. Alabama's common-law scheme is unconstitutionally vague because the State entrusts the jury with "such broad and unlimited power . . . that the jurors must make determinations of the crucial issue upon their notions of what the law should be instead of what it is."<sup>49</sup>

In a second component of her dissent, Justice O'Connor argued that even putting aside void-for-vagueness, a *Mathews v. Eldridge*<sup>50</sup> analysis would easily yield the conclusion that Alabama's procedure was unconstitutional, in light of its failure to provide the jury with substantially greater guidance in their decision.

A similar lineup of justices produced a similar result in the Court's next punitive damages decision, *TXO Production Corp. v. Alliance Resources Corp.*<sup>51</sup> Justice Stevens, writing for a plurality, approved a West Virginia punitive damages award in a fraud case, where the ratio of punitives to compensatories was 526 to 1.<sup>52</sup> When the potential harm of the defendants' conduct was considered, the punitives were not so unreasonable as to require overturning.<sup>53</sup> Pivotaly, however, Justice Stevens adopted Blackmun's moderate, if unstable, perspective:

"We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concer[n] of reasonableness . . . properly enter[s] into the constitutional calculus." And, to echo *Haslip* once again, it is with this concern for reasonableness in mind that we turn to petitioner's argument that the punitive award in this case was so "grossly excessive" as to violate the substantive component of the Due Process Clause.<sup>54</sup>

And Justice Stevens expressly cited several *Lochner*-era precedents in defense of the assertion that the Due Process Clause placed limits on permissible penalties.<sup>55</sup> As in *Haslip*, Justice Scalia concurred (joined by

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49. *Haslip*, 499 U.S. at 46 (O'Connor, J., dissenting) (quoting *Giaccio*, 382 U.S. at 403).

50. 424 U.S. 319 (1976).

51. 509 U.S. 443 (1993).

52. *Id.* at 453.

53. *Id.* at 460-61.

54. *Id.* at 458 (quoting *Haslip*, 499 U.S. at 18).

55. Specifically the Court stated:

TXO correctly points out that several of our opinions have stated that the Due Process Clause of the Fourteenth Amendment imposes substantive limits "beyond which penalties may not go." *Seaboard Air Line R. Co. v. Seegers*, 207 U.S. 73, 78 (1907). See also *St. Louis, I.M. & S.R. Co. v. Williams*, 251 U.S. 63, 66-67 (1919); *Standard Oil Co. of Ind. v. Missouri*, 224 U.S. 270, 286 (1912). Moreover, in *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482 (1915), the Court actually set

Justice Thomas),<sup>56</sup> as did Justice Kennedy in part.<sup>57</sup> And while Justice O'Connor again offered a vigorous dissent, she was joined this time by Justice White and (in part) Justice Souter.<sup>58</sup>

Taken together, this train of cases, with a mounting tort reform movement,<sup>59</sup> telegraphed the arrival of *Gore* in 1996.<sup>60</sup> Justice Stevens again wrote for the Court, joined by Justices Kennedy, Breyer, O'Connor, and Souter.<sup>61</sup> Justices O'Connor and Souter also concurred in Justice Breyer's separate concurring opinion.<sup>62</sup> As discussed in the next section, Justice Scalia dissented (joined by Justice Thomas),<sup>63</sup> and Justice Ginsburg dissented (joined by Justice Rehnquist).<sup>64</sup>

Justice Stevens began his constitutional scrutiny by addressing an issue that was somewhat peripheral, relative to the enduring significance of the holding of the case: the relevance of out-of-state conduct to punitive damages.<sup>65</sup> Almost as a preliminary, Stevens began by stating that Alabama

aside a penalty imposed on a telephone company on the ground that it was so "plainly arbitrary and oppressive" as to violate the Due Process Clause. *Id.*, at 491. In an earlier case the Court had stated that it would not review state action fixing the penalties for unlawful conduct unless "the fines imposed are so grossly excessive as to amount to a deprivation of property without due process of law." *Waters-Pierce Oil Co. v. Texas (No. 1)*, 212 U.S. 86, 111 (1909).

*TXO*, 509 U.S. at 453–54. In a footnote, Justice Stevens stated:

In each of those cases, the Court actually found no constitutional violation. Thus, in the *Seaboard Air Line R. Co.* case, the Court concluded: "We know there are limits beyond which penalties may not go—even in cases where classification is legitimate—but we are not prepared to hold that the amount of penalty imposed is so great or the length of time within which the adjustment and payment are to be made is so short that the act imposing the penalty and fixing the time is beyond the power of the State." 207 U.S. at 78–79.

*Id.* at 454 n.16.

56. *Id.* at 470 (Scalia, J., concurring)

57. *Id.* at 465 (Kennedy, J., concurring).

58. *Id.* at 472 (O'Connor, J., dissenting).

59. See DOBBS, *supra* note 2, at § 391, 1093–97 (noting the array of criticisms levied against tort law since the 1980s asserting that the system is "out of control," the injured are overcompensated, and that as a result insurance costs are inflated; other more specific schools of criticism were directed at mass tort litigation and the inadequacy of the "deterrence" effect of tort law).

60. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). I have omitted one intervening case, *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), which involved punitive damages, but not their permissibility. Several cases prior to *Browning-Ferris* also involved discussions, in some cases quite significant, regarding punitive damages in particular areas. See, e.g., *United States v. Halper*, 490 U.S. 435 (1989) (implying that punitive damages awarded to the government in a civil action may raise Eighth Amendment concerns); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (severely narrowing the domain of defamation cases in which punitive damages would be available).

61. *Gore*, 517 U.S. at 559.

62. *Id.* at 586 (Breyer, J., concurring).

63. *Id.* at 598 (Scalia, J., dissenting).

64. *Id.* at 607 (Ginsburg, J., dissenting).

65. *Gore*, 517 U.S. at 568–74. An important fact leading the Court to be deeply suspicious of the verdict was that *Gore's* attorney was permitted to argue to the jury that BMW had engaged in

would be violating principles of state sovereignty and comity if it used the potentiality of economic sanctions to change conduct in *other states* as a basis for the punitive damages award.<sup>66</sup> The comity and federalism aspects of *Gore*, along with the fact that BMW is a foreign luxury car maker that was judged harshly by an Alabama jury, may have been influential in moving the Justices to take the case and to act aggressively within it. Suspiciousness of jury overreaching against unpopular foreign entities and suspiciousness of states overreaching their proper scope of power are ideas that resonate with the Supreme Court's sense of its own mission within the constitutional scheme. There is every reason to believe these instincts would have been anticipated by BMW's sophisticated counsel and the tort reform interests that supported BMW at the Court. At the same time, the Justices were surely aware that these were only "hooks" for the proponents of constitutional scrutiny of punitive damages; the larger issue, by far, was whether the Court would strike down the award as excessive, and would hold that—even apart from comity and state sovereignty issues—there are guidelines for constitutional excessiveness that in principle apply to any punitive damages award under any American jurisdiction's tort law. The Court so held, and it is the reasoning leading to that conclusion that is of principal importance.

There is little that is surprising in the central portions of Stevens's opinion. He apparently felt pressure to tie the striking down of damages under the Due Process Clause to a familiar procedural concept: "notice."

Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose. Three guideposts, each of which indicates that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose for adhering to the nondisclosure policy<sup>67</sup> adopted in 1983, lead us to the conclusion that the \$2 million dollar award against BMW is grossly excessive: *the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by Dr. Gore and his punitive*

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nearly 1,000 instances of the same conduct around the country, and this argument appears to have been central to the inflation of a \$4,000 compensatory damages award to a \$4,000,000 punitive damages award. *Id.* at 564–65. BMW argued to the Alabama Supreme Court and to the United States Supreme Court that, in many other states, it was not only perfectly legal to have this policy (which BMW maintained was legal throughout the country, including in Alabama), but also sellers were *statutorily authorized* to have a policy such as BMW's. *Id.* at 565. Justice Stevens opined that this violated state sovereignty and comity principles. *Id.* at 571–73. As Justice Scalia pointed out in his dissent, however, the relevance of this finding by Justice Stevens is questionable in light of the fact that the Alabama Supreme Court had reached the same conclusion and affirmed a \$2 million verdict that supposedly involved only in-state conduct. *Id.* at 604 (Scalia, J., dissenting).

66. *Id.* at 572.

67. Under this national policy, BMW did not disclose minor repairs whose cost was less than 3% of the value of the vehicle. The policy was central to the fraud claim which, Gore asserted, warranted punitive damages. *Id.* at 563–64.

*damages award, and the difference between this remedy and the civil penalties authorized or imposed in comparable cases.*<sup>68</sup>

And yet little or none of the analysis that follows addresses the issue of notice, at least not in any clear way. Rather, it all seems to pertain to the three guideposts: reprehensibility, ratio between punitive and non-punitive damages, and comparable civil penalties.<sup>69</sup> And it pertains to the bearing of these guideposts upon gross excessiveness, as Justice Stevens's concluding statement makes very clear: "As in *Haslip*, we are not prepared to draw a bright line marking the limits of a constitutionally acceptable punitive damages award. Unlike that case, however, we are fully convinced that the grossly excessive award imposed in this case transcends the constitutional limit."<sup>70</sup>

Justice Stevens applied the three guideposts, and, not surprisingly, found: the concealment of the damage was not particularly reprehensible; the harm was minimal compared to the punitives award; and the comparable civil penalties were only a tiny fraction of the \$2 million.<sup>71</sup> The Court therefore struck down the award, finally holding that punitive damages can be unconstitutional.<sup>72</sup> On remand, the trial judge reduced the punitive damages to \$50,000, and the Supreme Court of Alabama affirmed.<sup>73</sup>

The law of *Gore*, as indicated in thousands of lower court opinions today<sup>74</sup> and in two subsequent Supreme Court opinions,<sup>75</sup> requires a determination of whether damages are excessive to the point of being constitutionally impermissible in light of the three guideposts. Although Justice Breyer's concurrence, drawing upon some of the themes in

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68. *Id.* at 574–75 (emphasis added).

69. *See id.* at 575–80 (discussing the degree of reprehensibility of BMW's conduct); *see id.* at 580–83 (indicating the need for a reasonable relationship between actual harm and punitive damages); *see id.* at 583–84 (comparing punitive damages to the civil penalties authorized for comparable misconduct).

70. *Id.* at 585–86. On remand to the Alabama Supreme Court, the punitive damages awarded were \$50,000. *BMW of N. Am., Inc. v. Gore*, 701 So. 2d 507, 515 (Ala. 1997).

71. *Gore*, 517 U.S. at 574–75.

72. *Id.* at 585–86.

73. More precisely, the trial court ordered a new trial unless the damages were remitted to \$50,000. *BMW*, 701 So. 2d at 515. Notably, Justice Stevens's opinion dropped a footnote indicating that, in light of fourteen Alabama cases and the juries' manifest attraction to the idea of multiplying the number of other instances by \$4,000, "respect for the error-free portion of the jury verdict would seem to produce an award of \$56,000 (\$4,000 multiplied by fourteen, the number of repainted vehicles sold in Alabama)." *Gore*, 517 U.S. at 567 n.11.

74. *See, e.g.*, Allison L. Bussell, Comment, *The Eclipse of State Common-Law Review and Assessment of Punitive Damages by the Due Process Analysis: The Aftermath of BMW of North America v. Gore, Inc.*, 71 TENN. L. REV. 337 (2004) (analyzing the impact of *Gore* in subsequent lower and higher court decisions).

75. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419–30 (2003) (applying guidepost analysis from *Gore* to punitive damages awarded in bad-faith action against an insurance company); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 442–43 (2001) (holding that appellate courts should apply a de novo standard to constitutional excessiveness inquiry regarding punitive damages).

O'Connor's earlier opinions, emphasizes the vagueness of Alabama's standards and "the basic unfairness of depriving citizens of life, liberty, or property through the application, not of law and legal processes, but of arbitrary coercion,"<sup>76</sup> it is, of course, the Court's opinion, with its focus on excessiveness and the three guideposts, that has served as the legal standard.

### *B. The Two-Fold Critique of the Dissenters*

The two dissenting opinions in *Gore* clearly press its shortcomings. Justice Scalia in effect contends that all of the putative constitutional arguments against the punitive damage awards are either unsound or irrelevant. First, the comity argument is irrelevant, since the Alabama Supreme Court accepted it, and took it into account.<sup>77</sup> Second, the due process argument is based on a misconception of what the Due Process Clause means, a view Justice Scalia had developed extensively in his *Haslip* concurrence.<sup>78</sup>

Parenthetically, the excessive fines argument was rejected in *Browning-Ferris*,<sup>79</sup> and no argument for resurrecting it was put forward in *Gore*. Moreover, the standard procedural due process argument based on the looseness of the state law standards had been made before *Gore*, and rejected.<sup>80</sup> More particularly, the test used by the Alabama courts<sup>81</sup> was specifically endorsed in a prior Supreme Court decision in which punitive damages were expressly evaluated.<sup>82</sup> While Justice Breyer's concurring opinion in effect revisits that issue,<sup>83</sup> his opinion is not the opinion of the Court. Moreover, Breyer really had nothing to say about what sort of standards would be adequate procedurally, nothing to say about the contrary precedent, and nothing to say about the historical argument cutting in the other direction.

Perhaps most important, according to Scalia, is what Stevens's opinion for the Court did say: the real problem identified was that the award was simply too big.<sup>84</sup> The "just-too-big" interpretation of Stevens's opinion is quite compelling in light of the fact that *Gore* is the culmination of a series of opinions by members of Stevens's five-member majority on punitive damages whose main message seems to have been: *We are troubled by these awards because they are very large, and, although we are not yet willing to say that they are so large that they are unconstitutional, we also do not rule*

76. *Gore*, 517 U.S. at 587 (Breyer, J., concurring) (citations omitted).

77. *Id.* at 598, 604 (Scalia, J., dissenting).

78. *Id.* at 598-99 (citing *Haslip*, 499 U.S. at 25-28 (1991) (Scalia, J., concurring)).

79. 492 U.S. 257, 259-60 (1989).

80. *Haslip*, 499 U.S. 1, 21-22 (1991).

81. *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 223-24 (Ala. 1989) (setting forth a several-factor test to be used for reviewing excessiveness of punitive damages awards under common law).

82. *Haslip*, 499 U.S. at 21-22 (1991) (approving the *Green Oil* test as part of what renders Alabama's procedures permissible from a procedural due process standpoint).

83. *Gore*, 517 U.S. at 586, 589 (Breyer, J., concurring).

84. *Id.* at 599 (Scalia, J., dissenting).



out the possibility that some day an award will come which will be so large, on the facts, that it crosses the threshold of constitutional acceptability. By Stevens's own terms, *Gore's* \$2 million for an undetectable flaw is the case that crosses the line.

The "just-too-big" rationale is indefensible, Scalia argues, because there is no constitutional hook for it once the procedural due process and excessive fines arguments have been rejected.<sup>85</sup> The Court therefore has no business even opining on whether the damages award is too large; there is no legal consequence to that decision given that the excessiveness of damages is a question of state law.<sup>86</sup> To say that the damages are a violation of the Due Process Clause based on a defect not in the process but only in the result is incoherent.<sup>87</sup> Of course, in one sense, it is not unprecedented, for all of the substantive due process cases that Scalia deplors also find a violation of the Due Process Clause based on a judgment of the injustice of the substantive result, rather than on the lack of adequate process.<sup>88</sup> This is what Scalia has in mind when he brands the Court's decision as a new entry in substantive due process.<sup>89</sup>

It is important for the structure of Scalia's constitutional theory and the nature of his reproach of substantive due process cases that he need not say any more than this to condemn them. But for many lawyers, this does not say enough; even before *Griswold* the Court's due process jurisprudence laid a foundation in precedent for a realm of due process that is not really about procedure, and certainly continued after *Griswold* to do so.<sup>90</sup> And so it would be easy to discount Scalia's refutation as too facile, too contentiously opposed to substantive due process, perhaps because of his strong views on abortion.<sup>91</sup>

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85. *Id.* at 602.

86. *Id.* at 600.

87. *Id.* at 607.

88. *See, e.g.,* *Lawrence v. Texas*, 539 U.S. 558, 602–03 (2003) (Scalia, J., dissenting) (critiquing the Court's improper use of rational basis review and accusing the Court of having "signed on to the so-called homosexual agenda" by interfering with the legislative process to achieve a result); *State Farm v. Campbell*, 538 U.S. 408, 429 (2003) (rejecting the *Gore* framework for punitive damages and reasserting the position that the state process for calculating damages was appropriate); *Planned Parenthood v. Casey*, 505 U.S. 833, 984 (1992) (Scalia, J., dissenting) (arguing that the Court's decision was based on "personal predilection" and not "reasoned judgment").

89. *Gore*, 517 U.S. at 599 (Scalia, J., dissenting).

90. *See* James E. Fleming, *Constructing the Substantive Constitution*, 72 TEXAS L. REV. 211, 257–58 (1993) (arguing that due process protection of substantive liberties is deeply embedded in the Supreme Court's constitutional jurisprudence). Fleming's substantive due process discussion relies on several well-known cases. *E.g.,* *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

91. *See* Benjamin C. Zipursky, *The Pedigrees of Rights and Powers in Scalia's Cruzan Concurrence*, 56 U. PITT. L. REV. 283 (1994) (depicting Scalia's historicist due process jurisprudence as, in part, strategic).

I think that this would be a mistake, as indicated by the fact that Justice Ginsburg also dissented in *Gore*.<sup>92</sup> She is among the Justices whose views are not history-bound and do not display fear of broad interpretations of rights-bearing clauses of the Constitution. *Gore* does not fit the model of landmark substantive due process cases in any respects except those which would tend to undermine its plausibility. That is, it fits in the sense that it appears to be textually untethered, it undermines state law, and it lacks any discernible connection to genuine questions about the acceptability of the state procedures actually utilized.<sup>93</sup> But cases like *Pierce*,<sup>94</sup> *Griswold*,<sup>95</sup> *Roe*,<sup>96</sup> and *Casey*<sup>97</sup> arguably have two attributes that appear to be lacking in *Gore*. First, these cases purport to be about substantive fundamental rights.<sup>98</sup> Second (and relatedly), advocates of federal judicial protection of those rights under the rubric of the Constitution advance arguments that the federal judiciary is specially situated as an institution to provide protection for those rights that we have reason to believe—for reasons other than contingent history—will not be reliably protected through other institutions.<sup>99</sup> Corporate interests in dollars are anything but fundamental rights, and virtually no one in America believes that state and federal legislatures are systematically ill-designed to recognize corporate interests. The relative institutional incompetence of the federal judiciary is the message that the oddly matched pair of Ginsburg and Rehnquist drive home in the second dissent.<sup>100</sup>

92. *Gore*, 517 U.S. at 607.

93. *Id.* at 599–601 (Scalia, J., dissenting) (arguing that the majority’s substantive due process analysis is based on neither constitutional text nor on any solid precedent).

94. *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (holding that the liberty of parents to direct the education of their children is protected by the Due Process Clause).

95. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that the right of married couples to use contraceptives is protected by the Due Process Clause).

96. *Roe v. Wade*, 410 U.S. 113 (1973) (holding that the right to abortion is protected by the Due Process Clause).

97. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (affirming *Roe*).

98. *See, e.g., Pierce*, 268 U.S. at 535 (recognizing that the fundamental theory of liberty means that rights guaranteed by the Constitution may not be abridged by legislation that is not rationally related to any purpose of the state); *Griswold*, 381 U.S. at 484 (recognizing that specific provisions in the Bill of Rights have penumbras that create zones of privacy); *Roe*, 410 U.S. at 155 (determining that a state may not infringe upon a fundamental right without a compelling justification); *Casey*, 505 U.S. at 848 (affirming *Roe* and recognizing that aspects of liberty are protected against state interference by the substantive component of the Due Process Clause).

99. *See, e.g., Pierce*, 268 U.S. at 535 (acknowledging the Court’s role in protecting the rights of private schools from “unwarranted compulsion” by the state); *Griswold*, 381 U.S. at 485 (recognizing the Court’s duty to protect freedoms guaranteed by the Bill of Rights by prohibiting overbroad government regulation); *Roe*, 410 U.S. at 155 (noting the Court’s ability to balance legitimate state interests and fundamental rights of individuals); *Casey*, 505 U.S. at 849 (discussing the Court’s function of using “reasoned judgment” when interpreting the Constitution and adjudicating substantive due process claims).

100. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 612–13 (1996) (Ginsburg, J., dissenting). It is not that Ginsburg’s dissent expressly makes the distinction from substantive due process cases. It does not. It does, however, expressly make a case for both a lack of institutional competence and a

If constitutional doctrine does not seem to help much, perhaps another pocket of high legal academy—economic analysis of law—will help. On this view, there really is a test for the rationality of damages awards: how defensible they are as deterrents to socially wasteful conduct. A number of important scholars have argued that, because of the costs of detecting tortious conduct that causes harm, there would be a serious problem of under-enforcement in actions for compensatory damages alone.<sup>101</sup> Hence, extra-compensatory damages serve to supplement compensatory damages in such a manner that a rational actor with awareness of under-enforcement problems would nonetheless consider the externalized costs of its actions, because the prospect of *extra-compensatory damages for torts that have actually been detected* in effect warrant doing so.<sup>102</sup> In order to make that prospect real, the extra-compensatory damages must then in fact be enforced. When courts refer to punitive damages, the theory goes, this is what they mean. While the aforementioned view would seem to favor the maintenance of punitive damages (which, in some ways, it does), it tends also to suggest some reconstruction of what would make a particular award rational or irrational. Hence, to the extent that a particular scheme is untethered from a conception of the appropriate deterrent for motivating a profit-maximizing agent, it would be fair game for a critique of punitive damages awards from a law and economics point of view.

There are at least three problems with an economic view of the punitive damages award, at least as an effort to unpack *Gore*. First, it simply does not engage the relevant constitutional text and history. Indeed, it has nothing whatsoever to do with rights-bearing provisions of the Constitution. And so, while the economic view of punitive damages might work as a policy for striking down an award, it does not make sense at the Supreme Court, at least if one takes jurisdictional considerations at all seriously. Second, it is far from obvious that it succeeds in explaining why *Gore* would seem unacceptable to the average lawyer, for the \$2 million dollar award may indeed be appropriately large for the purpose of providing an incentive for

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lack of functional arguments for exercising judicial power here. *Id.* (“The Court is not well equipped for this mission [of reviewing state court damage awards].”).

101. That is, legal actors would be inclined to take socially unjustifiable risks of injury where those injuries would not likely be traced back to the actors. In this way, compensating actual discovered injury victims at simply the costs of their injury would be sufficient to lead defendants to take appropriate precautions. Punitive damages arguably fix this problem. They involve threatening potential tortfeasors as follows: Even if we do not catch your every tort, when we do catch you, you will pay multiple damages.

102. See, e.g., A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 889–96 (1998) (emphasizing, principally, the under-detection and under-enforcement rationales for damages beyond compensatories). The law and economics literature on punitive damages is broad and deep in ways that I cannot, and do not, attempt to capture here. See, e.g., Robert D. Cooter, *Economic Analysis of Punitive Damages*, 56 S. CAL. L. REV. 79 (1982) (utilizing economic theory to develop punitive damage award standards); Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421 (1998) (constructing a punitive damages standard based on economic penalty theory).

BMW to correct its failures to reveal defects to consumers. Third, and conversely, this theory tends to undermine the soundness of huge swaths of punitive damages law, particularly those parts that require willfulness and those parts that fail to treat the flagrancy and obviousness of a misdeed as a reason not to award punitive damages.<sup>103</sup> While it would be interesting as an engine for policy change, the economic theory is not plausible either as a descriptive account of the actual tort doctrine or as an interpretation of the substance of the constitutional issues overlaying the tort doctrine.

A broader realist, functionalist, or public choice perspective does not help rationalize *Gore* either, at least not as a legal matter. It is tempting to argue that choices to engage in judicial review are not really a matter of constitutional text, basic rights, or common law monitoring; they are aspects of the courts' role as a corrective device where other institutions have not stepped in.<sup>104</sup> This is clearly the sort of role O'Connor has developed in her important opinions in the area of punitive damages, particularly those leading up to *Gore*.<sup>105</sup> But the problem with this argument is decisively pointed out by Ginsburg's dissenting opinion. The institutional design argument would seem to fail on every front: first, and most obviously, tort law is traditionally the prerogative of the states;<sup>106</sup> second, there is a tremendous amount of activity at the state judicial and legislative level working on the problem;<sup>107</sup> third, there has been action at the Congressional level.<sup>108</sup> Moreover, it would seem that the Court is peculiarly ill-designed to determine what sorts of restrictions are demanded by today's economy.<sup>109</sup> Indeed, Justice O'Connor's view that the punitive damages system is broken and therefore needs to be fixed—like the law and economics account described above—would seem to be totally vulnerable to the charge of Lochnerizing.<sup>110</sup>

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103. See, e.g., *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 (1993) (citing "the bad faith of petitioner" as a reason for upholding the large punitive award); David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 *VILL. L. REV.* 363, 387 (1994), cited in *Gore*, 517 U.S. at 576 (noting that rather than being a reason not to award punitives, "[t]he flagrancy of the misconduct is thought to be the primary consideration in determining the amount of punitive damages").

104. Mark Geistfeld understands the Court as engaged in this sort of project. See Mark Geistfeld, *Constitutional Tort Reform*, 38 *LOY. L.A. L. REV.* (forthcoming 2005).

105. See, e.g., *Pac. Mut. Life Ins. v. Haslip*, 499 U.S. 1, 43 (1991) (O'Connor, J., dissenting) (stating that the Court should overturn a punitive damages verdict because "the State's mechanism for postverdict judicial review . . . is incapable of curing a grant of standardless discretion to the jury"); *TXO*, 509 U.S. at 473 (O'Connor, J., dissenting) (arguing that the court should overturn a "monstrous award" because state law "procedures . . . were wholly inadequate").

106. *Gore*, 517 U.S. at 612 (Ginsburg, J., dissenting).

107. *Id.* at 607–08, apps. I, II, & III.

108. See, e.g., Common Sense Legal Standards Reform Act of 1995, H.R. 956, 104th Cong. (1995) (unsuccessfully proposing to limit punitive damages awards to "3 times the amount of damages awarded to the claimant for the economic loss on which the claimant's action is based, or \$250,000, whichever is greater").

109. *Gore*, 517 U.S. at 613.

110. For the same reasons, I am skeptical about whether the empirical research carried out by Sunstein, Kahneman, and others on jury findings in punitive damages has any capacity to support a

If these critical remarks are correct, then the right story to tell about *Gore* is that it is a hard case that made bad law. Frequently these are cases where judges are so dissatisfied with the result reached by the decisionmakers below that they cannot resist the idea of making a different decision; so gripped by the idea that injustice will result if they do not act, they allow themselves to reshape the law. But because the law itself does not generate any sound basis—the Court is solely correcting the facts of the prior decision—the law needs to be modified to make room for a just resolution of the particular case. Unless there is a rationale for the modification or reshaping that is independent of the fact pattern and posture of the case, the legal change may turn out to be unjustifiable and unwise. That is how hard cases make bad law. *Gore* seems to fit this mold: five justices were caught off guard by the flagrant and almost comical injustice of Dr. Gore walking away with \$2 million because of an invisible flaw in the paint of his BMW. They therefore permitted themselves to reach out and strike down the award as “unconstitutional,” despite the absence of any sound basis for doing so.

Nine years after the decision, we cannot simply shrug our shoulders and say that even if *Gore* was illegitimate as binding law, it was fine on the facts and it was just one case. Since *Gore*, the Supreme Court has been increasingly aggressive on punitive damages, deciding in *Leatherman* that de novo review is warranted,<sup>111</sup> and later advancing its doctrine and contracting its presumptions in *Campbell*.<sup>112</sup> Moreover, hundreds of courts around the country have now followed *Gore*, and it may well play a significant role in untold other cases.<sup>113</sup> And there is fluidity; we do not know where the Court’s punitive damages law will be going. Although the decision in *Gore* is a legal curiosity, it is not merely a curiosity. We need a way of thinking about *Gore* that begins to hang together as something other than the worst kind of Lochnerizing and Supreme Court motivated tort reform, slid through the Court by a talented team of defense lawyers who were able to convince five justices only because of the ludicrous facts of the case.

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reconstruction of *Gore* (which is not, to be fair, their aim). See e.g., CASS SUNSTEIN, ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE (2002). There is, moreover, reason to be skeptical about the putative incompetence of juries to assess punitive damages coherently. See, e.g., Theodore Eisenberg, Jeffrey J. Rachlinski, & Martin T. Wells, *Reconciling Experimental Incoherence with Real-World Coherence in Punitive Damages*, 54 STAN. L. REV. 1239 (2002) (criticizing claims about incoherence); Theodore Eisenberg, Neil LaFountain, Brian Ostrom & David Rottman, *Juries, Verdicts, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743 (2002) (finding that juries and judges do not perform substantially differently in assigning punitive damages, and both are relatively coherent and predictable); Theodore Eisenberg, John Goerdt, Brian Ostrom, David Rottman & Martin T. Wells, *The Predictability of Punitive Damages*, 26 J. LEG. STUD. 623 (1997) (finding that evidence undercuts the contention that juries are unreliable and erratic on punitive damages).

111. 532 U.S. 424, 436 (2001).

112. 538 U.S. 408, 419–29 (2003).

113. See Bussell, *supra* note 74, at 348 (discussing the various methods by which lower courts have attempted to follow the *Gore* decision, despite widespread confusion with its reasoning).

To say that *Gore* is difficult to justify is quite different from saying that it is difficult to explain in causal or historical terms. The Court's turn in *Gore* can be understood as simply a change in course due in part to changed personnel and in part to changed opinion. Of the five-justice majority in *Gore*, two—O'Connor and Stevens—had maintained this position all along on the Court, beginning with their (partial) dissent in *Browning-Ferris*.<sup>114</sup> Two more—Justices Souter and Breyer—replaced Justices Brennan and Blackmun, who had voted against punitive damages review in *Browning-Ferris*.<sup>115</sup> While Justices Brennan and Blackmun each maintained a strong attraction to due process review, each was clearly ambivalent.<sup>116</sup> Justices Souter and Breyer, by contrast, had consistently displayed the frugal New Englanders' skepticism about inflated punitive damages, and neither had ever rejected a constitutional argument against them at the Supreme Court. And so the turnover in court personnel went two-thirds of the way to making the change from two votes (in *Browning-Ferris*) to a majority of five in *Gore*.

The fifth vote was Justice Kennedy's, and it did reflect a change. Kennedy's *Browning-Ferris* vote, although unaccompanied by an individual opinion, likely represented a general disinclination to embark upon judicial review of genuine criminal fines imposed by the government,<sup>117</sup> as well as discomfort with the apparent softness on the civil-criminal distinction in double jeopardy cases.<sup>118</sup> But his due process decisions tell an intriguingly different story. Justice Kennedy's *Haslip* concurrence does not foreclose the possibility that, as a substantive matter, he might accept the view espoused by Justice O'Connor and some of the bar's tort reform wing that juries too frequently let punitive damages run wild. And yet Justice Kennedy rejects Justice Blackmun's suggestion, in the opinion of the Court in *Haslip*, that a due process problem exists notwithstanding the Court's approval of the actual procedure used.<sup>119</sup> Like Justice Scalia, but in a manner pointedly less tradition-bound, Justice Kennedy is unwilling to indulge his desire to strike down this unreasonable damages award because he thinks it is wrong to use

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114. 492 U.S. 257, 282–301 (1989) (O'Connor, J., concurring in part and dissenting in part).

115. *Id.* at 259, 262 (majority opinion).

116. *Id.* at 276–77 (reserving the due process question for “another day”); *id.* at 280 (Brennan, J., concurring) (noting that the Court “leaves the door open” for a due process argument in a future case).

117. See *United States v. Bajakajian*, 524 U.S. 321, 344 (1998) (Kennedy, J., dissenting) (rejecting the majority's holding that a civil forfeiture can constitute an excessive fine under the Eighth Amendment's Excessive Fines Clause).

118. *United States v. Ursery*, 518 U.S. 267, 295–96 (1996) (Kennedy, J., concurring) (arguing that civil in rem forfeiture following criminal punishment should not be barred by the Double Jeopardy Clause).

119. *Pac. Mut. Life Ins. v. Haslip*, 499 U.S. 1, 41–42 (1990) (Kennedy, J., concurring) (arguing that a Due Process argument does not make sense as a rationale for striking down a punitive damages award except insofar as the size of the award is understood to reflect bias or prejudice; otherwise, jury procedure deemed proper constitutes Due Process).

an untethered, non-procedural due process argument to do so, and he finds no other hook.<sup>120</sup>

Just three years later, in *Gore*, however, Kennedy changed his vote, abandoning the conservative bloc with which he had voted in earlier cases. Between *Haslip* and *Gore*, the Court decided *Casey*,<sup>121</sup> and Justice Kennedy famously switched positions on the permissibility of substantive due process.<sup>122</sup> Having taken that dive as a matter of principle, in an area where he was at best torn on substantive grounds, and having taken heat both on and off the Court for so doing,<sup>123</sup> it appears that Kennedy no longer had the same passion for staying clear of substantive due process. To put it more bluntly, he had no remaining reason to refrain from pushing what he thought was the substantively right framework for punitive damages under the Fourteenth Amendment's Due Process Clause.<sup>124</sup> And so he added his vote to Stevens's, and the Court struck down its first case. Kennedy has not turned back, and his decision for a six-member majority in *Campbell* plainly adopts the most aggressive approach the Court has taken to punitive damages.<sup>125</sup> The defendant won a victory in *Gore* for a simple reason: the votes were there.

A realistic analysis of the individualized Justices' thinking in *Gore* also sheds light on Justice Stevens's majority opinion in particular. Earlier, I expressed puzzlement at the vocabulary of "excessiveness" and of a "constitutional line," and I expressed concern that the Court had embraced a three-part substantive test for whether the line had been crossed, even though it was putatively due process at issue, not the Excessive Fines Clause. However, if Justice Stevens appeared enamored of an "excessiveness" idea reminiscent of an Eighth Amendment proportionality review, it is because he *is* enamored of that view; indeed, he was the only Justice to sign on to Justice O'Connor's (partial) dissent in *Browning-Ferris*, which articulated an excessiveness and Eighth Amendment proportionality inquiry to be used for punitive damages.<sup>126</sup> Having the votes in *Gore* and having the prerogative to write for the majority, Justice Stevens recycled the *Browning-Ferris* framework and placed it under the Due Process Clause, now utilizing the

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120. *Id.*

121. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

122. *Id.* at 849.

123. *See, e.g., Casey*, 505 U.S. at 987 (Scalia, J., dissenting) (taking Justice Kennedy to task for "erroneous citation" to prior opinions that Justice Scalia had joined); Nancy E. Roman, "Wimp Bloc" Disappoints Right Wing, WASH. TIMES, June 30, 1992, at A1 (noting conservatives' disappointment with Republican appointees to the Supreme Court following the *Casey* decision).

124. *Cf. E. Enters. v. Apfel*, 524 U.S. 498, 539-40 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) (expressing preference for using due process arguments over takings arguments in striking down economic regulation).

125. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418-29 (holding jury's \$145 million punitive damage award unconstitutional in light of *Gore* guideposts).

126. 492 U.S. 257, 282-301 (1989) (O'Connor, J., dissenting).

“unreasonableness” and “gross excessiveness” language,<sup>127</sup> language that had been officially blessed by the Court in dicta in *Haslip*<sup>128</sup> and *TXO*.<sup>129</sup>

Confirmation of Stevens’s Eighth Amendment orientation to punitive damages is provided by passages in his subsequent punitive damages opinion in *Leatherman* with which he frames the standard of review issue:

Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion. That Clause makes the Eighth Amendment’s prohibition against excessive fines and cruel and unusual punishments applicable to the states. *Furman v. Georgia*, 408 U.S. 238 (1972) (*per curiam*). The Due Process Clause of its own force also prohibits the States from imposing “grossly excessive” punishments on tortfeasors, *Gore*, 517 U.S., at 562; *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453–55 (1993) (plurality opinion).<sup>130</sup>

Justice Stevens then goes on to state that “[t]he Court has enforced those limits in cases involving deprivations of life; deprivations of liberty; and deprivations of property.”<sup>131</sup> Under deprivations of life and deprivations of liberty, he expressly cites Eighth Amendment cases.<sup>132</sup> And under deprivations of property he cites *United States v. Bajakajian*,<sup>133</sup> and *Gore*,<sup>134</sup> strongly suggesting that he believes both cases are excessive fines cases, but that, for whatever reasons, the Court has simply decided to say that the principle underlying the Eighth Amendment applies to punitive damages without the authority of the Eighth Amendment, but only through the Due Process Clause directly.<sup>135</sup> And one suspects that this is because *Browning-*

127. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996).

128. 499 U.S. 1, 18 (1991) (recognizing that the Due Process Clause should guide the Court’s inquiry into the reasonableness of punitive damages).

129. 509 U.S. 443, 458–59 (1993) (echoing the position in *Haslip* that a general concern of reasonableness should guide determinations of whether a punitive damages award is too excessive and in violation of the Due Process Clause).

130. *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 433–34 (2001).

131. *Id.* at 434.

132. *Id.* (citing *Solem v. Helm*, 463 U.S. 277, 279, 303 (1983); *Enmund v. Florida*, 458 U.S. 782, 787, 801 (1982); *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

133. 524 U.S. 321 (1998). The *Leatherman* opinion’s parenthetical on *Bajakajian* reads: “civil forfeiture of \$357,144 for violating reporting requirement was ‘grossly disproportionate’ to the gravity of the offense.” 532 U.S. at 434.

134. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585–86 (1996). The parenthetical for *Gore* reads: “(\$2 million punitive damages award for failing to advise customers of minor pre-delivery repairs to new automobiles was ‘grossly excessive’ and therefore unconstitutional).”

135. Cf. Pamela S. Karlan, Lecture, “Pricking the Lines”: *the Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 881 (2004) (citing *Bajakajian* for the proposition that “[t]he Court has also identified a gross disproportionality principle under the Excessive Fines Clause of the Eighth Amendment”); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 732–33 (2005) (also citing *Bajakajian* for its Eighth Amendment implications). Although not focused on the problem of *Gore* interpretation or



*Ferris* cut off the express Eighth Amendment route, and the slightly reconstituted Court (with a changed Kennedy) has decided to change course and adopt the excessive fines argument, but needs a new label to appear consistent.<sup>136</sup>

The “changed course” explanation of *Gore* should supply no greater comfort than Scalia’s “substantive due process” interpretation and leaves us equally in need of a satisfactory theoretical justification. First, and most obviously, the Court is not entitled simply to change its mind within a few years without giving any reasons for doing so, and the failure to own up to it only exacerbates the problem—if a true overruling is what is occurring. Second, although O’Connor’s reasons for deeming the Eighth Amendment applicable were not without force, seven members of the Court articulated a powerful and unmet reason for rejecting the Eighth Amendment: both historically and as a matter of principle, Eighth Amendment “fines” seem to connote the idea of the state as the one exacting the fine.<sup>137</sup> Third, and taking a more charitable view, Stevens’s approach seems to be placing an Eighth Amendment type of idea (not the Excessive Fines Clause as such) under the rubric of the Due Process Clause. This idea is quite obscure: while lawyers have some sense of what it means for the Due Process Clause to incorporate the Eighth Amendment, we really have no sense of what it means for an Eighth Amendment excessiveness idea to apply as a matter of due process when the Eighth Amendment itself is said not to be implicated—or, more precisely, we really have no sense what it means unless it is the kind of free-floating normative oversight that Scalia contemptuously labels “substantive due process.”

Finally, the mixed Eighth Amendment–Due Process rationale that seems, in some sense, to be engaging the Court today is far from inert. *Leatherman* provided a very powerful tool for defendants by embracing a de novo standard that depended heavily upon an Eighth Amendment idea.<sup>138</sup> Equally troubling, Justice Kennedy’s opinion in *Campbell* does not limit itself to a “just too big” excessiveness standard that might be folded under an

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on punitive damages as an aspect of tort law, Karlan’s and Lee’s articles display the overlap of (and differences between) the Court’s Eighth Amendment decisions “proper” (on the one hand) and *Gore* and its progeny (on the other), and have in that way influenced my view of the subject. Karlan also develops the idea that punitive damages may be, in effect, more plausibly targeted for effective review because they do not emerge from a legislative process, a point I make use of in Part VII, *infra*.

136. Cf. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 458–59 n.24 (1993) (noting, with irony, that Scalia’s critique of Stevens’s majority opinion for engaging in *Lochner*-era substantive due process and enumerated rights review is inconsistent with Scalia’s recognition that the Due Process Clause incorporates substantive guarantees of the Bill of Rights, one of which is the Excessive Fines Clause).

137. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 257, 266 (1989).

138. 532 U.S. 424, 436 (2001).

Eighth Amendment knock-off (whatever that means).<sup>139</sup> Rather, his opinion for the Court enumerates the kind of inquiry and the kind of factors that may permissibly be considered to be part of the reason for a punitive damages award; genuine process considerations appear to be leaking back in.<sup>140</sup> In short, it should be of no solace that we can, looking back, say that Justice Stevens in *Gore* was constructing a constitutional rationale with more of a shape to it than just “substantive due process.” For what we find, if we try to connect the dots, is a misshapen hybrid of Eighth Amendment and Due Process rationales, which only deepens the instability and apparent illegitimacy of the Court’s decision.

### III. The Double Aspect Problem in the Theory of Punitive Damages

At the end of the day, I do not really hold this skeptical view. I think that, all considered, *Gore* is rightly decided. Moreover, I think *Gore* is powerful as a “study” case, because there is something about its factual scenario that appears to provide a hint as to why constitutional scrutiny for punitive damages might make sense. My methodological conjecture is that if we can begin to identify what makes the case striking, this may help us identify an underlying structural feature relevant to legal analysis that the case illustrates. And my substantive conjecture, following this method, is that the four million dollar damages award by the jury (and even the two million dollar award after appellate review) seems so extraordinary relative to the wrong done to *Gore*, that one is really pressed to see *Gore* himself as anything but a true bounty hunter. Put differently, even after a great dose of deference on fact-finding, it just makes no sense to see *Gore*’s verdict as representing what is owed to him as plaintiff in a civil action; it seems evident that Alabama is imposing a criminal fine, and rewarding the person functioning as a private attorney general. What is missing in *Gore* is the ambiguity of a punitive damages award that is, in some sense, truly *damages to the plaintiff-victim in a civil tort action* and, in another sense, *a fine imposed by the state as punishment for wrongful conduct and collected by the one who brought the litigation*. In *Gore*, it is so overwhelmingly the second, criminal, aspect that dominates, that it is hard to take the first, civil (tort) aspect seriously as anything but a formality. But of course, to say this is only to articulate an inchoate conjecture as to what is peculiar about the case; we need much more to explain it, for the phrases “in some sense” and “in another sense” are just placeholders, doing all the work. An explanation of *Gore* would need to fill in the blanks.

If we follow this pair of conjectures, here is where we arrive: Sorting out *Gore* and its progeny requires us to admit that punitive damages have a

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139. 538 U.S. 408, 429 (2003).

140. *Id.* at 416–71 (reasoning that a person must receive notice of both the conduct that will create liability and the severity of the penalty that may be imposed).

double aspect. They are in part like fines collected by the bounty hunters who prosecute tort cases, and they are in part like damages awards in a civil action. If they are genuinely a part of the private law—genuinely damage awards for the plaintiff in a private cause of action—then treating them as fines appears misplaced, as *Browning-Ferris* concluded. But if they are really fines that happen to be collected as bounties, in private actions, then it is mere formalism to deny defendants Fourteenth Amendment and Eighth Amendment protection. The *Gore* Court just couldn't help but see them in the latter light, and therefore slid into a different constitutional mold. Because it could not actually justify the shift in perspective, it did so silently, finding a different label. But that means that if one were to come clean on *Gore* and justify it, one would need to explain why the "fines" image of punitive damages dominates, why the "genuine damages award" image of punitive damages just cannot hold up in *Gore*.

Explaining the differing images of punitive damages in *Gore* and some of its predecessors (like *Browning-Ferris*) is no small matter. For one thing, the Court is not explicit about what I have claimed, and indeed, expressly says it is doing something different. Moreover, while the idea of resting constitutional protection for facially civil remedies on the recasting of those remedies as criminal is not alien to the Court, in light of the *Mendoza-Martinez*<sup>141</sup> to *Halper*<sup>142</sup> line of cases in Double Jeopardy Clause jurisprudence, that line of cases has come to a sort of non-confidence vote in *United States v. Ursery*,<sup>143</sup> where the Court expressed in strong terms its distaste for this kind of approach. Indeed, this disinclination to recharacterize the formally civil as criminal, is likely part of the reason that the *Gore* court did not expressly soften and distinguish *Browning-Ferris*.<sup>144</sup>

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141. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165–66 (1963) (finding § 401(j) of the Nationality Act of 1940, as amended, and § 349(a)(10) of the Immigration and Nationality Act of 1952 unconstitutional because the penalties were essentially penal in character and would inflict severe punishment without due process of law).

142. *United States v. Halper*, 490 U.S. 435, 451 (1989) (holding that imposition of the full amount allowed for in the statute, which was well in excess of the Government's actual loss, would violate the Double Jeopardy Clause by punishing Halper a second time for the same conduct for which he had earlier been convicted).

143. 518 U.S. 267, 287 (1996) ("Nothing in *Halper* . . . purported to replace our traditional understanding that civil forfeiture does not constitute punishment for the purpose of the Double Jeopardy Clause.").

144. *Browning-Ferris* was decided the same term as *Halper*. The latter case expressly stated that punitive damages would not be eligible for double jeopardy protection, 490 U.S. at 450–51, suggesting that the Rehnquist Court as a whole saw the connection between these two kinds of cases and thought it important not to push punitive damages down the *Halper* line. More strikingly, *Halper* itself was expressly overruled in *Hudson v. United States*, 522 U.S. 93, 101–02 (1997) ("We believe that *Halper*'s deviation from longstanding double jeopardy principles was ill considered. As subsequent cases have demonstrated, *Halper*'s test for determining whether a particular sanction is 'punitive,' and thus subject to the strictures of the Double Jeopardy Clause, has proved unworkable."). Together, these two developments simultaneously: (a) tend to explain why members of the Court would be unlikely to rely upon a *Halper* type of framework for punitive

But the challenge of explaining *Gore* is a broader one: we would need to be able to articulate in a comprehensible way why punitive damages have this double aspect, and why it is sometimes appropriate to take their “public punishment” aspect to dominate, while at other times, their private liability aspect should be taken to dominate. To be more precise, the Supreme Court prior to *Gore* seemed willing to treat punitive damages awards as immune from the kind of scrutiny that would apply to fines, penalties, and criminal punishments, by virtue of the fact that, at least formally (and perhaps in some other sense, too), a punitive damages award is part of a verdict against a defendant held by a private plaintiff in a civil damages action—this, notwithstanding the fact that in several substantive ways it appears to be a fine, penalty, or criminal punishment. And so the problem is: What makes a punitive damages award qualify as a fine, penalty, or criminal punishment, rather than mere private liability, and (conversely, and perhaps more difficult), why does a punitive damages award (in any but the most formal sense) genuinely count as a part of private civil liability? The “double aspect problem” in punitive damages law, as I shall call it, is the challenge of explaining how punitive damages fit within the fabric of tort law such that they have these two aspects, and why there may be occasions or respects in which one aspect rather than the other dominates for a certain type of analysis. A solution to the double aspect problem will not fully explain *Gore*, but it may tell us why *Gore* was the straw that broke the camel’s back, and it will begin to give us a sense of why there should be such a thing as constitutional constraints on punitive damages law (even though there once was not), and why one could expect this to be a complex and difficult topic within constitutional law, not simply a set of opportunities to engage in federal judicial tort reform.

Solving the double aspect problem requires overcoming significant obstacles, beyond the Court’s own taciturnity, and its own disinclination to engage the civil–criminal gestalt in dealing with the applicability of constitutional criminal provisions. Indeed, the challenge before us has more to do with thinking about torts than thinking about constitutional law. Nineteenth-century legal academics became engaged in a heated but not particularly illuminating battle over punitive damages, with Theodore Sedgwick maintaining the propriety of punitive damages<sup>145</sup> and Simon Greenleaf maintaining their doctrinal illegitimacy.<sup>146</sup> Contemporary tort scholarship is, for the most part, ill-equipped to deal with the double aspect

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damages; and (b) create a high threshold for any analysis of punitive damages seeking to reconstruct a framework that would be usable for the Court.

145. THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 515–40 (5th ed. 1869) (asserting that case law supports the “salutary doctrine” of exemplary damages to punish a tortfeasor’s “gross fraud, malice, or oppression”).

146. 2 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 253 (16th ed. 1899) (arguing that damages should be “neither more nor less” than compensation for the actual injury received).

problem. This is for two sorts of reasons: one relating to the ordinary or hornbook-level thinking about tort law, and a second relating to the “high theorists” of tort law, particularly in law and economics and corrective justice theory. First, the open-ended, functionalist paradigm of modern American tort thinking rejects, as a false dichotomy, the following sort of question: is a punitive damages award really serving as a punishment or really providing compensation to a plaintiff?<sup>147</sup> Understanding tort law, in a century of tort thinking dominated by Oliver Wendell Holmes, William Prosser, and Leon Green, is understanding the idea that tort law is always simultaneously serving multiple functions, and playing many different roles. The sort of view that would question whether punitive damages really represent compensation or punishment is a kind of formalism that was rejected in tort even before it was rejected anywhere else.<sup>148</sup> Indeed, even picking and choosing a “dominant” strand is a questionable task when we understand what sort of a melting pot of purposes tort law comprises. The particular form of functionalism and instrumentalism that has held sway in tort has, for these reasons, pushed hard against categorizing in tort theory.<sup>149</sup>

Tort scholars, courts, and legislators within this anti-categorical functionalist tradition have certainly recognized the mix of punishment and private compensation in punitive damages.<sup>150</sup> But this has rarely led to an effort for theoretical disentanglement. Typically, the formal legal category of punitive damages as part of civil law simply holds sway.<sup>151</sup> Occasionally, a policy argument is powerful enough to move a court or legislature to do a frame shift: thus, for example, many jurisdictions are sympathetic enough

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147. See, e.g., Angela P. Harris, *Rereading Punitive Damages: Beyond the Public/Private Distinction*, 40 ALA. L. REV. 1079, 1090–99 (1989) (arguing that criticism of punitive damages doctrine as anomalous wrongly presumes a public–private distinction that has been shattered in twentieth-century legal theory). While Professor Harris’s illuminating article asserts that punitive damages theory has been too attentive to the public–private distinction, I take the opposite view: insufficient care in thinking through the public–private distinction has been a more serious problem. In any case, the leading and authoritative torts scholars who have written on punitive damages in the past twenty-five years have overwhelmingly adopted a much more pluralistic approach, rather than any kind of single-purpose or “private law” conception of punitive damages. See, e.g., Owen, *supra* note 103, at 373–74 (setting forth several different functions of punitive damages, and analyzing the strengths and weaknesses of features of punitive damages in light of those functions); Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133, 134 (1982) (stating that punitive damages would be justified if they achieve either deterrence or compensation).

148. See *supra* note 147 and accompanying text (discussing the rejection of this type of categorization in tort law).

149. See John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 521–22 (2003) (arguing that the Prosserian, functionalist perspective is actually the most widely accepted strain of tort theory in the twentieth century).

150. See, e.g., *id.* (stating that the “compensation-deterrence theory enjoys a unique status as the only mode of theorizing about tort that has been largely spared the need to explain and justify itself”).

151. Owen, *supra* note 103, at 365 (noting that, although punitive damages draw on aspects of both civil and criminal law, justifications for punitive damages liability come primarily from civil law).

with the “criminal” image of punitive damages that they deem them uninsurable as a matter of public policy.<sup>152</sup> The preferred method for the anti-categorical thinker to deal with what I have called the double aspect problem is to strike a compromise. So, for example, many jurisdictions, faced with the choice between a civil preponderance rule and a criminal reasonable doubt rule of evidence for proving punitive damages, pick neither, but strike a compromise with a clear and convincing evidence standard.<sup>153</sup> Similarly, many jurisdictions have decided that instead of treating punitive damages as purely civil, giving them to the plaintiff, or purely criminal, giving funds to the state, they should have split-recovery statutes that give some to each.<sup>154</sup>

The United States Supreme Court’s reasoning in punitive damages cases has similarly displayed this sort of middle-of-the-road approach. Recognizing some purposes akin to punishment but other features akin to civil law, the Court has tried to strike a compromise. At first rejecting the criminal categorization and adhering to the formally correct civil categorization, the Court tried to keep things simple.<sup>155</sup> But as time went by, the Court inched toward a compromise position; no excessive fines review, no heavy-handed procedural due process review, but not quite nothing at all.<sup>156</sup> Finally, a vague reasonableness or gross excessiveness review, tucked, without much reason, under due process.<sup>157</sup> Again, this is in some ways an attractive place for the Court to end up, and it is not particularly puzzling how the Court ended up there. But although this “middle ground” is in some ways attractive, I believe it is the very unarticulated and inarticulate “compromise” quality of the Court’s position in *Gore* that creates the problem. For while it has expressly rejected the criminal procedure and excessive fines routes,<sup>158</sup> it has basically rejected the procedural due process route too.<sup>159</sup> Its version of a compromise involves—Scalia would say—the creation of its own tests that are not as stringent as the real tests, and have no textual tether. This is particularly unsatisfactory when the Court (as opposed

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152. Catherine M. Sharkey, *Revisiting the Noninsurable Costs of Accidents*, 64 MD. L. REV. 409, 427–28 (2005) (analyzing the split among courts over insurability of punitive damages).

153. DAN B. DOBBS, *THE LAW OF TORTS* 1069 & n.1 (2000) (noting Arizona’s adoption of the clear and convincing evidence standard). Among other states, Alaska, Indiana, and South Carolina have also adopted the clear and convincing standard. *See, e.g.*, *Robles v. Shoreside Petroleum, Inc.*, 29 P.3d 838 (Alaska 2001); *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349 (Ind. 1982); *Austin v. Specialty Trans. Servs.*, 594 S.E.2d 867 (S.C. Ct. App. 2004).

154. *See* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 375–80 (2003) (describing and analyzing forms of split-recovery statutes). For further discussion of Sharkey’s views on punitive damages, see *infra* section IV(A)(3).

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

156. *Pac. Mut. Life Ins. v. Haslip*, 499 U.S. 1 (1991); *TXO Production Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993).

157. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

158. *Browning-Ferris*, 492 U.S. at 264.

159. *Haslip*, 499 U.S. at 17.

to some of the Justices on it) has rejected the relevant criminal categories for plausible reasons based on legal analysis.<sup>160</sup> So what the “compromise” anti-categorical mindset looks like is the creation of tests out of the blue, with no tether, and done in the face of uncontradicted claims that the legal features meriting special treatment are actually missing. Aside from seeming to provide the worst of both worlds in terms of legitimacy—a pretty bad problem, especially in any area that is patently political—the Court is also in a very bad place in terms of practicability, predictability, and guidance. Yet with a profoundly anti-categorical functionalism as the paradigm of ordinary legal thinking about tort, this result is not particularly surprising.

While hornbook-level tort thinking offers little help because of its uncompromisingly anti-categorical approach to the dual nature of punitive damages, the “high tort theorists” in law and economics and in corrective justice theory fail for a different, and in some ways more troubling, reason. Each of these theoretical frameworks adopts a perspective on tort law that selects only one aspect of the double aspect of punitive damages, and, in a sense, cannot even see the other aspect. The law and economics approach of Michael Polinsky and Steven Shavell, for example, takes as a fundamental premise that tort law is a system in which private parties perform the regulatory prosecution that our system needs, and collect a bounty for doing so.<sup>161</sup> That is the whole point of tort law. Punitive damages are peculiar only because there are structural reasons for believing that the fine should usually be equal to the damage caused, rather than greater than it, and those reasons are softened for punitive damages. But whether equal to or greater than compensatories, damages are always, essentially, a fine. And this is not remotely troubling; it is in fact the genius of our system. There is no room here for the idea that civil liability is something quite different from a fine; there is no purely private aspect. Corrective justice theory, as we will see below, is scarcely better equipped to handle the double aspect problem.

In short, tort theorizing within the most prevalent frameworks is poorly suited to attacking the double aspect problem. What we lack is a theory that could explain why punitive damages awards, in some contexts, would be essentially civil liability, while in other contexts they would be essentially criminal. And we lack a theory that would explain why these different images of punitive damages are more than formal, and are substantive in a manner that could make a difference for the applicability of constitutional norms. The strategy is to produce such a theory, and then to examine *Gore* in that light.

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160. *Browning-Ferris*, 492 U.S. at 275–76.

161. See Polinsky & Shavell, *supra* note 102. A particularly well-done version of this argument is in Edward L. Rubin, *Punitive Damages: Reconceptualizing the Runcible Remedies of Common Law*, 27 WIS. L. REV. 131 (1998).

#### IV. Two Approaches to the Double Aspect Problem

In the sections that follow, we will illustrate the kind of theory that would be helpful in solving the double aspect problem by considering several contemporary theoretical treatments of punitive damages. Although the phrase “the double aspect problem” has not been utilized in this context before, it is not a new idea that punitive damages have a criminal punishment aspect *and* have some other aspect more akin to private law or civil liability.<sup>162</sup> Scholars who have tried to identify these two areas have struggled most to articulate the civil aspect (and my own account is no exception). As a practical matter, then, what distinguishes the theories tends to be their accounts of what I call the civil aspect. Nevertheless, retaining the concept of a “double aspect problem” will be more conducive to constructing a theory that will illuminate the structure of constitutional analysis of punitive damages, which is largely a question of the interrelationship of the two aspects.

The theories we consider fall into two camps, which I refer to as “broadening compensatories,” and “privatizing punishment.” The first group (Wright,<sup>163</sup> Redish and Mathews,<sup>164</sup> Calabresi,<sup>165</sup> and Sharkey<sup>166</sup>) expresses the idea that punitive damages expand the type of compensatory damages a single victim can obtain, overcoming certain kinds of limits in tort law. Under “privatizing punishment,” there are two approaches: the first (Colby<sup>167</sup>) distinguishes the punishment of private wrongs from the punishment of public wrongs; the second (Galanter and Luban<sup>168</sup>) distinguishes punishment initiated by private parties from punishment initiated by the state. I argue that none of these approaches is capable of

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162. See, e.g., Bruce Chapman & Michael Trebilcock, *Punitive Damages: Divergence in Search of a Rationale*, 40 ALA. L. REV. 741, 742 (1989) (“Punitive damages lie at the interface between torts and criminal law.”).

163. See Richard W. Wright, *The Grounds and Extent of Legal Responsibility*, 40 SAN DIEGO L. REV. 1425, 1431 (2003) (“Properly understood and administered, punitive damages in tort law also compensate for discrete private injuries.”); see also Owen, *supra* note 147, at 378.

164. Martin H. Redish & Andrew L. Mathews, *Why Punitive Damages are Unconstitutional*, 33 EMORY L.J. 1, 15 (2004) (stating that punitive damages originated to compensate plaintiffs for intangible or immeasurable harms).

165. *Ciraolo v. City of New York*, 216 F.3d 236, 242 (2d Cir. 2000) (Calabresi, J., concurring) (contending that punitive or “socially compensatory” damages may be necessary in cases where traditional compensatory damages would fall short of the actual harm caused).

166. Sharkey, *supra* note 154, at 389 (recognizing that a desirable “societal compensatory component already lurks within the existing morass of punitive damages”).

167. Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583 (2003) (arguing that punitive damages should not be based on the “total harm” to the public, but rather the specific harm done to the plaintiff).

168. Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1440 (1993) (arguing that punitive damages play the necessary role of correcting injuries—public or private—that state-initiated criminal sanctions could not prosecute and privately-initiated civil sanctions of purely compensatory damages could not remedy).



solving the double aspect problem in punitive damages law, creating a need for the sort of theory I will develop in Part VI.

A. *Broadening Compensatories*

1. *Corrective Justice Theories.*—First, consider the corrective justice theorists' view of punitive damages in torts. On this view, punitive damages are acceptable as part of the fabric of the common law of torts, so long as they are simply compensatory damages for pain and suffering, or wounded honor, or indignation.<sup>169</sup> If they aim to restore the normative equilibrium in one of these amorphous ways, there is no reason that they should not be part of the common law of torts. However, if that is not what they aim to do, if they are really, as they are usually today described as being, a means of punishment or a piece of regulatory law, then they do not properly belong to the common law of torts as such.<sup>170</sup> They are really a graft onto that law. Because they are some other kind of law—criminal law or regulatory law—for which constitutional scrutiny is triggered, true due process scrutiny applies, and plaintiff Gore's verdict must be struck down. Insofar as some awards of punitive damages were ever deemed a proper part of the private law, and not subject to constitutional scrutiny, it was because they really were a misnomer for some category of nonpecuniary or dignitary damages.<sup>171</sup>

This argument is of the right form to complete an analysis capable of solving the double aspect problem. It explains why a serious form of constitutional scrutiny should apply in *Gore*, notwithstanding the Court's prior statements that punitive damages should not be subject to such scrutiny because they are within the zone of civil damages that have historically been deemed adequate. This theory says that punitive damages are on the cusp of the civil form, and cross over into the true public punishment zone when they stop being part of a civil system deferred to by the state, and start being essentially punishment or regulation. Such an argument does not rely upon history per se, but upon the structure of tort law and of our constitutional system. Contentions about this structure form the backdrop for an

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169. See, e.g., Wright, *supra* note 163, at 1431 (“Properly understood and administered, punitive damages in tort law also compensate for discrete private injuries.”).

170. *Id.* See also WEINRIB, *supra* note 7, at 135 n.25 (noting that English common law restricted punitive damages “to cases of oppressive, arbitrary, and unconstitutional governmental action and to cases where the defendant has calculated that the gain from misconduct will exceed the compensation payable to the plaintiff”). For an illuminating discussion of the possibility of more room for punitive damages in a Weinribian framework (in contract), see Curtis Bridgeman, Note, *Corrective Justice in Contract Law: Is There a Case for Punitive Damages?*, 56 VAND. L. REV. 237 (2003).

171. Weinrib and other corrective justice theorists are of course eager to accommodate punitive damages that could be squeezed into a restitutionary or disgorgement model, too, although these remedies are more common in property and contract. See WEINRIB, *supra* note 7, at 142 (stating that the “correlativity of gain and loss is normative, not merely factual . . . [as such] [t]he plaintiff is entitled to recover . . . gain[s] even without having suffered a corresponding factual loss”).

explanation of why a remedy that is genuinely part of the civil tort system should be immune from heightened constitutional scrutiny. It is because the remedy is not a matter of the state punishing or imposing a sanction or modifying the distribution of goods by taking something from someone else. It is a matter of the state restoring an order that the defendant disturbed by tortious conduct. The state is not in the enterprise of punishment or regulation, and therefore need not meet such standards, if the damages are merely non-pecuniary. But once it crosses over, it can no longer say that this is essentially something other than punishment or regulation, and procedural demands change.

There are many problems with the substance of this effort to reconstruct *Gore*. First, punitive damages have always been asserted to have a “punitive” aspect,<sup>172</sup> so it is quite unpersuasive to say that punitive damages were once part of a purely compensatory system, but they now are not. Moreover, Anthony Sebok has displayed in great detail that, as a historical matter, even the idea of punitives addressing indignation was really not principally intended to make plaintiffs whole.<sup>173</sup> And the more general point is that for well over a century, punitive damages have drawn the ire of critics because they could not be squeezed into the compensatory mode.<sup>174</sup> Second, the corrective justice account of civil tort law as exclusively aimed at making the plaintiff whole, even apart from punitive damages, is quite questionable. I have defended this claim in greater depth elsewhere, but the basic point is familiar: the appropriateness of making whole is a (default) principle of remedies, not the basis of liability itself.<sup>175</sup> And third, it is not immediately clear why a different constitutional analysis applies when the court takes money in order to make the plaintiff whole; it would appear that the state is still taking money, even if it is distributing it to someone else.<sup>176</sup>

2. *Redish and Mathews*.—A forcefully argued variation on the above-mentioned theme is found in a recent article by Martin Redish and Andrew Mathews.<sup>177</sup> Redish and Mathews accept that there is a long history of case

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172. See, e.g., *Wilkes v. Wood*, (1763) 98 Eng. Rep. 489, 498–99 (K.B.) (“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 proof of the detestation of the jury to the action itself.”).

173. Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163, 185–90 (2003).

174. See *supra* notes 145–146 and accompanying text (alluding to the nineteenth-century debate between Greenleaf and Sedgwick).

175. See Zipursky, *Civil Recourse*, *supra* note 5, at 748–52 (arguing that the dominance placed on compensatory damages should not be equated to the right for a cause of action itself).

176. *But see infra* text accompanying notes 199–209 (criticizing Colby’s treatment of the double aspect problem).

177. Redish & Mathews, *supra* note 164 (arguing that the current system of punitive damages leads to constitutional problems specifically due to improper private and personal interests possessed by those who impose the punishments).

law in which punitive damages were intended, in part, to punish the tortfeasor.<sup>178</sup> But, like the corrective justice theorists, they contend that at the inception of punitive damages awards, tort law did not offer compensation for intangibles, so that punitive damages served a dual purpose of compensating for intangibles and punishing the defendant.<sup>179</sup> More precisely, Redish and Mathews contend that the punitive role was incidental to the compensatory role.<sup>180</sup> Today, by contrast, tort law affords compensatory damages for intangibles. Hence, a punitive damages award today is not incidental to the compensation for intangibles that are sought. Litigation for punitive damages is a naked attempt to punish the defendant.<sup>181</sup> Because our liberal political system requires that the coercive power of the state be seated in the state itself, punitive damages awards today violate a fundamental precept of our system. Indeed, it is part of due process in punishment that the only one empowered to seek punishment is the state itself, subject to the variety of constraints on its exercise of discretion.<sup>182</sup>

On this view, the double aspect of the punitive damages award is rooted in the historical fact that it served both a compensatory function and a punitive function. It retains its character as part of civil liability, for constitutional purposes, so long as it retains the compensatory function. But once it becomes purely punitive, its character for constitutional purposes switches. The coercive power of the state triggers protections, one of which is that it is not to be concentrated in the hands of a private plaintiff.

The Redish and Mathews view deals with several problems mentioned above. First, it concedes that punitive damages have always been used, in part, to punish. Second, it concedes that an award sometimes serves both compensatory and punitive purposes. And third, it explains why damages awards sometimes shift into a constitutional box befitting punishments.

Nevertheless, several problems remain, and some new ones enter the picture. The first problem was mentioned above: so long as the court is taking money from the defendant for something he allegedly did, why does it matter whether one of the reasons for taking it is to compensate? This question is even more acute than it was for corrective justice theorists, because Redish and Mathews are conceding an aim by the state to punish in both cases. If the aim is there, and the taking is there, why does it matter, constitutionally, whether another aim is also there?

A second, and in some ways deeper, problem is a confusion concerning the coercive power of the state. Whatever the purpose of the liability and

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178. *Id.* at 14–15.

179. *Id.* (stating that courts in the early nineteenth century “began to explain exemplary damages by reference to concepts of punishment”).

180. *Id.* at 15.

181. *Id.* at 18–19.

182. *Id.* at 45–48 (discussing neutrality as a due process requirement for government advocates asserting coercive state power).

wherever the funds will go once paid, the coercive power of the state is being used in some sense. First, it is being used by the state, which seems unproblematic, and indeed the plaintiff cannot do anything coercive to enforce her rights, unless the state authorizes it. But let us suppose that it is problematic because the plaintiff, not the state, is initiating the suit (a much weaker point). Again the coercive power of the state is being used by the private party. There is concededly no unconstitutionality about this when compensatory damages alone are sought. The power to punish and the coercive power are not the same; the coercive power exists whether punishment or compensation is exacted.

A third problem is that Redish and Mathews's view is historically inaccurate in a manner that is subtle but nevertheless important. While some of the historical role of punitive damages did involve intangible harm that is now compensable, it is not correct that: (a) compensating intangible harm, and (b) imposing public punishment, together comprised the goals or endorsed functions of punitive damages law. The courts saw punitive damages as vindicating the plaintiff and raising his status, not simply compensating him for intangible harm.<sup>183</sup> Such a vindicative function remains significant today, and is not mooted by the greater availability of damages for intangible harm. Therefore, the availability of damages for intangible harm under today's law does not, *contra* Redish and Mathews, yield the conclusion that today's punitive damages verdicts are simply exercises of the power to punish.

Finally, and relatedly, it seems that the Redish and Mathews account relies on a conception of the plaintiff's motivation, but offers little by way of realistic description of such motivation. The problem is that if we ask why a plaintiff seeks punitive damages, there probably is no one answer: the desire to punish the defendant may be part of the answer, but so too may be the desire to obtain money as compensation for the harm. Moreover, if we are going to be realistic about a plaintiff's motivation and needs, we must recognize that many needs are still not met—attorneys' fees and the intangible costs and frustrations of litigation being major components. Ultimately, then, the Redish and Mathews article suggests that we say the mix is different, that the relative magnitudes of private and public are different today than in centuries past. But it does not tell us (and, to be fair, does not purport to tell us) why this is not true for all punitive damages awards today (or for the past century, roughly). It does not give us a useful

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183. See, e.g., Harris, *supra* note 147, at 1085–87 (observing that punitive damages either evolved from the juries' practice of awarding large damages for public outrage or as a way of compensating victims for intangible harms); Galanter & Luban, *supra* note 168, at 1432–33 (explaining that the wrongdoer has asserted superiority over the victim and the punishment serves to reassert the true relative value of the wrongdoer and victim); Owen, *supra* note 103, at 375–77 (observing that punitive damages restore the equality of the victim by removing the extra worth and freedom stolen by the thief); Sebok, *supra* note 173, at 200–01 (reasoning that punitive damages allowed the victim to recover his lost honor).

tool for thinking about why one sort of mix is more permissible. And it does not tell us why the different mix should be deemed to constitute a move from essentially civil to essentially penal.

3. *Social Compensatory Damages*.—One significant variation on the idea of broadening compensatories deserves greater consideration than space permits me here. In his characteristically distinctive concurring opinion in *Ciraolo v. City of New York*, Judge Guido Calabresi introduces the idea of socially compensatory damages.<sup>184</sup> Professor Catherine Sharkey has offered a systematic development of this idea in her important article, *Punitive Damages as Societal Damages*.<sup>185</sup> Sharkey claims that punitive damages are justifiable because they represent an internalization of the social costs of tortious conduct, costs that go beyond the plaintiff.<sup>186</sup> She recommends—following several jurisdictions that have enacted statutes to this effect—that some of the punitive damages award be funneled to victims of such tortious conduct other than the plaintiff, as compensation for their injuries and to produce the desired regulatory effect.<sup>187</sup> The “social compensatory” analysis of punitive damages can therefore be understood as broadening compensatories by broadening the domain of beneficiaries of the damages award, not by expanding the kind of damages that go to the plaintiff.

Neither Calabresi’s opinion nor Sharkey’s article puts forward the idea of social compensatory damages as an effort to reconstruct or justify *Gore* or, indeed, to address the constitutionality of punitive damages more generally; to that extent, it is somewhat speculative to address the import of that theoretical apparatus for the questions before us now. The idea would be, presumably, that a purely civil aspect of punitive damages exists where those damages can be reconstructed as social compensatory damages. To the extent (if any) that punitive damages cannot be so reconstructed—or reconstructed as some other form of compensatory damages—the characterization of punitive damages in terms of its criminal aspect would apply, and would presumably call for greater constitutional scrutiny.

The short response to this conjectured theory is that everything turns on how one resolves a certain ambiguity in the other-victims’-damages rationale. If the rationale is, in part, that other victims really do have claims,

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184. *Ciraolo v. City of New York*, 216 F.3d 236, 244 (2d Cir. 2000) (Calabresi, J., concurring). During the editing of this Article, Judge Calabresi sent me proofs of his chapter, Guido Calabresi, *The Complexity of Torts—The Case of Punitive Damages*, in *EXPLORING TORT LAW 333* (M. Stuart Madden, ed. 2005). Judge Calabresi’s chapter, like the present article, takes as a starting point that an understanding of punitive damages requires a recognition of the different normative ideas packed into this remedy. His analysis of the strands of punitive damages to be explained, and his explanation of these strands, differs in most respects from my own, and is consistent with his views in *Ciraolo*.

185. Sharkey, *supra* note 154.

186. *Id.* at 389.

187. *See id.* at 375–80 (citing split-recovery legislation in Alaska, Georgia, Illinois, Indiana, Iowa, Missouri, Oregon, and Utah).

and it is salutary to use the punitive damages mechanisms for rendering those claims actionable, then it makes sense to see punitive damages as a peculiar form of civil remedy for an aggregate of potential claimants. In that case, however, a great deal more analysis will be needed to make the case that it is permissible to side-step aggregative devices, such as class actions, that are usually thought necessary from a civil procedural point of view. As a matter of positive law, such detail is plainly missing; it is an interesting question whether Sharkey's considerable progress in that direction (aiming at possible legislative revision) will ultimately be sustainable.<sup>188</sup>

If, on the other hand, the rationale is that consideration of other victims' harm is necessary for an efficient sanction (which then might productively be turned over to the actual victims), then we are not really relying on the idea of other victims' claims. But in that case, the justificatory basis for making the defendant vulnerable to a damages award of that magnitude ultimately relies on the power of the state to exact a penalty matching the harm done. We are no longer dealing with a compensatory rationale for the justification, and therefore social compensatory damages really fall on the criminal side of the divide,<sup>189</sup> or at least on a regulatory side, which, I argue below, faces a similarly steep procedural challenge.<sup>190</sup>

## B. Privatizing Punishment

1. *Private Wrongs*.—Let us now turn to an entirely different line of argument put forward in an important article by Thomas Colby.<sup>191</sup> Unlike most of the other articles I have discussed, Colby is expressly concerned with what I have labeled “the double aspect problem,” both in light of *Gore* (and other Supreme Court decisions), and more pointedly in light of double jeopardy issues.<sup>192</sup> Colby argues that so long as punitive damages are intended to punish *private* wrongs, they are legitimately within the tort law, but that once they are intended to punish *public* wrongs, they become essentially criminal punishments.<sup>193</sup> In that case, they would be subject to

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188. See generally *id.* at 392–410. Sharkey addresses the question of whether plaintiffs' rights would be adequately protected in such a reconceiving of punitive damages, as well as concerns over defendant protection from multiple separate damages. *Id.* at 404, 408–09. However, she does not devote substantial attention to what I regard as the more critical concern: defendants' due process rights with regard to non-plaintiffs' claims for compensatory damages, which would appear to circumvent a large number of procedural and substantive demands that are in place in other forms of aggregate litigation, including class actions.

189. The argument in the text reflects, in part, my learning from Anthony J. Sebok, *Deterrence or Disgorgement? Reading Ciralo After Campbell*, 64 MD. L. REV. 541, 569 (2005) (arguing that “the . . . theory of socially compensatory damages must be subjected to the same due process scrutiny as any private penalty”).

190. See *infra* section IV(B)(2) (arguing that the Constitution might not permit the delegation of state regulatory functions to private parties in the form of unbounded punitive damages).

191. Colby, *supra* note 167.

192. *Id.* at 592–601. However, Colby does not name or identify the problem as such.

193. *Id.* at 638–39.

double jeopardy protection, as well as the protection of serious due process constraints, which they fail.<sup>194</sup> The Court's willingness to accept punitive damages verdicts in prior cases may have reflected an inclination to treat the imposition of damages for private wrongs as a genuine aspect of tort law.<sup>195</sup> Where jurisdictions have permitted a boundary crossover to occur, the awards are properly subject to serious constitutional scrutiny.<sup>196</sup> *Gore* is an example of such a case, as Colby points out.<sup>197</sup> This account is attractive in that it concedes that a punishment of wrongs has been essential to punitive damages all along. Relatedly, it is also much more plausible as an effort to construe punitive damages as having changed over the past several decades.

And yet Colby's account also suffers from four serious difficulties. The first problem is that the punishment of private wrongs is still punishment, and it is therefore hard to explain why constitutional scrutiny appropriate to criminal punishment should apply to punishment of public wrongs but not to punishment of private wrongs. Colby in effect concedes this problem, writing that "it is at least understandable, if still a bit disquieting, that the defendant is deprived of criminal procedural safeguards."<sup>198</sup> Insofar as he has a response, it appears to be purely positivistic and historicist:

Thus, a number of commentators (along with two Justices) have noted that punitive damages, under their modern conception, clearly appear to meet the test for requiring criminal procedural protections. The only way to avoid this conclusion, and to take advantage of the historical shield against constitutional challenge, is to constrain punitive damages to their historical role as punishment for private wrongs.

In sum, if punitive damages were to be cut loose entirely from their historical moorings in the harm to the plaintiff, and set adrift in a sea of constitutional doubt, they could no longer lay claim to the only defense against constitutional challenge that has sustained them—their historical pedigree.<sup>199</sup>

This response is disappointing for a number of reasons. Most notably, it is probably not a sound constitutional principle that history carries

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194. *Id.* at 657.

195. *Id.* at 648.

196. *Id.* at 594, 648–49.

197. *Id.* at 592.

198. *Id.* at 638.

199. *Id.* at 650. The text of Colby's article surrounding the quoted passage is more ambiguous than the quotation suggests. It notes that the Court deemed punitive damages non-penal because they were "calibrated by reference to the private injury," *id.* at 649 (citing *O'Sullivan v. Felix*, 233 U.S. 318, 324–25 (1914)), and asserts that the Blackstonian distinction between public wrong and private wrong retains currency with the Court. *Id.* To this extent, Colby might seem to be suggesting that the private-wrong–public-wrong distinction not only enjoys a historical pedigree in fact, but merits that pedigree in light of the way the law draws its distinctions. My view is that the text quoted, and the reliance on historical pedigree asserted throughout the article, ultimately lead to the conclusion that Colby is advocating a purely pedigree-based view.

dispositive weight in defining constitutional rights, and it appears that only Justice Scalia and perhaps Justice Thomas even nominally accept it.<sup>200</sup> Second, punitive damages are grandfathered into constitutional protection because they were historically permitted, but if the courts permit punitive damage awards in order to punish public wrongs, those awards then leave the boundaries of that due process grandfathering. And it is certain that the two justices most eager to accept a historicist premise would not accept it in that form.<sup>201</sup>

A second problem is that Colby's history is probably distorted and incomplete. Sebok's work suggests that punitive damages traditionally served multiple purposes, including deterring potential tortfeasors from injuring any number of people, not just the plaintiff.<sup>202</sup> From the beginning, they were called "exemplary damages," and the capacity of the damages award to achieve fairly broad deterrence unrelated to the plaintiff struck many courts as important.<sup>203</sup>

Third, and to my mind most fundamentally, Colby does not say enough about what a private wrong is. If "private wrong" is defined as a wrong to a private person—such as a battery to a particular person—then it is understandable why it is called "private," but not understandable why it is not a public wrong as well, for certainly this is an affront to the public peace, and the sort of thing for which prosecutors, within the executive branch, seek punishment. If a private wrong is defined as something that is not sufficiently important to the public as a wrong to merit punishment or regulation, then one avoids the punishment–regulation problem, but only at an extraordinary cost, for overwhelmingly punitive damages are made available in cases that are not unimportant in this sense.

Colby selects the first horn of the dilemma, conceding that a given act could be both a private wrong and a public wrong.<sup>204</sup> And he concedes that this sort of wrong could be subject both to punitive damages, as a matter of privately initiated civil liability, and to some other penalty, depending on the

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200. See, e.g., *Pac. Mut. Life Ins. v. Haslip*, 499 U.S. 1, 24 (1991) (Scalia, J., concurring) (setting forth a purely historicist and history-bound interpretation of the meaning of due process for purposes of the Fourteenth Amendment's Due Process Clause). While Thomas was not on the Court when *Haslip* was decided, his concurrence in Scalia's *Gore* dissent, which relied upon *Haslip*, suggests (along with a variety of other decisions displaying similar historicism) that he agrees with Scalia on the dispositiveness of historical practice.

201. The Scalia dissent in *Gore*, in which Thomas concurred, renders doubtful the possibility that these two Justices would accept Colby's historical argument. They are skeptical of any effort to create a due process problem for a procedure that has historically passed muster. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 600 (1996) ("At the time of the adoption of the Fourteenth Amendment, it was well understood that punitive damages represent the assessment by the jury, as the voice of the community, of the measure of punishment the defendant deserved.").

202. Sebok, *supra* note 173, at 197.

203. See, e.g., Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 12–20 (1982) (recounting the history of punitive damages and depicting deterrent aims).

204. Colby, *supra* note 167, at 630.



circumstances.<sup>205</sup> It is hard to accept, however, that what we think of as the private wrong is only punished with punitive damages. And conversely, it is hard to accept that the criminal punishment meted out is only for the public wrong, not for the private wrong. And so, when a state incarcerates someone for a violent sexual assault, for example, the prison term is a punishment for the defendant's having committed a wrong upon a particular private person (the victim), not just for the offense to society that such an act represents. The fact that this wrong rises to the level of being a public wrong does not show that it is only the wrong *to the public* that is being punished. So the general proposition that procedural safeguards are not necessary when the punishment is punishment of a private wrong is unwarranted. More precisely, one would expect punishment of a private wrong that is also a public wrong—if it is really *punishment*—to meet the standards required for criminal punishments.

Finally, in conformity with his general view that punitive damages are a form of punishment, Colby agrees that the purposes of such punishment are retributive and deterrent.<sup>206</sup> And he also displays appreciation for the deterrence analysis of economists such as Polinsky and Shavell, who argue that hard-to-detect wrongdoing requires higher deterrence.<sup>207</sup> There is nothing inherently wrong with Colby's acceptance of these views, but they undercut a central practical inference he tries to draw from his work: that a large punitive damages verdict, such as that awarded in *Gore*, is constitutionally defective, and that, more broadly, plaintiffs should not be permitted to introduce evidence of other wrongful conduct by defendant. Colby fairly infers from his theory that a plaintiff should not be permitted to punish a defendant for harm to other parties.<sup>208</sup> But this does not undercut the permissibility of large damages keyed to the need for heightened deterrence of certain wrongs. And, moreover, evidence of a pattern of conduct rarely detected would appear to be highly relevant evidence for the jury to consider if the jury wishes to deter acts like those committed against the plaintiff. So, even if retribution for harm to others is not a permissible basis for consideration of those other acts, deterrence of future acts like the private wrong upon the plaintiff would be a basis for such punitive damages.<sup>209</sup>

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205. *Id.* at 634–35.

206. Colby, *supra* note 167, at 635–36, 668, 672.

207. Polinsky & Shavell, *supra* note 102, at 887–96 (arguing for a formula for calculating damages in which the harm caused by the defendant is “multiplied by a factor reflecting the probability of his escaping liability”).

208. *See* Colby, *supra* note 167, at 650–57.

209. The question of whether other acts should come in, under a view like Colby's, is complex on several levels, and merits much greater scrutiny. Two important qualifications are: (1) there are reasons to exclude such evidence rooted in the need to avoid prejudice; and (2) there are arguments based on proportionality to harm as a constraint (not just a factor) for excluding such evidence. Both Colby's analysis, and these qualifications, are especially important because Justice Kennedy's opinion for the Court in *Campbell*, declaring the impermissibility of such evidence, appears to

2. *Privatizing Punishment*.—In an obvious and historically significant respect, Marc Galanter and David Luban's justly famous article, *Poetic Justice: Punitive Damages and Legal Pluralism*,<sup>210</sup> is ill-suited to solving the double aspect problem as a means of reconstructing *Gore*. Galanter and Luban published the article while *TXO* was pending, before the Court had taken *Gore*, and before it had ever struck down a punitive damages award. Moreover, their article was written, in part, as an argument against constitutional review of punitive damages awards. They argue forcefully that, notwithstanding the fact that punitive damages are a genuine form of punishment, and not merely an aspect of liability, criminal procedural safeguards would not be appropriate. And yet the Galanter–Luban analysis of punitive damages is among the most illuminating on what I have called the double aspect problem.

Their picture of the value of a system of punitive damages has three parts. First, they argue for the necessity of punishment, over and against liability for actual damages, on the ground that the law must be able to prevent legal actors from treating injury to others as a mere cost of doing business.<sup>211</sup> Second, they offer an account of the meaning of punitive damage awards. Borrowing from the legal and political philosopher Jean Hampton,<sup>212</sup> they argue that while certain wrongdoings send a message of the inferiority of the victim to the injurer, punishment—including punitive damages—operates to send a countermesssage of equality.<sup>213</sup> Third, they argue that private punishment, both formal and informal, is more pervasive in

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conform to Colby's analysis. 538 U.S. 408, 420–24 (2003) (stating that punishing reprehensible conduct of the defendant that is not related to the plaintiff's harm is a violation of due process).

For a number of reasons, however, the issue does not end here. First, the Supreme Court in the Eighth Amendment context seems entirely willing to give great weight to general deterrent considerations beyond the particular act that is punished. Second, punitive damages historically have been labeled "exemplary," as both the Court and Colby recognize. *Leatherman*, 532 U.S. 424, 438 n.11. Third, as explained below, potential harm has always played a great role in punishment in criminal law, severe punishment for attempt and conspiracy being the classic examples. See, e.g., *People v. Schwimmer*, 411 N.Y.S.2d 922, 925 (App. Div. 1978) ("[T]he basis of conspiratorial liability is . . . to punish the firm purpose to commit a crime, while preventing the actual commission thereof. Although constituted by agreement, the crime of conspiracy is directed at the intended result of the agreement."). Fourth, it is hard to see why the power to inflict punishment *qua* criminal law should not carry with it the lesser power to sanction in accordance with regulation, and it is hard to see why those exercising this latter power should not, as Sharkey, Calabresi, and most economic analysts of the law insist, think intelligently and broadly about the size of sanction needed in terms of risk of detection and potential for repetition. See Sharkey, *supra* note 154, at 449–52 (arguing that jurors can and should take into account deterrence when computing punitive damages under societal damages approach); GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 68–94 (1970) (asserting that society can collectively decide on punitive general deterrence measures that will force actors to consider accident costs when choosing among activities).

210. 42 AM. U. L. REV. 1393 (1993).

211. *Id.* at 1430.

212. See, e.g., Jean Hampton, *The Retributive Idea*, in JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 111–61 (1988).

213. Galanter & Luban, *supra* note 168, at 1432–33.

our contemporary society than is usually admitted,<sup>214</sup> and that punitive damages in private tort actions are essentially a valuable form of privatized punishment in which the state delegates the power to punish to individuals.<sup>215</sup> As to constitutional safeguards, they argue that the reason for a bill of rights is to protect individuals against a state that occupies vast power, resources, and a near-monopoly on coercive force.<sup>216</sup> Since punitive damages are sought by private parties, they do not call for the same constitutional protection.<sup>217</sup> More particularly, criminal procedural safeguards regarding punishment are especially important where the rights against violent treatment (historically, the paradigm of punishment) are at stake; in punitive damages, they are not.<sup>218</sup>

The double aspect problem would, it seems, be handled as follows by Galanter and Luban. Punitive damages really are an attempt to punish and to send a message in the way that criminal punishment of a homicide intends to send a message. To that extent, they have a criminal and public aspect. But their role within a system of private law and civil liability is not a mere formality, at least not for constitutional purposes. Indeed, there are genuinely private (as opposed to public) features of punitive damages: Private parties decide when to bring actions, against whom to bring them, and for what conduct to bring them. Moreover, when jurors decide to award damages, private parties benefit. The reasons our constitutional norms look to the public-private distinction in determining applicability of criminal procedural safeguards are implicated by this double aspect, and the result is that the safeguards should not apply, even though punishment is occurring.

Like Colby's, this is an impressive stab at the double aspect problem. Importantly, however, it does little to support where the Court went with *Gore*. Indeed, if Galanter and Luban are right, then *Gore*, which applies substantial constitutional scrutiny notwithstanding that (what they would analyze as) the private aspect does dominate, is wrongly decided.

Moreover, Galanter and Luban's article suffers from an internal contradiction that undercuts their position. Galanter and Luban treat private plaintiffs as those to whom the state has delegated enforcement power—in effect, as private attorneys general.<sup>219</sup> The problem with this is it undercuts the idea that constitutional norms should not apply. If the private plaintiffs are really delegates of state power, then the awesome power of the state is being used, albeit in a decentralized way. But if that is so, then punitive damages should, in principle, be subject to substantial constitutional scrutiny. Indeed, Galanter and Luban's view tends to highlight the aspect of punitive

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214. *Id.* at 1397–99.

215. *Id.* at 1445–46.

216. *Id.* at 1457.

217. *Id.*

218. *Id.* at 1458.

219. *Id.* at 1445.

damages that Redish and Mathews plausibly argue is constitutionally suspect: the removal of state power to punish from within the domain in which it is constrained by legal and moral norms governing prosecutorial choice. No doubt, Galanter and Luban are right that a variety of political benefits flow from that independence (at least from a progressive point of view), but the delegation and deregulation of the power to punish is not the solution, so much as the problem.

Ironically, Galanter and Luban's account in fact seems to enhance the problem with punitive damages. For by explaining the sense in which punishment sends an important equalizing message, their account tends to undercut the idea that punitive damages are not really punishment. Indeed, it tends to support the idea that punitive damages do call for just the same sorts of protection that attend criminal law. Similarly, to a large extent Anthony Sebok's analysis of the vindicative function of punitive damages tends to draw from a Hampton-like interpretation of the equalizing meaning of punishment and vindication;<sup>220</sup> this likewise suggests that Sebok's vindication-based analysis of punitive damages will not solve the double aspect problem because it will bring punitive damages too close to public punishment.<sup>221</sup>

Edward Rubin has offered an account expressly paralleling Galanter and Luban's emphasis on the "private bounty hunter" picture, but in Rubin's view, punitive damages are a form of regulation without the "social meaning" baggage of criminal punishment.<sup>222</sup> Like Posner, Shavell, and several tort theorists providing models from a law and economics point of view,<sup>223</sup> Rubin argues that there are numerous benefits to permitting a privatized system of sanctions for risky conduct, and for providing private parties with a financial incentive to carry out the litigation.<sup>224</sup>

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220. Hampton, *supra* note 212.

221. See Sebok, *supra* note 173, at 200–01 (arguing that punitive damages were meant to demonstrate the reprehensibility of the defendant's conduct, thereby restoring honor to the plaintiff).

222. See Rubin, *supra* note 161, at 132 ("Our misimpression that [punitive] damages are unusual, inappropriate and akin to criminal punishment comes from the same source as so many of our other legal misimpressions—outdated attitudes derived from common law.").

223. See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 160–63 (1987) (asserting that punitive damages deter a potential injurer from seeking to appropriate a right without negotiating with the owner, thereby forcing transactions into the market and saving courts the cost of measuring actual damages); Polinsky & Shavell, *supra* note 102, at 873–74 (arguing that, in cases where injurers sometimes escape liability for the harms they cause, punitive damages that exceed compensatory damages will, on average, hold injurers responsible for the full amount of harm that they cause); Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 *GEO. L.J.* 421, 423 (1998) (asserting that punitive damages will either incentivize offenders to internalize victim losses or eliminate the offender's prospects of gain, thereby optimizing deterrence of socially undesirable behavior); Cooter, *supra* note 102, at 98 (contending that large punitive damages, when awarded in cases involving proven intentional and gross or repeated offenses, deter future injuries and reward plaintiffs for undertaking the additional burden of proving that fault was intentional).

224. Rubin, *supra* note 161, at 141–42.

While quite interesting, and in some ways sympathetic, from a blank-slate prescriptive point of view, Rubin's perspective offers the worst of both worlds interpretively. As I have argued at numerous points in the article, this type of model is unpromising as a means of capturing the common law of punitive damages, since concepts like malice, largely alien to the regulatory framework (and more akin to criminal law) are fundamental to punitive damages law.<sup>225</sup> The model is equally unavailing on the question of why punitive damages should, in any sense, be immune from a heavier level of due process review than they would seem to be getting. There is no constitutional rationale for permitting ad hoc state regulation of risks, delegated to private parties, to enjoy the vague standards of liability and unbounded penalty levels that our punitive damages law employs.<sup>226</sup> Moreover, the forms of political accountability that exist, at a number of levels (though of course, raising substantial issues themselves) are simply not matched in any sense by private litigants.<sup>227</sup>

The double aspect problem therefore remains. We have entertained, principally, two sorts of solutions. One approach contends that punitive damages have their civil liability aspect when they are serving a compensatory, or make-whole, function, and cross into punishment when they are no longer serving that function. The problem with this theory is that it is quite insensitive, both historically and doctrinally, to the very idea of punitive damages, which have always been at least partly punitive, and have never really been well-explained in terms of compensatory damages. Indeed, these damages have always been punitive *within* civil law. Another approach is that punitive damages involve punishment, but punishment that is somehow more limited in scope than that which would require constitutional protection. This second approach treats the punishment itself as having a double aspect: in one sense appropriate to the individual private lawsuit and in another sense exemplifying the purposes of criminal punishment more broadly. This approach is better interpretively attuned to punitive damages, and more candid about its centrally punitive aspects. And it succeeds in explaining, at least to some extent, why punitive damages are different, and

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225. See Cooter, *supra* note 102, at 98 (arguing that punitive damages should be restricted to intentional faults because they will deter intentional conduct that is "aggravated and constitutes gross negligence, willful and wanton disregard for others, and the like").

226. *Pac. Mut. Life Ins. v. Haslip*, 499 U.S. 1, 46 (1991) (O'Connor, J., dissenting). O'Connor's vagueness and *Mathews v. Eldridge* arguments are not in any obvious or principled way undercut by the shift to a regulatory, rather than criminal, mold. See also *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585-95 (1996) (Breyer, J., concurring) (setting out in detail problematic features of Alabama procedure that fail to control arbitrariness in a manner that Due Process requires). Breyer, who is sympathetic in many ways to a regulatory perspective, does not hinge his analysis on the criminality of punitive damages.

227. Although I have been (briefly) critical of the content of Redish and Mathews's procedural due process argument against privatizing punishment, I believe that argument, and a parallel argument regarding regulation: (a) are promising; (b) are strengthened by the model of the private versus public law offered herein; and (c) in any case, do require further development.

more individual, than criminal punishment. On the other hand, by taking the punitive aspect more seriously, it fails to create enough room for the view that as a substantive matter, there is anything really meriting purely civil treatment for punitive damages. Punishment of private wrongs is real punishment, and private wrongs are often simultaneously criminal wrongs; why they should be subject to less scrutiny is obscure. Similarly, the apparatus of the state used for punishment (even if only fines) is operating even if it is a private party to whom the power to energize it has been delegated. If anything, as Redish and Mathews point out, we would want greater, not lesser scrutiny if it is really the power of the state being brought to bear under the name of punishment. What we need is an account that does not try to explain the civil aspect of punitive damages by implausibly squeezing it into the compensation mold, but that also does not concede that we have full-fledged punishment, albeit by a different mechanism or for a subset of punishable offenses.

I shall offer such a model of punitive damages in what follows. The account derives from a philosophical theory of the structure of tort law that I have previously labeled “the model of rights, wrongs, and recourse.” Let me say by way of preface that the point of this model is to provide a cogent interpretation of the concepts and principles that constitute the common law of torts. While these concepts and principles plainly have a normative dimension, and while it is a large part of my project to illuminate this normative dimension in a manner that renders it plausible, my aim is to defend this as an interpretation, not to say that it is normatively correct.

## V. The Model of Rights, Wrongs, and Recourse

It is central to the model of rights, wrongs, and recourse that tort law is both more public and more private than most tort theorists recognize.<sup>228</sup> It is more public in the following respect: tort law is built from public legal norms that not only play a role in imposing liability, but also articulate norms of conduct that enjoin individuals to treat each other in certain ways (e.g., with reasonable care) and enjoin individuals from treating each other in certain ways (e.g., not battering others, not defaming others, not defrauding others). While these norms of conduct have normative content in the sense that they impose duties of conduct and simultaneously protect rights to be treated in certain ways, it is vitally important that their status as part of tort law is legal, not moral. Part of the lawyer’s job in advising her clients is to say what their legal duties of conduct are, and this applies in torts as elsewhere. The breach of these legal duties to others—defamation, fraud, battery, trespass, negligence—are legal wrongs to others—literally, torts. A very large aspect of tort law is the announcement and elaboration of such norms of conduct

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228. Zipursky, *Rights*, *supra* note 5, at 63–69 (explaining how the primary rights and duties tort law imposes have broad public and private rationales).

and the concomitant classification of certain actions as legal wrongs. In the sense that it is constituted in part by legal rules about how to treat others, not just by attribution of costs to private parties, tort law is very much a matter of public law.<sup>229</sup>

And yet scholars have also not fully grasped the respects in which tort law is private law. Corrective justice theorists are ironically as guilty of this as economists, I believe. They claim that a key concept in tort law is the defendant's duty of repair to the plaintiff.<sup>230</sup> But they have not really probed deeply enough into the structure of torts. For when we probe deeply, we see that the plaintiff's right of action against the defendant is a more basic structural notion than the notion of a duty to repair. As *Palsgraf* famously held, a plaintiff has a right of action in tort only against one who wronged her.<sup>231</sup> The point is not so much that one who has wronged another now owes it to her to make her whole. If our system were really based on that idea, it would make sense for the state to enjoy the power to bring a tort action against a defendant, requiring defendant to pay plaintiff. That would be, in an important sense, a much more public system than we in fact have. What we in fact have is a system in which the power to bring a tort action belongs to the one who has been wronged. It is literally a legal power to force defendant to pay plaintiff, a legal power to take from the defendant. This legal power is a right of action.<sup>232</sup>

I have argued in several prior articles that there is a principle underlying the right to take from one who has injured another.<sup>233</sup> It is not a principle that the defendant owes the plaintiff; it is a principle that the plaintiff is entitled to take from defendant. Similarly, the right to self-defense does not stem from the fact that the assailant should be killed, but simply from the fact that the normal prohibition of physical violence against someone does not apply when one is engaging in self-defense. The victim of a tort has a right not in the sense that defendant must pay, *simpliciter*, but in the sense that if the victim chooses to bring a right of action, and proves the tort, she is not prohibited from taking, but is in fact empowered to do so.

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229. *Id.* at 92–93 (explaining that tort law creates “schemes of legal rights and duties” that guide the behavior of individuals and are characteristic of public law); see also Zipursky, *Civil Recourse*, *supra* note 5, at 755 (emphasizing that to the extent that tort law sets out public norms of conduct, it is a matter of public law).

230. See Zipursky, *Civil Recourse*, *supra* note 5, at 709–10 (describing the corrective justice theory that tortfeasors are responsible—they owe a duty of repair—to injured parties for the harm they cause).

231. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 100 (N.Y. 1928).

232. Zipursky, *Civil Recourse*, *supra* note 5, at 733–38 (arguing that the rule of law in our society prevents individuals from acting directly against individuals who have wronged them, but empowers a plaintiff to bring a legal action against a defendant).

233. *Id.* at 735–38 (asserting that a plaintiff has the privilege to act through the state against one who has legally wronged him or her); Zipursky, *Private Law*, *supra* note 5, at 643–44 (arguing that one who has been wronged by another is entitled to recourse against that other because the state has limited his right to respond immediately to the wrongdoing).

What is the rationale for empowering the victim of a tort with a right of action? The answer I offer is that our system recognizes in one who has been wronged an entitlement to an avenue of civil recourse against the wrongdoer. Our political system forbids violent actions against others, even in response to a wrongdoing by them. But in forbidding this course of action, the state assumes a duty to provide some avenue through which the aggrieved party may at least respond to the wrong. The right of action is what the state affords the citizen after his raw liberty to take is diminished. This avenue of recourse is civil in three respects: it is civil, rather than criminal; it is civil in the sense that it is artificially mediated through a system of government; and it is civil, rather than violent. The idea of civil recourse is an idea of an *entitlement* to civil recourse, for whomever has been wronged, against the wrongdoer, in light of the wronged party's inability to respond to the wrongdoing otherwise. I have elsewhere supplied a more thorough analysis of this principle within a social contract-based normative framework.<sup>234</sup>

## VI. Punitive Damages and Civil Recourse

### A. *The Right to Be Punitive*

The idea of civil recourse supplies a nuanced view of the role of damages, and of the ideal of “making whole.” Under corrective justice theory, making whole is the *telos* of the system, that for which the system aims. But under civil recourse theory, the tort system is not trying to reach some substantive ideal. It permits an individual whom it judges to have been wronged to recover in tort from the one who wronged her. The notion of making whole is not a goal but a constraint, normally, on the extent to which plaintiff may redress her wrong. One may not take from the tortfeasor more than one needs to make oneself whole. Yet one is entitled to take that much.<sup>235</sup>

Punitive damages are best understood as an exception to this normal rule. For certain torts, making whole is not the limit. A plaintiff is entitled to go beyond making whole; she is entitled to *be punitive*. This permission exists because of the manner in which she was wronged—willfully or maliciously. Having suffered this insult, the plaintiff is herself entitled to redress at a different level. Harking back to the self-defense analogy, the idea of taking punitive damages is a privilege of the plaintiff; it is not a

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234. The three principal articles in which I develop this idea are: Zipursky, *Civil Recourse*, *supra* note 5, at 733–53 (developing an idea of entitlement to civil recourse based on a “rights, wrongs, and recourse” model as a superior alternative to corrective justice theory); Zipursky, *Private Law*, *supra* note 5, at 643–44 (developing an idea of entitlement to civil recourse as an outgrowth of social contract theory); Zipursky, *Rights*, *supra* note 5, at 82–93 (developing an idea of entitlement to civil recourse as a principle explaining tort law and its substantive standing rule).

235. Zipursky, *Civil Recourse*, *supra* note 5, at 738–40 (arguing that tort law properly understood concerns “rights of action” rather than “duties to repair”).



punishment by the state. The state permits the plaintiff to seek and to receive these awards, but the state is not in the driver's seat.

Let me note that the account thus far meshes well with the history and the doctrinal structure of punitive damages at the common law.<sup>236</sup> Punitive damages are limited to cases of willful, malicious, or oppressive wrongdoing.<sup>237</sup> The normal limit under the common law is compensatory, but it is in fact relaxed for punitive damages. The damages are not necessary; they are discretionary, even where the jury decides that the limiting criteria have been met. It is, in effect, a choice. And though the jury has been told, historically, that the purpose of the award is to punish and to set an example, even these instructions, couched in the procedural system I have described, and set against a backdrop of lawyering that selected only relatively few cases for punitive damages awards,<sup>238</sup> make it plausible that these awards were principally understood in terms of a plaintiff's power to *be punitive*.

Punitive damages, when viewed in this light, are not *solely* regulatory, criminal, compensatory—they may serve all of these functions. And, indeed, they may serve a vindicative function of the sort indicated by Sebok.<sup>239</sup> Courts are aware, at some level, that these functions are being served. But articulating the functions of punitive damages, at least in this context, is not necessarily equivalent to analyzing what punitive damages *are*.<sup>240</sup> In the context of saying why punitive damages are permitted as part of tort law, notwithstanding significant constitutional qualms about penalties, fines, and punishments, it is simply inadequate to rely on the functions served by punitive damages. We need to know what sort of reason our system uses to justify its demands upon defendants that they pay plaintiffs more than the plaintiffs need in order to compensate for the actual harm, even though our normal rule is that the system will limit its demands to compensation. If it is deemed a sufficient reason that, in light of how bad the defendant's conduct

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236. See, e.g., Ellis, *supra* note 203, at 12–20 (tracing the development of the concept of punitive damages out of a sequence of English cases in which defendants sought to have large damages awards set aside, and the court rejected these appeals notwithstanding that the damages exceeded tangible loss; part of the courts' reasons were connected to the jury's power to punish the defendant).

237. *Id.* at 20–21.

238. See *id.* at 2 (discussing the relatively low occurrence of cases involving punitive damages in the past); Sebok, *supra* note 173, at 163 n.3 (noting that most courts usually only offer “punishment” or “deterrence” as rationales for punitive damages).

239. See Sebok, *supra* note 173, at 200–01 (describing the personal vindication rationale behind punitive damages).

240. See Zipursky, *supra* note 8 (expounding, in philosophical theory, the meaning and significance of non-functional explanations of tort concepts); Zipursky, *Civil Recourse*, *supra* note 5, at 724–32 (criticizing the corrective justice theory and its functionalist hybrid as ill-equipped to adequately embody tort theory). *But see* COLEMAN, *supra* note 7, at 384 (asserting that tort law is in part “a web of substantive and structural rules designed to enforce claims in corrective justice”); WEINRIB, *supra* note 7, at 134 (arguing that the purpose of tort liability reflects the theory of corrective justice).

was, he ought to suffer these consequences, so that others may see, and so that he gets what he deserves, and if our system's imposition of the demand relies upon this justification, then the criminal aspect of punitive damages is showing.

On the other hand, there is a different sort of reason our system may be using to justify its demand upon the defendant to pay the plaintiff an amount greater than compensatory damages. Our system may be deciding that the plaintiff is entitled to exact this amount from the defendant, in light of what the defendant did to her; that it is just that plaintiff shall be permitted to exact this amount, notwithstanding that it exceeds compensatory damages. As the United States Supreme Court said on one of the earliest of the occasions on which it addressed punitive damages:

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.<sup>241</sup>

More particularly, a jury may be deciding what is appropriate for the plaintiff, in light of the "enormity of the offence," and a judge may be entering a judgment for that amount because that is what the jury decided. Our law is designed so that a jury is not permitted to grant such an award without deciding that the conduct was willful or wanton, and a court is not permitted to enter a judgment on a verdict including such damages without deciding that the jury could reasonably reach such a conclusion. If that is what the court is doing, then the entering of a judgment that includes a punitive damages award is of course a use of state power, but it is importantly different from an exercise of the state power to punish.<sup>242</sup> And it is not an example of the state authorizing an individual to carry out the state role of punishing. It is the state's permission and empowerment of a plaintiff to be vindictive, and to be punitive, albeit in a well-circumscribed and civil way. This is the civil aspect of punitive damages.

### *B. Subjective Punitiveness and Objective Punitiveness*

Although I hesitate to employ the easily misunderstood language of objectivity and subjectivity, it may be helpful here. My central question has been premised on the idea that punitive damages have two aspects, one of which is penal, criminal, and public, the other of which is, in substance, civil and private. The question—the double aspect problem—is how to interpret and clarify these aspects in a manner that would shed light on the proper analysis of the constitutional status of punitive damages. The answer can be

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241. *Day v. Woodworth*, 54 U.S. 363, 371 (1851).

242. Zipursky, *Private Law*, *supra* note 5, at 649–51 (explaining the significance of the distinction between state exercise of executive power and state exercise of judicial power, permitting and empowering private plaintiffs).

expressed as follows: the punitiveness of punitive damages has a double aspect, an objective aspect and a subjective aspect.

Objective punitiveness is the punitiveness we are intuitively comfortable with in today's Anglo-American law. It is what conventional tort scholars are referring to when they describe deterrence and punishment as the functions of punitive damages. Punitive damages, in this respect, are focused on the defendant's conduct and character. The question is whether this conduct and character warrant or call for a certain response from the legal system. The plaintiff, of course, is the one who calls the bad conduct to the attention of the legal system, but ultimately it is the state that imposes the award and the jury who decides what it should be. The question of where the damage award goes is conceptually independent of the question of whether the defendant ought to be required to pay it. This sense of punitiveness is "objective" in the following respects: (1) attributes of the object of the punishment—the defendant and its conduct—warrant or call for the punishment; (2) the resemblance of the award to expressly criminal punishment qualifies it as "punitive" (rather than compensatory); (3) the justification for the existence of such an award relates to reasons or principles or policies endorsed and imposed by the state, albeit in a civil action.

The idea of subjective punitiveness makes some contemporary thinkers squirm. It is the idea that the victim of a wrong is allowed to *be punitive*. The imposition of punitive damages reflects a judgment that a private person is entitled, in light of the wrong done to him or her, to act upon the defendant in a manner that exceeds what is necessary to restore her holdings—to be compensated for the injury done. She is entitled to exact a punitive sanction from the defendant in light of what he did to her and how he did it. It is distinguished from objective punitive damages in the following respects: (1) it is not the character of the conduct of the object of the punishment itself that warrants the appropriate degree of permissible punishment, but the nature of wrong the defendant required the victim (the subject of the punishment—the punisher) to endure; (2) what qualifies the damages as "punitive" is that they reflect and embody a subjective desire and intention to *be punitive*—to exact a penalty for the purpose of being the one who requires the defendant to endure a hardship; their punitiveness derives from their role, as intended by our system, to permit a form of civil punitiveness by and in the victim; (3) the justification for the permission of the damages is not the appropriateness or the advisability of the state's imposing a sanction of this magnitude, but rather the appropriateness of permitting and empowering private victims to exact a penalty, beyond self-restoration, in a civil form.

The subjective punitiveness of punitive damages is in some ways difficult to accept (and, indeed, there may be good reasons to reject it). There is a quality of vengefulness to punitive damages in its civil aspect, so understood. More precisely, the state, on this account, is choosing to privilege and empower individuals to act in a manner that displays

vengefulness. Undoubtedly this image of punitive damages as related to private vengefulness is high on the list of reasons that many foreign jurisdictions, as well as several American states, have decided to eradicate punitive damages from their tort law.<sup>243</sup> And even more to the point, it is undoubtedly part of the reason why most jurisdictions are more comfortable giving the objective punitiveness a more substantial, articulated role. For many contemporary thinkers, vengefulness is a primitive instinct one should try to get over, not the basis for a moral claim that our expensive legal system will turn into a legal right.<sup>244</sup>

I shall have a bit more to say below about whether punitive damages ought to be re-established on a more attractive basis or whether they should be eliminated. Neither of these is the question at hand. The question at hand is how to understand the dual structure of punitive damages; the suggestion that vengefulness is morally unappealing is not directly relevant to this. Of course, if there were something fundamentally incoherent about the idea of a right to be punitive, then even from the positivistic point of view of describing the content of the law, it would be problematic to give the idea of a right to be punitive a prominent place. But even assuming there is merit in the contemporary visceral aversion to punitive damages, that is far from an argument that the cluster of normative ideas underlying the civil aspect of punitive damages, as I have described it, is incoherent. I am not alluding to *lex talionis*, an eye for an eye; I am countenancing a considerably weaker, more civil idea. I am asserting that our law of punitive damages involves permitting private parties, when a jury so decides, to exact monetary damages that go beyond compensatory damages in redressing a willful or malicious wrong done to them.

### *C. Subjective and Objective Punitiveness and the Double Aspect Problem*

The double aspect of punitive damages, its civil–criminal duality, is captured in part by the subjective and objective senses of punitiveness. Insofar as punitive damages are permitted because of a judgment that the plaintiff is entitled to be punitive, the civil aspect is at play. Insofar as they are deemed appropriate because the state is judging the defendant to be meriting punishment (for reasons of deterrence or retribution), the criminal aspect is at play. The double aspect problem then turns into a problem of explaining when and why it matters whether the state is utilizing a remedy rooted in subjective punitiveness, objective punitiveness, or both.

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243. See DAN B. DOBBS, *THE LAW OF TORTS* § 381, 1062 n.1 (2000) (“Several states reject . . . punitive damages altogether . . .”).

244. *But see* JEFFRIE G. MURPHY, *GETTING EVEN: FORGIVENESS AND ITS LIMITS* 17–26 (2003) (arguing, within moral philosophy, that “retributive” responses to wrongdoing are in some cases morally appropriate). Unlike Murphy, it is not my aim here to “defend” vengeance or retributive responses; like Murphy, it is my aim to recognize and learn from the complexity of such responses, and the extent to which they are integrated into our moral thinking and our legal institutions.

When the punitive damages are justified only as objective punishment, then it is untenable to deny that the state is imposing punishment, and the criminal protections available should, at least *prima facie*, be applicable. However, if the damages award represents something else—if it is really something distinct from the imposition of punishment by the state, if it is essentially civil—then it is not appropriate to plug in criminal procedural safeguards. The problem is explaining what that “something else” could be. The subjective aspect of punishment provides an explanation. For if a punitive damages award is grounded in the state’s judgment that the plaintiff is entitled to be punitive in exacting a remedy from the defendant, then the award is being granted within the context of the state’s empowering action among private parties, as a matter of the plaintiff’s right of redress. The state might be happy about the consequences of such an award, and might even maintain its regime in part because of these recognized consequences. But if the state is imposing punitive damages out of respect for a right of private redress, then the reasons for providing criminal procedural protections are not necessarily implicated.

Thus, my contention is that when a judgment for punitive damages is entered such that the state could no longer be viewed as treating, in any sense, the plaintiff’s right to be punitive—when the punitiveness in the subjective aspect is absent as a possible justification—the award may only be understood in its objective aspect. In that case, the punitive damages award must be understood as a state-imposed penalty. Constitutional restraints that are applicable to state-imposed penalties, but not to genuine private liability should, as a matter of constitutional principle, apply.

Although not derived from the theories entertained in connection with the double aspect problem, the account developed above can be understood as a means of simultaneously resolving the tensions correctly recognized by each.<sup>245</sup> The compensatory theories correctly recognized that constitutional constraints akin to those required for punishment are not properly required insofar as punitive damages are not grounded in a right to punish but to do something else, the classic example in tort being compensation. However, it is widely recognized that punitive damages present a *prima facie* problem because they exceed individual compensation as normally construed. I have argued that efforts to fix the problem by stretching the concept of compensation in one direction or another did not succeed.<sup>246</sup> On the other hand, to conclude that punitive damages are indeed nothing but criminal punishment is essentially to miss that they have, at least historically, been

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245. Indeed, permitting the flexibility to address punitive damages in general, the double aspect problem more specifically, and *Gore* in particular have long been some of the considerations motivating the development of my civil recourse view. See Zipursky, *Rights*, *supra* note 5, at 95 & n.13 (referring to contemporary problems in the analysis of punitive damages, and *Gore*, as a reason to want a civil recourse theory).

246. See *supra* subpart IV(A).

sincerely understood as a part of the civil law of torts. The recourse account retains the point that *if* punitive damages are really only objective punishment, then constitutional constraints are due, but it does not squeeze everything into the compensation mold. Compensation is significant in differentiating private tort liability from criminal punishment. But it is not the only thing that could do so, and it is not essential to the idea of a private remedy (as opposed to public punishment). What is essential is that the state's imposition of liability be premised on the state's judgment that the plaintiff herself is entitled to exact this from the defendant. The right of a person wrongfully injured to be made whole is the normal limit of the entitlement to exact payment from defendant, but it is not the fundamental normative basis of a right of action, and it is not *necessarily* the limit. In certain cases, our system has judged that the remedy need not be limited by the right to be made whole. Our system calls the privilege to exact payment in excess of compensatory damages a right to obtain punitive damages. Insofar as this right is rooted in the idea that a plaintiff who has been the victim of a particularly malicious, willful, or wanton wrong is not necessarily limited to self-restoration, but is permitted to *be punitive*, it is cogent to speak of a "right to be punitive." That is the classic, civil law idea of punitive damages, and it is distinct from the idea of delivering the punishment that the state believes the defendant ought to suffer in light of its conduct.

The privatizers—Colby and Galanter and Luban—were in two respects closer than the compensators and in one respect farther. They were closer because they recognized that punitive damages are essentially punitive and have always been essentially punitive, and because they recognized that there is something distinctively and importantly private about punitive damages.<sup>247</sup> They were farther because, under their respective theories, punitive damages remained a form of state criminal punishment notwithstanding important private aspects; the private aspects did not provide any significant reasons for a sufficiently meaningful constitutional or political theoretic difference in terms of the standards applied.<sup>248</sup> For Colby, it is the privateness of the wrong that counts<sup>249</sup> and for Galanter and Luban it is the privateness of the punisher.<sup>250</sup> But punishment for a private wrong, as Colby conceives private wrongs, is still completely punishment, and punishment by private parties to

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247. See Colby, *supra* note 167, at 619, 643 (endorsing the argument that punitives inflict "punishment for the private legal wrong—the insult—done to the individual plaintiff"); Galanter & Luban, *supra* note 168, at 1426 (emphasizing the value of punitive damage awards for enforcing private individuals' rights).

248. See *supra* text accompanying notes 193–198, 219–221 (criticizing the theories of Colby, as well as Galanter and Luban, for their failure to explain why the respect in which punitive damages were private would account for the appropriateness of less scrutiny).

249. Colby, *supra* note 167, at 648 (stating that punitive damages were initially upheld against due process and double jeopardy challenges because they only punished the private wrong and not the public wrong).

250. See Galanter & Luban, *supra* note 168, at 1440–41 (arguing that punitive damages are the most effective method of exerting control over private actors).

whom the state has delegated power is still completely punishing. None of the reasons for constitutional scrutiny should vanish or even significantly diminish.

The recourse view keeps the two strengths of the privatizers and corrects their problem. Unlike Colby's view, the recourse view does not make punitive damages a punishment in the same sense as criminal punishment, only attached to a more narrowly defined act (a "private wrong"). Nor is it, like Galanter and Luban's, a matter of the individuals being private attorneys general to enforce the punishments required under the law. Rather, the punitiveness is a matter of the right to be punitive, not a matter of the plaintiff meting out punishment the state would wish to impose because the defendant deserves or merits it. On the other hand, punitiveness in this sense is distinct from punishment as a remedy imposed by the state upon those who have transgressed legal boundaries of wrongful conduct in such a way as to merit the official infliction of a sanction. Punitive damages can play either or both roles, and this is why they have a double aspect.

It is instructive to look at the history of punitive damages in light of this depiction of their double aspect. If one begins with private rights of action brought against willful or malicious tortfeasors, English law originally empowered and privileged individuals to impose violent physical punishments upon those who had wronged them.<sup>251</sup> The law eventually channeled the power to inflict physical punishments to the state as prosecutor and conditioned it in various ways that we now regard as precursors to constitutional criminal procedure.<sup>252</sup> The right to seek damages and certain more limited injunctive remedies was all that was left for private parties.<sup>253</sup> Within damages, rules developed according to which the measure of damages was: (a) left to the jury, but (b) typically limited to costs for the actual damage inflicted. However, in cases where the actual damages inflicted were small but the wrong was willful or malicious, juries sometimes awarded large damages verdicts.<sup>254</sup> On appeal, defendants argued that the damages were excessive, and the courts responded that in cases of willful wrong, punitive damages, vindictive damages, or exemplary damages were permitted.<sup>255</sup> Plaintiff was empowered by this process to make an example of

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251. See David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 59–60 (1996) (stating that English law allowed victims to choose whether to exact personal vengeance through criminal law or to be compensated through tort law).

252. *Id.* at 64 (discussing the expansion of the king's and state's authority in relation to punishment).

253. *Id.* at 85 (describing the writ of trespass and attendant monetary remedies).

254. See Ellis, *supra* note 203, at 12–13 (recounting a case in which a 17th-century English jury awarded a plaintiff £4,000 in damages for slander).

255. *Id.* (tracing conflicting trends by English courts in both overturning and upholding extremely large damage awards).

defendant by exacting a large damages award.<sup>256</sup> For the most part, these were classic intentional torts with a substantial component of insult or dignitary slight.<sup>257</sup> The courts envisioned the damages award as something that it was only fair to permit the plaintiff to exact in light of the defendant's conduct.<sup>258</sup> And the courts openly reasoned that this kind of award would probably serve as a punishment.<sup>259</sup> Thus, even from the first cases, both senses of punishment were at play.

Now, there need not be any incompatibility between these two senses. Indeed, even as to compensatory damages, there is nothing necessarily inconsistent about the view that plaintiff is entitled to be made whole, and the view that providing compensatory damages in tort tends to deter risky conduct by making potential tortfeasors aware in advance that they will have to pay for the damages their unduly risky conduct causes.

#### *D. Punitive Damages in Tort Law Today*

Punitive damages doctrine in American tort law today is plainly not simply about the plaintiff's right to be punitive. And punitive damages are not simply about the plaintiff as a private attorney general, helping the state to append a criminal or regulatory punishment to a private compensatory award. Today's punitive damages in tort law are about both at once. Perhaps this has been true for a long time; establishing that, however, would require a historical study of a form I have not undertaken. It is clear in 2005, and has certainly been so for the past few decades, that punitive damages are a hybrid of these two ideas.

How might this theoretical apparatus help us to understand punitive damages better? As indicated above, it is not novel to assert that punitive damages have this hybrid status. Indeed, I have pointed to a variety of features of tort law that, in effect, recognize the hybrid status—the utilization of a clear and convincing evidence standard, the need for a heightened state of mind requirement, problems about insurability and indemnification, and the existence of split-recovery statutes. These are all good examples of the mixed status of current law. And so one might wonder how a civil recourse theory of tort law, even assuming it is accurate, really makes progress in tort theory or in practical tort debates.

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256. See, e.g., *Gilreath v. Allen*, 32 N.C. 67 (10 Ired.) (1849) (depicting the role of exemplary or vindictive damages in making an example of defendant).

257. See *Sebok*, *supra* note 173, at 185 (reasoning that punitive damages compensate the victim for his wounded honor).

258. See, e.g., *Allen*, 32 N.C. 68 (10 Ired.) (“[W]hen there are circumstances of aggravation, juries are not restricted, in the measure of damages, to a mere compensation for the injury, actually sustained, but may, in their discretion, increase the amount, according to the degree of malice . . .”).

259. See *Sebok*, *supra* note 173, at 202 (observing that the court awarded punitive damages as a punishment in order to make an example of the defendant for other likeminded criminals).



Even leaving aside constitutional issues (see below), three sorts of advantages immediately spring to mind. First, to concede that punitive damages have hybrid status is quite different from understanding that status. Indeed, the concession to hybrid status can mean, and usually has meant, simply the negative point that neither the civil nor the criminal picture fits well—the former because the damages were not compensatory, and the latter because the state was not bringing the litigation, and the misconduct was not defined as a crime. The explanation offered here explains the civil aspect in a manner that is not merely negative, formal, or conclusory. The civil aspect is not simply that we permit private parties to bring the action; we also permit a wrongdoing not defined as a crime, and we permit the plaintiff to keep all (or some) of what the “punished” defendant is required to pay. Punitive damages are displayed as something our system offers as part of a private law picture of entitlement to a private remedy, in light of what the defendant did. Punitive damages are displayed as criminal, insofar as the reason for awarding them sounds in deterrence and retribution.

Second, and relatedly, the procedural features of the system can be understood in relation to the system’s embodiment of these genuinely civil or criminal features. It is not simply that judges perceive the award as somewhat civil and somewhat criminal, and therefore select a mix of procedural features, like Goldilocks selecting Baby Bear’s porridge because it is not too hot and not too cold. If punitive damages are indeed warranted as part of a civil remedy for a plaintiff, then even if part of the purpose in awarding them may be to deter, the plaintiff—and not the state—ought to be able to keep the damages. Conversely, if the jury is not opining on what plaintiff is entitled to exact, but simply on what the defendant should be sanctioned in light of deterrence and retribution, then there is no particular reason plaintiff should be able to keep the award. Similarly, various sorts of jury instructions will make sense if the state is conceiving of the award one way rather than another, and various sorts of procedural protections will fit on the civil model and not on the criminal. This is not to say that a legal system could never choose an intermediate option—as, for example, clear and convincing evidence—but that it should do so with a clear understanding of what the system is, not because it is too puzzled or tired to think through which box to choose.

Third, from a practical point of view, a more fulsome understanding of the structure and significance of punitive damages in our tort system should enable us to make better decisions on what to do with them. What should the evidentiary standard be? Should they be insurable? How, if at all, should the defendant’s wealth figure into punitive damages? How, if at all, should punitive damages relate to compensatory damages? How, if at all, should other conduct by the defendant figure into punitive damages? Should it be possible to have punitive-damages-only litigation? Do caps on punitive damages make sense? Are punitive damages a sensible way to deter corporate misconduct? What sorts of arguments should a plaintiff be able to

use in front of a jury regarding punitive damages? All of these practical questions will of course be sensitive to a variety of political, judicial, and economic considerations. But the starting point is understanding how punitive damages fit into our tort law.

## VII. *Gore* Revisited

With this in mind, let us turn back to *Gore* itself. The \$4 million verdict of the jury was so plainly untenable as an account of the extent to which Gore himself was entitled to be punitive, in light of the wrong done to him, that there is no way around *Gore*'s simply being a case of indirectly commenced state punishment. As such, the "immunity" that belongs to punitive damages as part of civil liability between private parties drops out of the picture. The award, if considered as a fine for what BMW was proven to have done to Gore, was dazzlingly excessive; moreover, the notice of such an award and the standards for it were plainly unacceptable as a matter of procedural due process.<sup>260</sup> If Alabama wants to do this as a regulatory penalty, it must put some regulations with some standards for conduct and some standards for penalties on the books. Scalia's complaints about substantive due process are off the mark because this is not substantive, but procedural due process.<sup>261</sup> His *Haslip* argument is off the mark because the law has simply metamorphosed into a penalty masquerading as civil liability, for all of the reasons mentioned.<sup>262</sup> Ginsburg's complaints about judicial restraint and institutional competence (which also animated Scalia's

260. *Pac. Mut. Life Ins. v. Haslip*, 499 U.S. 1, 46 (1990) (O'Connor, J., dissenting) ("Alabama, making no pretensions whatsoever, gives civil juries complete, unfettered, and unchanneled discretion to determine whether or not to impose punitive damages. Not only that, the State *tells* the jury that it has complete discretion. This is a textbook example of the void-for-vagueness doctrine."). The point of citing O'Connor's dissent here is quite particular: the argument is that once the reasons for bracketing the civil aspect have disappeared, O'Connor's arguments are extremely powerful. To put it differently, I do not wish to beg the question of the adequacy of her arguments, but to explain them by using the subjective-objective framework to capture the respects in which her view was inadequate.

261. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 598–99 (1996) (Scalia, J., dissenting) ("I do not regard the Fourteenth Amendment's Due Process Clause as a secret repository of substantive guarantees against 'unfairness'—neither the unfairness of an excessive civil compensatory award, nor the unfairness of an 'unreasonable' punitive award. What the Fourteenth Amendment's procedural guarantee assures is an opportunity to contest the reasonableness of a damages judgment in state court; but there is no federal guarantee a damages award actually *be* reasonable.").

262. *Id.* at 598 (Scalia, J., dissenting) ("[A] state trial procedure that commits the decision whether to impose punitive damages, and the amount, to the discretion of the jury, subject to some judicial review for 'reasonableness,' furnishes a defendant with all the process that is 'due.'"). See also *supra* notes 191–199 and accompanying text (citing Colby as identifying the constitutional treatment of punitive damages as justified only by a "historical pedigree."). As I noted above in criticizing Colby, Scalia and Thomas might reject this response to the historical distinction. So be it. As I also indicated, the majority of the Court—indeed all members but Scalia and Thomas—either (a) take relevant changes over history to be relevant to force of the history, or (b) do not take history to be dispositive in any case, or adopt both (a) and (b). Most relevantly, the account of the civil aspect offered here articulates a normative (not just positive) basis for the relative immunity of private civil damages awards, which Colby did not do for private punishment.

discussion) are sound only if one takes as one's foil the view that this is not a real due process problem, but simply a problem of part of the law getting out of hand.<sup>263</sup> That is no longer the best foil.

The foregoing explanation succeeds in identifying why the Court was not willing to let the award in *Gore* stand. There was no blinking the fact that it was a state punishment, and the civil model upon which the Court had relied as a reason for staying its hand in *Browning-Ferris* and *Haslip* just could not hold up. It also tells us a bit about chestnuts—about great cases—for it is quite plausible that the sheer power of the facts in *Gore* pushed the majority over the edge. And it is surely part of why we focus upon great cases: We can perceive more clearly troubling features of legal frameworks when a particular set of facts vividly displays those features. In *Gore*, we are led to focus on how absurd it is to suppose that Dr. Gore is entitled to redress the fraud perpetrated upon him by exacting a \$2 million penalty from BMW. What is vivid is Dr. Gore's *lack of entitlement* to these damages as a form of private redress, the completely anomalous character of a \$2 million remedy for the concealment of initial (but now virtually undetectable) paint damage on the surface of one man's luxury car. And what is equally vivid—but not particularly anomalous—is the idea that a jury has made a judgment based on what it thinks is an appropriate *punishment* the legal system should inflict upon BMW. The objective aspect of punitive damages is virtually the only aspect that shows in *Gore* and so the Court ends up treating it, in effect, as a case of criminal punishment.

*Gore* was, therefore, on its facts the perfect case for making the argument that punitive damages should be subject to constitutional constraint. But having just the right facts nevertheless left a very serious problem. As we have already noted at length, the Court's prior decisions had seemed to shut off the most tenable routes for constitutional analysis, leaving only an amorphous due process constraint perilously close to delegitimized *Lochner* precedents.<sup>264</sup> Of course, it was highly relevant that the Court itself had expressed the intention to use that amorphous due process constraint.<sup>265</sup> Of additional importance, perhaps, was the fact that *Gore* presented the opportunity for an interesting and quite compelling state sovereignty and comity argument in federalist terms.<sup>266</sup> In any event, we now have a better sense of why *Gore* is a "chestnut" in at least one respect: the facts of the case itself are such a powerful illustration of one, and just one, aspect of punitive damages, that the resistance presented by that other aspect simply vanished.

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263. *Gore*, 517 U.S. at 607 (Ginsburg, J., dissenting) ("The Court, I am convinced, unnecessarily and unwisely ventures into territory traditionally within the state's domain . . .").

264. See *supra* text accompanying notes 51–58.

265. See *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454–55, 458 (1993) (citing several *Lochner*-era "due process" cases with approval and announcing a standard of "grossly excessive"). Indeed, *TXO* purports to use that constraint to evaluate the damages award, but does not strike down the award.

266. See *supra* text accompanying notes 65–66.

If this account is right, then—at least starting from a blank slate on punitive damages, and at least in theory—*Gore* would have provided a good opportunity to declare that protection under the Excessive Fines Clause, the Due Process Clause, or both should be offered under a theory that emphasizes the vagueness of the conduct guidelines, the vagueness of the penalty guidelines, the absence of criminal procedural safeguards and, in addition, the absence of safeguards that would be reasonable on a *Mathews v. Eldridge* analysis. At least two powerful sets of reasons counted against doing so in *Gore*. First, all of these arguments had been expressly rejected in prior cases.<sup>267</sup> Second, a large part of the motivation for rejecting them in prior cases was not simply the tort-theoretic reason I have cited—the presence of a civil component, what I have called the “subjectively” punitive aspect of punitive damages. A large part of it was a set of meta-reasons sounding in federalism and more particularly in judicial restraint when it comes to interfering with the common law of torts under state law.<sup>268</sup> So quite apart from the fact that the Court had not in fact conceived a way to understand the double aspect of punitive damages and had not crafted a plausible way to pry apart, conceptually, the sort of punitiveness that in principle calls for heightened scrutiny from that which does not—and even assuming that the theory presented here is sound—the Court was moved by meta-considerations that cast doubt on its ability to winnow out the suspect from the nonsuspect. Put differently, there are strong reasons of restraint why the Court might be wise to refrain from declaring a substantial and politically contentious aspect of state tort law structurally unconstitutional. Interestingly, the meta-reasons led the Court, in *TXO* and *Haslip*, to a tentative in-principle position: punitive damages could become unconstitutional, but we are going to hesitate as long as we can before saying that any particular award actually does.<sup>269</sup>

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267. See *Gore*, 517 U.S. at 588 (Breyer, J., concurring) (citing *Haslip*, 499 U.S. at 20) (explaining that although vague legal standards risk arbitrary results and invite judicial scrutiny, the vagueness does not in itself violate due process); *TXO*, 509 U.S. at 462–63 (finding meritless the assertion that a punitive damages award violated due process because the state courts did not adequately review the award and because there was no advance notice that a jury could return such a large damages award); *id.* at 474–75 (O’Connor, J., dissenting) (noting that in the area of punitive damages, juries often receive “only vague and amorphous guidance” and that the Court has not held such instructions unconstitutional); *Haslip*, 499 U.S. at 24 n.12 (citing *Giaccio*, 382 U.S. 399) (rejecting Pacific Mutual’s void-for-vagueness argument that attempted to rely on *Giaccio* as support for its argument that focused on the jury’s discretion in fixing the amount of punitive damages); *Browning-Ferris*, 492 U.S. at 283 (O’Connor, J., concurring in part and dissenting in part) (stating that the Court held that the Excessive Fines Clause “places no limits on the amount of punitive damages that can be awarded in a suit between private parties”).

268. *Gore*, 517 U.S. at 568–74.

269. *TXO*, 509 U.S. at 454–58 (refusing to recognize a bright-line rule which could be applied to every case but recognizing that a grossly excessive punitive award might violate the Due Process Clause); *Haslip*, 499 U.S. at 15–18 (recognizing that punitive damages have long been a part of state tort law, but that it would be inappropriate to say that, because they have been recognized for so long, their imposition is never unconstitutional).

*Gore* of course was the case in which they could hesitate no longer: the substance broke through a rather powerfully felt set of reasons sounding in restraint. The analysis above has suggested this was no accident; strikingly absent in *Gore* is a plausible version of the subjective sort of punitiveness that constitutes the core of the civil aspect of punitive damages, which in turn underlies the Court's reasons for restraint. But the problem was that all the enumerated provisions that would, in fact, have provided principled grounds for constitutional concerns seemed to have been shut down. And so the Court seems to have invented something new: on Scalia's account, a new chapter of substantive due process without any basis in fundamental rights; on the hindsight reconstruction, an Eighth Amendment excessive fines idea attached to the Due Process Clause, but distinct from the Eighth Amendment. Neither makes much sense as a source of authority, as argued above.

How might *Gore* have been decided if the double aspect problem had been understood? Perhaps the Court might have done well to articulate a synthesis along the following lines:<sup>270</sup> Where the state's enforcement of a punitive damages award can be understood as reflecting an effort, by the state, to permit the plaintiff to obtain redress to which she is entitled in light of the wrong defendant did to her, constitutional constraints appropriate to penalties, fines, and punishment are not appropriate. However, where the award cannot be so understood, even from a perspective that adopts a wide measure of deference to the states and restraint in judicial review, then not only *is* the state imposing a penalty, but the state *must be treated* as imposing a penalty or fine. As is generally true under the Eighth Amendment, the legislative framework within which the fine is located and the compliance by the state with that framework normally demand such a high level of deference from a federal court that the Court declines to do a substantive proportionality review under the Excessive Fines Clause. However, individually driven punitive damages awards do not generally arrive within the protective clothing that such a procedural background delivers.<sup>271</sup> Thus, for due process reasons, they are dissimilar from most criminal and regulatory fines.<sup>272</sup> Whether they are thereby procedurally defective is a question that has not been addressed fully, but there are again reasons for caution in interfering with state tort law. At a minimum, two sorts of reasons for declining to engage in Eighth Amendment excessiveness review do not apply: it is not genuinely something that implicates the state only because it is providing redress (and therefore it is genuinely a fine); and it is not insulated by a legislative process or even an executive process. Therefore,

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270. The following should be read only as an articulation, from an academic's point of view, of the type of theoretical treatment that would have met the various constraints that the *Gore* court faced in light of its precedents and its general posture.

271. See Karlan, *supra* note 135, at 918–19 (contrasting the standards of review and procedural constraints in criminal punishment and punitive damages contexts).

272. *Id.*

substantive review of excessiveness should apply. Reprehensibility, actual and potential harm, and comparable civil and criminal sanctions are rough guideposts for determining excessiveness.

Because the Eighth Amendment excessiveness inquiry only applies to certain awards in light of their lack of procedural insulation, it is fairly considered a hybrid of due process and the Eighth Amendment. Because *Browning-Ferris* did not contemplate a case which lacked a substantial subjective punitiveness that could, under highly deferential review, render the award permissible, *Browning-Ferris*<sup>273</sup> is distinguishable.<sup>274</sup>

Therefore, nothing in the Court's prior case law, either on punitive damages specifically or on the Excessive Fines Clause more generally, foreclosed the recognition of an Eighth Amendment right, applied through the Due Process Clause and couched in a theory that declines high deference to state law because of reasons sounding in legislative process. Although *Browning-Ferris* appears to have done so, neither the facts of *Browning-Ferris* nor the theories put forward by the parties or entertained by the court presented an excessive fines argument based on a version of a punitive damages award that only pretended to be a matter of private right under an individual civil right of action.

Not only are *Haslip*<sup>275</sup> and *TXO*<sup>276</sup> consistent with this approach, they themselves foreshadowed excessiveness review based on Due Process concerns. Both cases display, in a concededly inchoate way, a certain sort of ambivalence. On the one hand was inaction on punitive damages, based on both considerations of deference rooted in federalism, and judicial caution rooted in history and respect for state tort law.<sup>277</sup> On the other hand was a felt need to concede that the startling sorts of punitive damages that have been coming down seem to differ from our historically entrenched punitive damages; that history should not, in any case, be dispositive. Although there is no desire to fiddle with state procedure, there does seem to be a problem both of constitutional magnitude and of constitutional type, and some combination of excessiveness, unreasonableness, and due process violation is the best we can do to articulate why we believe it is of constitutional type.<sup>278</sup>

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273. 492 U.S. 257 (1989).

274. See *infra* notes 288–293 and accompanying text (describing the defendant's efforts to crush the plaintiff "like a bug" as giving rise to a legitimate subjective right to be punitive).

275. 499 U.S. 1 (1991).

276. 509 U.S. 443 (1993).

277. See *Haslip*, 499 U.S. at 19–20 (recognizing the state's interest in deterrence and retribution); *TXO*, 509 U.S. at 462 (acknowledging the state's power to deter).

278. *Haslip*, 499 U.S. at 9–13 (summarizing earlier cases where the Court acknowledged that juries can unpredictably award punitive damages in amounts bearing no relation to the harm caused, but refused to address directly what limits the Due Process Clause places on undue jury discretion); *TXO*, 509 U.S. at 457–58 (recognizing that jury awards differ greatly because they result from numerous fact-based considerations, but refusing to define a bright-line test to assess the constitutionality of punitive damages awards).

Now equipped with a theoretical framework that can handle the double aspect of punitive damages, we are positioned to see why there was a bit of slippage in Justice Blackmun's *Haslip* opinion that evolved into a problem in *Gore*. Justice Blackmun emphasized, based on a consistent acceptance of punitive damages by state and federal courts, that the common law method for assessing punitive damages is not "so *inherently* unfair as to deny due process and be *per se* unconstitutional."<sup>279</sup> Shortly thereafter, he derided the idea that history provides absolute insulation from constitutional scrutiny, and inferred that the question left open is whether the "Due Process Clause renders the punitive damages award *in this case* constitutionally unacceptable."<sup>280</sup> Blackmun slipped easily from a rejection of the idea that the common law method is inherently unfair to the idea that if there is a violation of Due Process, it is a violation *in this case*. But that is too quick an inference. It remains a possibility that the problem does not lie in the very idea of punitive damages at the common law, but in a particular direction that punitive damages in tort law has, as it turns out, developed. Then, while punitive damages as assessed at the common law would not be *per se* unconstitutional, punitive damages in the jurisdiction in question, for the type of case and procedure used, could be unconstitutional. The foil to punitive damages not being inherently unconstitutional is not simply their being unconstitutional in a particular case, or at a particular number; they could be unconstitutional given a particular direction of evolution in a particular jurisdiction or jurisdictions.

The Court does not entertain this possibility seriously. As Colby, Redish and Mathews, Sebok, and Wright show,<sup>281</sup> there is much to be said for a view that takes the constitutional problems associated with punitive damages to be, in part, the product of substantial changes in both the letter of punitive damages law and the surrounding practices in which it is used and applied—not simply in the fact that today's numbers are arguably an order of magnitude greater than those of earlier generations (even when adjusted for inflation).<sup>282</sup> Indeed, the inflation of the numbers is very likely a product, at least in part, of changes in jury instructions, attorney instructions, judicial overview, and in the kinds of cases where punitive damages claims are brought and won.<sup>283</sup> For example, today's judges and trial lawyers tend to

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279. *Haslip*, 499 U.S. at 17 (emphasis added).

280. *Id.* at 17–18 (emphasis added).

281. See *supra* Part IV.

282. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 597–98 (1996) (appendix to concurring opinion of Breyer, J.).

283. See John G. Corlew, *The Pursuit of Deep Pockets: An Historical Overview of Punitive Damages in Mississippi*, 63 MISS. L.J. 583, 600–01 (1994) (emphasizing that punitive damages awards skyrocketed once plaintiffs discovered a target in vulnerable insurance companies); Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1305–07 (1993) (confirming that punitive damages awards were once restricted to cases of malicious conduct, but are now commonly available when a

push harder, and more concretely, on the social value of a strongly deterrent message that is keyed to what would be an effective sort of liability rule in terms of protecting the public from the unduly risky conduct that is undertaken willfully.<sup>284</sup> In particular, many trial lawyers deliberately adopt a kind of argument that embraces the private attorney general model and encourages jurors to select some kind of measure to calibrate their punishment of defendants' corporate decisionmakers so that it will have a powerful deterrent effect.<sup>285</sup> Black-letter law on evidence and jury instructions that may be presented as to punitive damages has developed far beyond where it was when the Fourteenth Amendment was ratified (and, *a fortiori*, when the Eighth Amendment was ratified). There is no reason to believe that any historical decisions on the processes appropriate for punitive damages, and their distinctiveness from fines, were broad enough, robust enough, and close enough to what we are looking at today to assume that *those* decisions were made in the past.

If this rational reconstruction of *Gore* were accepted, certain aspects of constitutional punitive damages assessment would require elaboration, and some would probably warrant change. First, and most closely related to the subject of this article, in principle not all punitive damages awards should be subject to *Gore*-like, excessive-fines-type scrutiny. *Gore* was a case with facts more powerful than the Court's grasp. The importance of the facts was their capacity to display, by example, why the sort of constitutional scrutiny appropriate for punishment was sometimes undeniably appropriate for punitive damages. Our theoretical account of why that was so was that there was no way to understand the judgment entered in *Gore* as, in any form, an effort by the state to empower the plaintiff to exact what he was entitled to from BMW, in light of the wrong done to him. It was therefore unequivocally a case about the imposition of a punishment deemed objectively appropriate to the defendant's conduct—it was a case of punishment in the objective sense only, and therefore in the criminal sense. This raises the question of whether

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defendant engages in highly negligent acts); *id.* at 1332 (describing the use of punitive damages in business and contract disputes as a recent development).

284. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (characterizing punitive damages as “private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence”); LANDES & POSNER, *supra* note 223, at 161 (explaining that in cases where measuring actual damages is difficult, courts are often justified in imposing punitive damage awards that prevent underdeterrence and free courts from the heavy costs of calculating actual damages); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 103–04 (2005) (asserting that deterrence, rather than private compensation, often serves as the Court's primary motivation in decisions under securities and investor protection laws).

285. See Michael L. Rustad, *Happy No More: Federalism Derailed by the Court that Would be King of Punitive Damages*, 64 MD. L. REV. 461, 529 (2005) (indicating that when plaintiffs act as private attorneys general, punitive damages serve to “vindicate the larger societal interest by bridging the enforcement gap and increas[ing] both punishment and deterrence”); Stephenson, *supra* note 284, at 103–04 (observing that, in seeking to improve enforcement of statutes, courts often think of plaintiffs as private attorneys general, rather than as victims seeking compensation).



constitutional scrutiny of punitive damages is appropriate in a case in which the judgment *could be understood* as an effort by the state to empower the plaintiff to exact a remedy to which the plaintiff was entitled. The implication of the analysis is, at a minimum: when the punitive damages award *is properly regarded* as reflecting a judgment about the plaintiff's right to be punitive, constitutional scrutiny appropriate to criminal punishments should not apply. This would involve not simply the analogue of excessive fines review, but procedural Due Process protections, too.<sup>286</sup> The latter could, at least in principle, be applied even where the actual damages award is not large enough to raise a "judicial eyebrow."<sup>287</sup>

What will determine whether an award is properly regarded as reflecting a judgment about the plaintiff's right (or privilege) to be punitive? This is related to the question of when an award of punitive damages is one that a reasonable juror could have concluded the plaintiff was entitled to in light of the wrong defendant did to her. In fact, whether an award reflects the right to be punitive is a combination of this question, plus aspects of deference, the content of the jury charge, and the kinds of evidence and arguments presented to the jury. Put differently, if there is no good reason to believe that the jury opined on this question or that if it had opined upon it, it could have reached this result, then it would not properly be regarded as reflecting such a judgment.

Let us look at *Gore* itself. There is no reason to believe that the jury thought about this question: the jury instructions, the evidence presented, and the arguments made to the jury looked almost entirely to a broader scope of conduct by BMW. But if the jury had thought about it, could the jury have reached this judgment? I have argued above that part of what made *Gore* illuminating is that it is so intuitively clear that the jury could not have reached this judgment. But why not? Part of the reason, it seems to me, is that *Gore* did not really have a particularly serious grievance against BMW. The right to be punitive exists, in part, out of recognition of a substantial grievance against the defendant. The magnitude of the grievance determines, to some extent, the magnitude of the right of redress. A right to exact

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286. The gray area is what should happen in a case in which an award could, within reason, be interpreted as permitting the plaintiff to exact a remedy to which he is entitled or, alternatively, could be interpreted as reflecting a judgment that is not about the plaintiff's right at all, but about the defendant objectively meriting punishment. How this sort of case ought to be dealt with is, in part, a question of the level of oversight the court reviewing the constitutionality question thinks it appropriate to apply to the jury verdict, and, more generally, the framework of state law—the lighter the touch and the stronger the deference, the more appropriate to look at how the damages award could be interpreted.

287. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 481 (1993). Whether the Court believes even fines that are not *prima facie* excessive should be subject to heightened constitutional scrutiny is not just an issue of whether "excessiveness" is essential to there being a constitutional problem; a plausible form of judicial restraint in this area of state tort law could involve a systemic decision to decline to review (even on purely procedural grounds) awards that are not *prima facie* "too big."

damages of \$2 million would comport with a much more significant willful injuring of Gore than that which occurred. Indeed, in light of the relatively minor fraudulent concealment, the grievance legitimately held against BMW by Gore is quite paltry. Perhaps redress of \$4,000—the difference in value, as decided by the jury, between the price paid and the actual market value with full disclosure—does not fully correlate to the grievance. But it is preposterous that the grievance associated with this transaction was anywhere near the size that a jury would have believed warranted personal redress of \$2 million.

The facts of *Browning-Ferris* present a fascinating contrast to those of *Gore*. Joseph Kelley, the individual plaintiff in that case, had left the defendant company, Browning-Ferris, to start his own small business, Kelco (which is in fact the name plaintiff and the name petitioner in the caption of the Supreme Court case). Kelco was a small competitor of Browning-Ferris in the waste disposal industry.<sup>288</sup> Browning-Ferris was a huge, billion dollar business that decided to “crush” plaintiffs “like a bug,” according to testimony the jury heard.<sup>289</sup> The campaign to crush the plaintiffs went on for a matter of years, and involved powerful below-market price-setting in order to bankrupt the plaintiffs.<sup>290</sup> During that period, the power of Browning-Ferris’s efforts to drive Kelco and Kelley out of business were enormous; as Kelley’s lawyer put it to the Supreme Court, “[h]owever it may appear to petitioners [Browning-Ferris], it was hardly a trivial matter to Joseph Kelley to find himself faced with destruction of a business into which he had put his life savings.”<sup>291</sup> So they filed suit in response, and won a jury trial.<sup>292</sup> The compensatory damages were only \$51,146, but the plaintiff also demonstrated the right to exact punitive damages, and the jury awarded \$6,000,000 in punitive damages.<sup>293</sup> Here is a case where one can easily imagine the jury believing defendant had an extraordinarily legitimate grievance against defendant, a former employer who set out to crush him financially. And one can imagine the jury thinking the right to exact \$6,000,000 in punitives was proportionate to the grievance.

The more general point is that one must look at the nature and magnitude of the personal wrong inflicted upon the plaintiff (and presented to the jury) before one is able to judge whether the punitive damages verdict is plausibly understood as the jury’s effort to calibrate the punitive remedy to

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288. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 260 (1989).

289. *Id.*

290. *Id.* at 260–61.

291. Brief for Respondents at 39, *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (No. 88-556). The jury in *Browning-Ferris* heard testimony that Kelley and his wife put their life savings into their new start-up company and sold their house and then borrowed further cash to keep the company going in the face of the pressures from Browning-Ferris. Joint Appendix at 14, *Browning-Ferris*, 492 U.S. 257 (1989) (No. 88-556).

292. *Browning-Ferris*, 492 U.S. at 261–62.

293. *Id.* at 262.

the willful wrong endured by plaintiff. It is not so much that the law favors an eye for an eye; it is that when analysts and scholars look to what juries have decided a plaintiff's entitlement is, it is sensible to imagine that juries are themselves operating within an eye-for-an-eye frame of mind. And so long as an award represents the judgment of what the plaintiff's entitlement is, then we do not need to reach the question of whether state punishment is occurring.

### VIII. Conclusion

Candor is the starting point of an adequate theory of punitive damages. Being candid about punitive damages means admitting a number of discomfiting truths. First and foremost among these realities is the fact that punitive damages are partly about permitting tort plaintiffs to *be punitive*, to exact damages that go beyond what they need to be made whole, because they desire to see the defendant endure an unpleasant consequence. As I have put it, punitive damages give legal recognition to a *right to be punitive*. Indulging vengeful and punitive instincts is not something in which most of us take pride, and we are not particularly thrilled to see it in our legal system either. I have argued above that we cannot make sense of the reality of punitive damages as part of our tort law without giving substantial attention to this, quite critically *civil*, aspect of punitive damages. But drawing on civil recourse theory, I have tried to offer a less harsh and more balanced picture of the role of punitive damages, even within a conception that takes vengefulness seriously. I have argued that, taken within the broader context of the structure and civility of private law, and the narrowness of punitive damages as a remedy, the private punitiveness recognized by tort law is neither primitive nor irrational. It can be understood as having a place, albeit small, within a reasonable, social-contract-based system of private law.

A second "harsh reality" of punitive damages is that the "private law" story is hardly the whole story. Since their inception, punitive damages have sometimes been called "exemplary" damages. Courts have frequently referred to the deterrence function of punitive damages.<sup>294</sup> It is possible that there was an earlier time when this "function" of punitive damages fit smoothly and comfortably within the private punitiveness model; that would take more investigation than I have done. But American punitive damages law today—and for the past several decades—has included a robust conception of punitive damages as a criminal or quasi-criminal idea that envisions the imposition of damages as a deterrent and retributive sanction imposed by the state, on the occasion of a plaintiff's private law suit.<sup>295</sup>

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294. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (stating that one of the goals of assessing punitive damages is deterrence).

295. See *supra* text accompanying notes 147–161.

In one sense, this is not such a “harsh” reality, for there is nothing unseemly about state punishment of seriously wrongful conduct, and in fact—as both economists and legal scholars have rightly indicated—such punishment may serve important functions where there would otherwise be serious gaps in deterrence. And yet the story does not stop here.

Fundamental constitutional values and rule-of-law values demand that there be certain kinds of clarity and notice as to what sorts of conduct will be punished; certain kinds of standards and notice for the selection of punishment level; and certain kinds of limits to the punishments selected.

For decades, punitive damages law has passed under the constitutional radar screen because it is nominally civil. To the extent that what it is really about is virtually the same as criminal punishment, the “nominally civil” finesse is unsatisfying and unjust: the worst kind of formalism. *Gore* and its progeny represent the delicate project that arose when courts came to take seriously this criminal aspect of punitive damages: the courts must craft a way to treat punitive damages—insofar as they are a form of state punishment—in a manner commensurate with our constitutional norms surrounding punishment, and must strive to do so without indulging themselves in a massive rewriting of the civil law of damages within the states.

Thus, the two aspects of punitive damages—civil and criminal—correspond to the state’s empowerment of private plaintiffs to be punitive, and the state’s own act of punishment. Prying apart these aspects analytically should help us work toward a modest, workable, and defensible constitutional doctrine for scrutiny of punitive damages. More fundamentally, it should help us understand and work toward a sensible and coherent doctrine of punitive damages within tort. How to formulate state-of-mind requirements, jury instructions, insurance law, evidentiary standards, damages caps, split-recovery statutes, punitive damage bifurcations, standards for appellate review, and even the question of whether to have punitive damages at all—these are persistent and difficult issues that today give off more heat than light. An open explanation and recognition of the punitiveness in punitive damages is an apt way to begin down that path.

