



Punitive Damages and the Public/Private Distinction: A Comparison Between the United States and Italy

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**PUNITIVE DAMAGES AND THE PUBLIC/PRIVATE DISTINCTION:
A COMPARISON BETWEEN THE UNITED STATES AND ITALY**

Marco Cappelletti*

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I. INTRODUCTION

In 2007, the Italian Supreme Court stated in a landmark judicial decision regarding the enforcement of a U.S. punitive damages award that Italian tort law is meant to serve a compensatory function and that there is no room for any goal other than corrective justice within domestic tort law. The majority of Italian jurists, while criticizing this mono-functional reading of tort law, have excluded the adoption of punitive damages as a domestic remedy on the grounds that they would blur the line between tort law and criminal law and the conditions existing in the United States make punitive damages non-replicable in different settings.

In this paper, I criticize the Italian rejection of punitive damages by offering a comparative analysis of the treatment punitive damages receive in the United States and the Italian legal discourse, with a special focus on the relationship between this tort law remedy and the public/private distinction. The significance of this analysis transcends Italy and the United States: controversial judicial decisions and intense academic discussions concerning punitive damages are detectable both in the United States and across Europe. Everywhere, punitive damages raise issues concerning essential aspects of legal systems, such as tort law's function(s), the difference between tort law and criminal law, and the relationship between public law and private law.¹

¹ For an overview of punitive damages in Europe, see generally HELMUT KOZIOL & VANESSA WILCOX, *TORT AND INSURANCE L.*, 25 (2009); Helmut Koziol, *Punitive Damages—A European Perspective*, 68 *LA. L. REV.* 741 (2008). For an overview of punitive damages in Germany, see Volker Behr, *Punitive Damages in American and German Law—Tendencies towards Approximation of Apparently Irreconcilable Concepts*,

The comparative analysis I propose unfolds as follows. In Part II, I explore U.S. punitive damages law and the explanatory theories U.S. scholars propose to accommodate this controversial tort law remedy within domestic law. This inquiry shows that the battle over the “true” justification of punitive damages is part of a larger clash relating to the public/private distinction because punitive damages have the effect of locating punishment and deterrence within private law, where, according to traditional thought, they should not be.

Part of U.S. law conveys the message that courts and juries award punitive damages to further the public’s interest in punishing and deterring wrongdoers. On this account, punitive damages are a public sanction that contributes to minimizing the distinction between public and private law. Other legal materials offer a different picture by suggesting that punitive damages are awarded to promote the interest of private parties in punishing tortfeasors for their egregious wrongs. On this account, punitive damages are reconcilable with a vision of the law that keeps private law distinct from public law.

These *prima facie* contradictory indications in the extant law mirror the divergent conclusions scholars have reached as to the theoretical foundations of punitive damages. Some jurists see punitive damages as instrumental to the fulfillment of public goals and proffer explanatory theories that tend to blur the line between public and private law. Others, focusing on different parts of extant law, justify punitive damages in a way that serves their commitment to preserving the public/private distinction. Basically, they argue that punitive damages are about private, as opposed to public, punishment. If so understood, punishment is consistent with the basic tenets of private law.

Although both strands of legal scholarship recognize that U.S. punitive damages law exhibits a *mélange* of public and private law features,² their conceptualizing efforts consider punitive damages as essentially public or private. These legal thinkers fail to satisfactorily accommodate punitive damages within domestic law because they do not perceive that public and private elements coexist throughout tort law (and private law more generally). By resorting to the

78 CHI.-KENT L. REV. 105 (2003); Madeleine Tolani, *U.S. Punitive Damages before German Courts: A Comparative Analysis with Respect to the Ordre Public*, 17 ANN. SURV. INT’L & COMP. L. 185 (2011). For an overview of punitive damages in France, see generally Benjamin West Janke & François-Xavier Licari, *Enforcing Punitive Damages Awards in France after Fountaine Pajot*, 60 AM. J. COMP. L. 775 (2012); Matthew K.J. Parker, *Changing Tides: The Introduction of Punitive Damages into the French Legal System*, 41 GA. J. INT’L & COMP. L. 389 (2013). For a detailed analysis of punitive damages in the United States, see *infra* Part II. For a reconstruction of different paths punitive damages have followed in the United Kingdom and the United States, see Cristina Costantini, *Per una genealogia dei punitive damages. Dissociazioni sistemologiche e funzioni della responsabilità civile*, in IL RISARCIMENTO DEL DANNO E LE SUE “FUNZIONI,” 287, 287-97 (2012).

² See Benjamin C. Zipursky, *Palsgraf, Punitive Damages, and Preemption*, 125 HARV. L. REV. 1757, 1797 n. 97 (2012) [hereinafter *Palsgraf Punitive Damages*].

“nesting” method,³ I show that although punitive damages law is characterized by an internal coexistence of public and private as opposite and yet inextricably linked poles, it should not be read as an isolated and perhaps unfortunate instance in which public and private are under the same shelter.

I use the findings of Part II to illuminate and critically assess the Italian rejection of punitive damages. In Part III, I argue that in Italy too tort law mixes public and private elements. Against this background, I criticize the position of the Supreme Court and of scholars towards punitive damages. I demonstrate that the Court relies on the ideal of corrective justice to the point of transforming it into a dogma that legal reasoning must obey with virtually no exception. This approach unveils adherence to an unhelpfully rigid distinction between public and private that can only generate detrimental effects, such as impeding desirable legal reforms. It further appears that Italian jurists, although disenchanted as to the absoluteness of the public/private dichotomy, still see the notion of punishment as a wall between public and private law, even though extant law shows that punitive and deterrent elements feature in Italian tort law. Italian legal actors fail to realize that if punitive damages were adopted in Italy, they would only represent an additional element to the already-conspicuous list of public elements in tort law.

In Part IV, without any pretense of being exhaustive, I analyze three situations where the Italian system is remedially deficient. I argue that punitive damages could be very useful in solving the following long-standing problems: when the wrongdoer’s gain exceeds the loss suffered by the victim; when the wrongful action harms personality rights currently protected by the criminal law; and when a harm is caused to a number of people but it is likely that few, if any, of them will bring an action seeking damages.

³ For an application of “nesting” to legal arguments and concepts, see Jack M. Balkin, *Nested Oppositions*, 99 YALE L. J. 1669, 1676 (1990), (arguing “a nested opposition is a conceptual opposition each of whose terms contains the other, or each of whose terms shares something with the other.”). Interestingly, regarding the distinction between public and private power, he contends that “[p]ublic and private form a nested opposition, which means that they are similar in some respects while different in others, and that they have a mutual conceptual dependence even though they are nominally differentiated.” *Id.* at 1687. See also Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75, 97-104 (1991); Duncan Kennedy, *Savigny’s Family/Patrimony Distinction and its Place in the Global Genealogy of Classical Legal Thought*, 58 AM. J. COMP. L. 811, 821-30 (2010). The “nesting” idea is borrowed from Claude Levi-Strauss. See CLAUDE LEVI-STRAUSS, *THE SAVAGE MIND*, 16-22 (1966).

II. PUNITIVE DAMAGES IN THE UNITED STATES

After English courts expressly accepted punitive damages in the second part of the 18th century,⁴ they were transplanted into the United States. Since then, they have flourished across the country and courts regularly apply them despite ongoing debates as to their permissibility. Today, punitive damages constitute a theoretically controversial but judicially enforced legal doctrine that sometimes exposes tort defendants to substantial, even crushing, liability. The discussions of punitive damages turn on various puzzles that academics have tried to solve to accommodate the tort law remedy in domestic law. The controversial issues are many: is it acceptable to have punishment and/or deterrence as part of private law? Does this not undermine the traditional distinction between private and public law? Is the plaintiff's windfall from punitive awards fair and consistent with the normative foundations of tort law? If punitive damages are really punitive, is it acceptable that criminal procedural safeguards are not applied? To these and other questions different scholars have given different answers.

The degree of intimacy between punitive damages and the public/private distinction can be fully appreciated by focusing on the treatment punitive damages received in different periods of legal thought. During the late 19th century, legal thinkers carried out a systematizing effort in order to provide a conceptually clear and orderly legal structure.⁵ Within this framework, there was a rigid distinction between public and private law. The former, encompassing constitutional law, administrative law, and criminal law, governed the vertical relationship between the state and the individual. An essential feature of public law was that legal rules were crafted in the interest of the community and represented the expression of public will. By contrast, private law, comprised of contract, tort, and property law, was conceived as a system centered on the ideal of individual autonomy and aimed at governing the horizontal relationship between private individuals.⁶

The public/private distinction entailed sorting everything that was legally relevant, including punitive and deterrent functions, into public and private domains. Both functions were perceived as belonging exclusively to public law on the ground that only the state was entitled to interfere with individuals' autonomy by regulating their conduct. Since tort law was intended to compensate victims of wrongs through corrective justice and criminal law was intended to regulate conduct by imposing sanctions, it comes as no surprise that late 19th-century U.S. legal thinkers argued to abolish punitive damages.⁷ This tort law

⁴ The first decision awarding punitive damages was issued in 1763. *See* *Huckle v. Money*, [1763] 2 Wils. 205, 95 Eng. Rep. 768 (K.B.).

⁵ *See* Morton J. Horwitz, *History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1425-26 (1982) [hereinafter *Public/Private Distinction*].

⁶ *See* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 10-11 (Oxford Univ. Press ed., 1992).

⁷ *Public/Private Distinction*, *supra* note 5, at 1425.

remedy represented an aberration by contaminating the purity of private law with regulatory ideas.

Since the beginning of the 20th century, U.S. courts and jurists have vigorously criticized this architecture on the ground that what was presented as neutral and inevitable was in reality the product of policy choices.⁸ As a consequence of the progressive critique of the late-19th century mode of legal thought, private law underwent important transformations over the first four decades of the 20th century and acquired a clearly “social” posture. To any American legal thinker, it was clear that private law could no longer be conceived as an autonomous legal domain, immune from politics and public law. This skeptical view, which reached its heyday in the 1960s-70s, is still shared by a majority of U.S. jurists, who have been deeply influenced by the lessons of Legal Realism.⁹ Unsurprisingly, as soon as the public/private distinction came under attack, the movement against punitive damages lost its force, and U.S. tort law has continued to provide an overtly punitive and deterrent remedy. Since the battle over the existence and normative desirability of the public/private distinction continues to animate academic discussions, it is natural that U.S. theories of punitive damages either minimize the distinction by recognizing the public nature of the remedy or emphasize it by treating punitive damages as a mistake or by considering punishment as part of private law.

The next section overviews the main U.S. explanatory theories of punitive damages. I propose to distinguish them depending on whether they minimize or emphasize the public/private distinction, earning the label, respectively, of “publicizing” or “privatizing” accounts of punitive damages. This classification allows investigating the public/private distinction, which lies at the heart of the punitive damages discussion. Exploring these explanatory theories in light of extant law demonstrates that there is something to both the “publicizing” and “privatizing” accounts of punitive damages. At the same time, neither of them is completely satisfactory because each fails to account for what the other captures. In this respect, an approach that emphasizes that punitive damages are not an isolated and unfortunate instance of a public/private *mélange*, but rather one of the many instances in which the public and private coexist, offers a third, more promising way of accommodating punitive damages within domestic law.

⁸ See, e.g., Morris Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 562 (1933); Robert Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923). For a European critique of the same phenomenon, see RUDOLF VON JHERING, *LAW AS A MEANS TO AN END* 297 (Isaac Husik et al. trans., 1924); FRANÇOIS GÉNY, *METHOD OF INTERPRETATION AND SOURCES OF PRIVATE POSITIVE LAW* (La. St. L. Inst. trans., 2d ed. 1963).

⁹ See generally Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 SEATTLE U. L. REV. 1 (2004) (discussing the current resurgence of late 19th century private law).

A. “Publicizing” Theories of Punitive Damages

In the United States, the vast majority of commentators and, more relevantly, courts and legislators share a pragmatic vision of the law, showing that they have learned from the Realist and post-Realist critiques of rigid categorizations and conceptualisms. Consequentially, it is no surprise that the language used by most courts and legislators conveys the idea that punitive damages are conceived of as a regulatory tool to further policy goals. Many commentators, relying on these “publicizing” legal materials, propound theories of punitive damages that minimize the public/private distinction and that deem it as immaterial to the conferral of punitive and deterrent powers on public authorities or private entities.

1. “Publicizing” Extant Law

In conceptualizing punitive damages, federal as well as state courts and legislators tend to blur the line between public and private law, for they identify the foundations of this tort law remedy with *public* punishment and deterrence. By doing so, they confer on punitive damages a marked regulatory quality and reinforce those doctrinal theories that see the plaintiff as a private attorney general pursuing the state’s objectives on behalf of the public authority.

To begin with, the federal legislator is very clear in excluding any compensatory aim from punitive awards and in limiting punitive damages to deterrent and punitive functions. As Congress explicitly stated, “[p]unitive damages are intended to punish the wrongdoer and do not compensate the claimant for lost wages or pain and suffering.”¹⁰ Moreover, in a number of states local legislators have adopted split-recovery schemes, whereby a percentage of the plaintiff’s punitive damages award goes to the plaintiff and the remainder – often a majority of it – goes to a state- or court-administered fund.¹¹ These schemes, taken together with other legislative changes such as the adoption of the clear-and-convincing standard of proof and the “bifurcation” or “trifurcation” of trials involving punitive damages claims, reinforce the criminal (hence public) nature of punitive damages and considerably blur the public/private divide by attributing typically public functions to private law.¹²

Similarly, courts conceive of punitive damages as pursuing punitive and deterrent goals in the interest of the state.¹³ For instance, the U.S. Supreme Court

¹⁰ H.R. REP. NO. 104-586, at 143 (1996).

¹¹ Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 375-78 (2003).

¹² *Palsgraf Punitive Damages*, *supra* note 2, at 1783-84.

¹³ RESTATEMENT (SECOND) OF TORTS § 908(1) (1977) (“Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct

stated that punitive damages are imposed: “for purposes of retribution and deterrence”;¹⁴ “if the defendant’s culpability . . . is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence”;¹⁵ “to further a State’s legitimate interests in punishing unlawful conduct and deterring its repetition.”¹⁶ Lower courts share a similar view. Inspired by an efficiency-based rationale, in *Mathias v. Accor Economy Lodging, Inc.* the Court of Appeals for the Seventh Circuit argued that punitive awards are necessary to avoid the detrimental effects of under-detection, so that “if a tort-feasor is ‘caught’ only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away.”¹⁷ Similarly, in *Jacque v. Steenberg Homes, Inc.*, the Supreme Court of Wisconsin ordered the trespasser to pay one dollar in nominal compensatory damages and \$100,000 in punitive damages: “[p]unitive damages, by removing the profit from illegal activity, can help to deter such conduct [intentional trespass]. In order to effectively do this, punitive damages must be in excess of the profit created by the misconduct so that the defendant recognizes a loss.”¹⁸ In sum, by founding punitive damages on public punishment and deterrence, courts endorse a regulatory conception of punitive damages that greatly blurs the distinction between public and private law.

Disagreeing with any monolithic conception of punitive damages, other courts prefer to adopt a more nuanced approach. For instance, Judge Calabresi argues that punitive damages cannot and should not be reduced to a legal device pursuing only one goal.¹⁹ This functionalist approach, which considers mono-dimensional views of punitive damages as a serious threat to their multi-functional capacity,²⁰ rejects the idea of tort law as an autonomous system, and criticizes the reductionism of both corrective justice and civil recourse.²¹ This view, which assesses a legal device not on its compatibility with a given domain of law but

in the future.”).

¹⁴ *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991).

¹⁵ *St. Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003).

¹⁶ *Philip Morris U.S. v. Williams*, 549 U.S. 346, 352 (2007).

¹⁷ 347 F.3d 672, 677 (7th Cir. 2003).

¹⁸ 563 N.W.2d 154, 165 (Wis. 1997) (This decision fits both the “property rule” model and the “gain elimination” model as articulated by their proponents (see *infra*, Subsection (A)(3))).

¹⁹ *Ciraolo v. City of N.Y.*, 216 F.3d 236, 244-45 (2d Cir. 2000). See also GUIDO CALABRESI, *THE COMPLEXITY OF TORTS. THE CASE OF PUNITIVE DAMAGES*, reprinted in *LIBER AMICORUM PER FRANCESCO DONATO BUSNELLI*, Vol. II, 327-28 (2008) (stating that the reasons for punitive damages in tort law serve the five following functions: (i) “enforc[ing] societal norms, through the use of private attorney’s general,” (ii) pursuing deterrence by employing the “multiplier” model, (iii) “the Tragic Choice Function, such as in the *Pinto* case,” (iv) “permit[ting] Recovery of Generally NonRecoverable Compensatory Damages,” and (v) “permit[ting the] Righting of Private Wrongs.”).

²⁰ *Id.* at 329.

²¹ Guido Calabresi, *Civil Recourse Theory’s Reductionism*, 88 IND. L.J. 449, 467-68 (2013).

rather on how well it performs its functions, has the effect of blurring the distinction between private and public law.

An additional point worthy of consideration is the U.S. Supreme Court's constitutionalizing of punitive damages initiated in the late 1980s. In a series of successive cases analyzed below, the Court stated that punitive damages must comply with the principles of reasonableness and proportionality to survive scrutiny under the Due Process Clause of the 14th Amendment. This judicial development confirms the impact that public law, especially constitutional law, has on private law matters and the (great) extent to which the outcome of private law disputes can depend on the settlement of constitutionally relevant issues.

A good number of U.S. scholars rely on these "publicizing" segments of extant law to build descriptively plausible and normatively attractive theories of punitive damages. These jurists produce instrumental views of punitive damages, for they see them as a regulatory tool that furthers public, not private, goals. By doing so, they are able to account for some, but not all, of the features current U.S. punitive damages exhibit.

2. Punitive Damages as Delegation of Public Power

Marc Galanter and David Luban put forward a theory according to which punitive damages are truly a form of punishment that can fairly be imposed even without the procedural safeguards required for punishment in criminal law. On their account, punishment is not an exclusively legal institution, but is rather a social institution that pervades our society in many forms.²² Calling into question the conventional taxonomy in which criminal law, a branch of public law, and punishment go hand in hand and must be kept distinct from private law and civil remedies, they argue that punishment cannot be described as solely pertaining to criminal law and that the very notion of punishment is present in other branches of law as well.²³ For instance, in private law, compensatory damages do not clearly distinguish, from a subjective point of view, between punishment and restoration of the victim of a civil wrong.²⁴ That is, the victim may well seek compensatory damages not in order to be made whole, but instead to punish the wrongdoer.

These two authors argue that punitive damages are grounded in ideas of retribution and deterrence. Moreover, they contend that punitive damages are normatively desirable because they tend to sanction sophisticated and powerful economic actors who usually can steer clear of criminal sanctions that are usually wielded against the poor and the marginalized.²⁵ In this context, private parties act as private attorneys general, exercising a law enforcement power delegated by

²² Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1397-99 (1993).

²³ *Id.* at 1401.

²⁴ *Id.* at 1406.

²⁵ *Id.* at 1426.

the state. In response to the concern that punitive damages administer punishment without adequate procedural protections, they argue that lesser protections are required because the life and liberty of a defendant are not at stake in a tort case, and because private parties, rather than a powerful state, seek punitive damages.²⁶

Galanter and Luban's theory has been criticized on the grounds that, by postulating that punitive damages are almost exactly like criminal sanctions, it does not reconcile the punitive component of punitive damages with their status as one of the legal weapons of which a private party may legitimately avail itself in private law disputes.²⁷ In other words, Galanter and Luban have been criticized because their theory minimizes the distinction between private and public law.

3. Punitive Damages as a Means for Achieving Efficiency

A different approach is adopted by law and economics theorists, according to whom the main objective of tort law, and of law more generally, is efficiency, the maximization of utility without the waste of valuable resources. With respect to punitive damages, law and economics advocates identify three possible models.

According to the multiplier model, put forward in 1998 by Steven Shavell and A. Mitchell Polinsky, the total damages (compensatory damages plus punitive damages) a wrongdoer pays must be calculated by multiplying the harm "by the reciprocal of the probability that the injurer will be found liable when he ought to be."²⁸ In order to prevent under-deterrence, they maintain that punitive damages should be imposed only if the injurer has a significant chance of escaping liability for the harm she causes.

A number of scholars have criticized Shavell's and Polinsky's theory. For instance, Catherine Sharkey argues that the multiplier model unduly limits the scope of the under-deterrence problem, confining it to cases in which the harm cannot be detected. Actually, there are other situations in which the injurer may escape liability but which the multiplier model does not capture: when the injured party does not bring a lawsuit either because (1) "the probable compensatory damages are too low, or (2) the victim is not particularly litigious, is unsophisticated, lacks the necessary financial resources," or perhaps has been harmed by a shaming tort; when the defendant's identity is unknown; or when there are more diffuse societal harms.²⁹

Keith Hylton criticizes the multiplier model on the ground that it makes sense only when the injurer's gain is greater than the victim's loss. When the

²⁶ *Id.* at 1454-58.

²⁷ Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 147 (2005) [hereinafter *A Theory of Punitive Damages*].

²⁸ A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 889 (1998).

²⁹ Sharkey, *supra* note 11, at 366-67.

injurer's gain is less than or equal to the victim's loss, the multiplier model should be replaced by the imposition of punitive damages to eliminate the prospect of gains on behalf of the injurer.³⁰ The difference between these two models can be explained by reference to the type of deterrence pursued. The multiplier model pursues optimal deterrence (the wrongful conduct is prohibited so long as its costs outweigh its benefits), whereas Hylton's "gain elimination" model seeks to achieve complete deterrence (the wrongful conduct is prohibited altogether).

David Haddock, Fred McChesney, and Menahem Spiegel provide a different economic rationale for punitive damages, labeled the "property rule" model.³¹ Drawing on the traditional distinction between property rules and liability rules, they argue that when certain activities have zero social value and ought to be totally avoided, an efficient legal system should employ a property rule instead of a liability rule. On this view, punitive damages force a potential wrongdoer to use the market rather than illicit activities to procure goods. According to its proponents, this approach is particularly useful in "illiquid" markets such as those involving bodily injuries, slander, libel, trespass, deceit in inducing marriage, and many others.³²

Although the efficiency-based approach provides an at least partially accurate picture of how courts conceive of punitive damages in the United States, it is not free from criticisms. As Benjamin Zipursky observes, law and economics theorists do little to solve the puzzle over the acceptability of punitive damages as a private law remedy, for they tend to obscure the difference between criminal and civil liability and to treat all types of damages as, essentially, fines.³³ The consequence of this approach, the critique goes on, is the inability to reconcile the punishing side of punitive damages with their position in private law, an issue that matters a great deal if not to economists, to jurists who care about legal coherence.

4. Punitive Damages as a Means for Achieving Societal Compensation and Deterrence

Catherine Sharkey offers a justification for punitive damages distinct from punishment and deterrence.³⁴ Analyzing *State Farm Mutual Automobile Insurance Co. v. Campbell*, together with other relevant cases and recent legislative and judicial developments in a number of states, she argues that punitive damages can be understood as a special form of compensation, namely,

³⁰ Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L. J. 421, 470 (1998).

³¹ See generally David D. Haddock et al., *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 CAL. L. REV. 1 (1990).

³² *Id.* at 26 (citing CHARLES MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 287 (1935)).

³³ A Theory of Punitive Damages, *supra* note 27, at 134.

³⁴ Sharkey, *supra* note 11, at 389-414.

compensation for the victims of wrongdoing who, for various reasons, do not bring an action against the wrongdoer.³⁵

Sharkey traces the notion of punitive damages as “socially compensatory” damages to Judge Calabresi’s multiple opinions in *Ciraolo v. City of New York*.³⁶ In his concurring opinion, he argues that the term “punitive damages” is confusing and that they should instead be labeled “socially compensatory damages . . . [f]or, while traditional compensatory damages are assessed to make the individual victim whole, socially compensatory damages are, in a sense, designed to make society whole by seeking to ensure that all of the costs of harmful acts are placed on the liable actor.”³⁷

Sharkey develops more fully the idea of punitive damages as societal damages by analyzing state legislative reforms consisting in the adoption of split-recovery schemes.³⁸ Besides the contingent reasons that brought States’ courts and/or legislators to adopt these schemes, Sharkey identifies a common denominator, largely ignored by most of the academic literature, to such legislative and judicial moves: the goal of pursuing societal compensation.

According to Sharkey, the societal compensation approach can advance fairness and corrective justice goals by, respectively, preventing the plaintiff from acquiring a windfall gain and by making sure that all the persons whom the defendant’s wrongful conduct harmed can obtain proper compensation through the distribution of punitive damages awards. Moreover, Sharkey maintains that the theory of punitive damages as societal damages would also meet the economic goal of optimal deterrence by forcing wrongdoers to internalize their costs.³⁹

Sharkey’s theory has been criticized on the ground that if the purpose of punitive damages was really that of compensating victims of the defendant’s wrongdoing not before the court, there would be no reason for courts to require, as they invariably do, “grave misconduct as a threshold for a punitive award.”⁴⁰ It can also be argued that Sharkey’s reading of punitive damages captures interesting ongoing developments of punitive awards but that, at least for the moment, her interpretive effort is more an encouragement for further transformation than an accurate depiction of the current status of punitive damages in the United States, founded as they are judicially on the notions of punishment and deterrence.

³⁵ *Id.* at 400; *see also* *St. Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

³⁶ Sharkey, *supra* note 11, at 393. *See also* *Ciraolo v. City of N.Y.*, 216 F.3d 236 (2d Cir. 2000).

³⁷ *Ciraolo*, 216 F.3d at 245.

³⁸ Sharkey, *supra* note 11, at 373 (“Eight states currently have split-recovery statutes of some form, including: Alaska, Georgia, Illinois, Indiana, Iowa, Missouri, Oregon, and Utah.”).

³⁹ *Id.* at 354.

⁴⁰ John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 961 n. 221 (2010) [hereinafter *Torts as Wrongs*].

B. “Privatizing” Theories of Punitive Damages

For those committed to the preservation of the public/private distinction, punitive damages represent a serious problem, for punishment and deterrence (but especially punishment) have been traditionally presented as belonging to the exclusive province of public law. How can this issue be solved while preserving the autonomy of private vis-à-vis public law? There are two possible solutions. One, adopted by commentators like Benjamin Zipursky, Anthony Sebok, and Thomas Colby, consists in producing theories that draw on parts of extant law to accommodate punitive damages while guarding the public/private distinction. Another solution, embraced by corrective justice adherents, consists in treating punitive damages as an unfortunate mistake that cannot be reconciled with the idea of correlativity and that should be erased as soon as possible.⁴¹

1. “Privatizing” Extant Law

Whereas some segments of extant law legitimize a “publicizing” reading of current punitive damages, a number of different features of U.S. punitive damages law legitimize a “privatizing” interpretation of this tort law remedy. First, in a tort law dispute the plaintiff must explicitly claim punitive damages, as judges and juries do not automatically grant them. Second, a certain standard of conduct on the part of the wrongdoer is required, for courts award punitive damages only if the conduct of the defendant has been particularly reprehensible, qualifying as willful, wanton, or reckless.⁴² Third, punitive damages fall within the full discretion of judges or juries. That is to say, even if the adjudicator finds the defendant liable and its conduct above the required threshold of reprehensibility and then orders the payment of compensatory damages, it can deny punitive damages.⁴³ Fourth, in many states the punitive award accrues to the victim and not to some state- or court-administered fund.⁴⁴ Fifth, criminal procedural safeguards are not applied to punitive damages.⁴⁵ Sixth, “the nonparty-harm rule” applies, whereby a defendant cannot be ordered to pay punitive damages for harms caused to individuals not part of the litigation.⁴⁶ These features, considered as distinctive of private law’s autonomy vis-à-vis public law,

⁴¹ See *infra* Subsection (B)(4).

⁴² See, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575-76 (1996).

⁴³ *Palsgraf Punitive Damages*, *supra* note 2, at 1785.

⁴⁴ *Id.*

⁴⁵ *BMW of N. Am., Inc.*, 517 U.S. at 575.

⁴⁶ *Philip Morris U.S. v. Williams*, 549 U.S. 346, 348, 353-354 (2007). The expression “nonparty-harm rule” is owed to Benjamin C. Zipursky. See Benjamin C. Zipursky, *Punitive Damages After Philip Morris USA v. Williams*, 44 CT. REV. 134, 135 (2007).

appear to be emphasized by the advocates of private law's autonomy to legitimate and reinforce the idea of a public/private distinction.

2. Civil Recourse Theory⁴⁷

Zipursky argues that punitive damages have a “double aspect” that derives from an ambiguity in the idea of punishment. In one sense, punitive damages have the same nature as criminal sanctions. They are administered in the name of government or society as a whole for the purpose of punishing and deterring certain forms of highly anti-social conduct. In another sense, punitive damages embody a right on the part of the victim of an egregious wrong to punish the wrongdoer.⁴⁸ How can the punitive nature of punitive damages be reconciled with the fact that they are available to a party in private litigation?

To solve this problem, Zipursky argues that tort law should be understood not as aiming to make the wronged person whole, but rather to provide her with “an avenue of civil recourse against the wrongdoer.”⁴⁹ The state prohibits victims from responding on their own to those who have wronged them, for reasons of social peace. Consequently, it must provide a structure through which a private individual can obtain justice if wronged. Within this conception of tort law, Zipursky argues, there is room for a notion of punitive damages. In particular, the state is not authorizing a private individual to act as a private attorney general. Rather, it is empowering the victim of a certain kind of egregious wrong to be vindictive toward the wrongdoer and to exact a penalty from her using a civil remedy.⁵⁰ By letting the plaintiff claim punitive damages in addition to compensatory damages, the wrongdoer is punished and other people, fearing the same treatment, will refrain from adopting a similar conduct. In this way, Zipursky produces a normative theory of punitive damages that, as part of his broader civil recourse theory, should be understood as connatural to his commitment to preserving the public/private distinction.⁵¹

Zipursky's theory is not immune from criticism. His “double aspect” characterization of punitive damages, although expressive of the Supreme Court's “schizophrenic jurisprudence,” does not satisfactorily justify the absence of

⁴⁷ This view can be assimilated to a slightly different theory, that of Anthony J. Sebok. See Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957 (2006-2007).

⁴⁸ *A Theory of Punitive Damages*, *supra* note 27.

⁴⁹ *Id.* at 151.

⁵⁰ *A Theory of Punitive Damages*, *supra* note 27, at 153.

⁵¹ For a discussion of civil recourse theory, see John C.P. Goldberg & Benjamin C. Zipursky, *Civil Recourse Defended: A Reply to Posner, Calabresi, Rustad, Chamallas, and Robinette*, 88 IND. L.J. 569 (2013); John C.P. Goldberg & Benjamin C. Zipursky, *Civil Recourse Revisited*, 39 FLA. ST. U. L. REV. 341 (2011); *Torts as Wrongs*, *supra* note 40, at 919.

criminal procedural safeguards.⁵² The fact that besides their civil aspect, punitive damages also have a criminal aspect suggests that criminal procedural safeguards should be applied when punitive damages are awarded. In contrast, and unacceptably to this view, Zipursky's theory seems to suggest that so long as the criminal side of punitive damages is accompanied by a civil side, those procedural safeguards are not required.⁵³ Moreover, as Zipursky himself admits, his normative theory of punitive damages does not coincide with current U.S. punitive damages law, characterized as it is by a mixture of "publicizing" and "privatizing" elements.⁵⁴

3. Punitive Damages as Private Punishment for Private Wrongs

Colby argues that the dominant conception of punitive damages as an instrument to punish the wrongdoer for a *public wrong* is an inaccurate depiction of punitive damages.⁵⁵ By relying on the segments of "privatizing" extant law seen above, Colby concludes that punitive damages should be conceived not as public sanctions operating in private law settings, but as private sanctions operating in private law settings.⁵⁶ According to his approach, punitive damages cannot be equated to criminal, hence public, sanctions, and the public benefits deriving from this civil remedy are only an incidental effect of punitive damages.⁵⁷ Rather, punitive damages are a form of punishment for private, individual wrongs. For this reason only, criminal procedural safeguards are not necessary in punitive damages cases.

Colby's theory has been criticized because his proposed distinction between private and public wrongs to explain punitive damages erects a descriptively unpersuasive barrier between public wrongs and criminal punishment on the one hand and private wrongs and punitive damages on the other. According to this critique, it is not true that punitive damages are awarded for exclusively private wrongs and that criminal sanctions are imposed only for exclusively public wrongs: it may well be that a private wrong is also a public wrong because the wrongdoing is not just harmful to the injured person, but also constitutes a threat to the public peace, and that a public wrong (e.g. a homicide) is not only a threat to the public peace but also an offense to a private individual.⁵⁸

⁵² Thomas B. Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 118 YALE L. J. 392, 447 (2008) [hereinafter *Clearing the Smoke*].

⁵³ *Id.* at 446.

⁵⁴ See Palsgraf Punitive Damages, *supra* note 2, at 1777.

⁵⁵ *Clearing the Smoke*, *supra* note 52.

⁵⁶ Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 607-9, 630 (2003).

⁵⁷ *Clearing the Smoke*, *supra* note 52, at 462.

⁵⁸ *A Theory of Punitive Damages*, *supra* note 27, at 143-44.

4. Rejection of Punitive Damages: The Corrective Justice Framework

Corrective justice theorists, committed to keeping as firm as possible the distinction between public law and private law, harshly criticize the very existence of punitive damages. In Aristotelian terms, corrective justice, as distinct from distributive justice, can be understood by resorting to arithmetic notions of addition and subtraction applied to two parties between whom a transactional injustice has taken place and between whom a reverse transaction can re-establish the *status quo ante*.⁵⁹ Some argue that tort law embodies the principle of corrective justice by undoing injustices that occur between two parties when a wrongful injurer gains something and the victim loses something. Corrective justice is built upon a notion of correlativity, in the double sense that the injustice is beneficial to the wrongdoer and detrimental to the wronged individual (structural correlativity) and that the remedy consists in making the defendant return to the plaintiff what the former previously and wrongfully took from the latter (content-related correlativity).⁶⁰

A corrective justice approach to understanding tort law has no room for punitive damages. Ernest J. Weinrib gives two fundamental reasons for this that flow directly from the structural correlativity and content-related correlativity of corrective justice. Under structural correlativity, punitive damages are based on an evaluation that is focused on the gravity of the wrongdoer's wrong, rather than on the interaction between injurer and victim. Under content-related correlativity, because punitive damages seem to provide a windfall in favor of the plaintiff, they cannot accord with corrective justice, which calls for a restoration of the victim's infringed right and nothing more.⁶¹

C. Understanding Punitive Damages in Relation to the Public/Private Distinction

In offering "publicizing" or "privatizing" conceptualizations of punitive damages, U.S. jurists fail to satisfactorily accommodate this tort law remedy within domestic law because they do not perceive that public and private elements coexist throughout tort law and not only within punitive damages law. By highlighting the public and private poles of U.S. tort law and its sub-domains, I show how the relationship between public and private plays itself out within this area of U.S. law. In brief, fault-based liability represents the private, relational pole of tort law, whereas strict liability represents the public, regulatory pole. By

⁵⁹ John Gardner, *What Is Tort Law For? Part 1: The Place of Corrective Justice*, 30 L. & PHIL. 1, 11 (2011).

⁶⁰ Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349, 350 (2002).

⁶¹ Ernest J. Weinrib, *Civil Recourse and Corrective Justice*, 39 FLA. ST. U. L. REV. 273, 290 (2011-2012).

private and public I mean that the reasons for imposing liability on the defendant are, respectively, internal or external to the plaintiff/defendant relationship. Both fault-based and strict torts are characterized by the coexistence of private and public rationales, with a prevalence of the former in fault-based torts and a prevalence of the latter in strict torts.

1. Fault-Based Liability

A fundamental distinction is that between intentional torts and the tort of negligence. In cases related to the former class of torts, e.g. battery or intentional infliction of emotional distress, the language courts use demonstrates that liability is imposed on the wrongdoer essentially because of the wrongful harm she inflicted on the plaintiff.⁶² Implicated here is the ideal of individual justice, according to which the victim of a wrongdoing is entitled to hold the tortfeasor accountable and to obtain the righting of the wrong.⁶³ To be sure, there are policy reasons justifying the imposition of liability on such defendants, but such reasons seem to be of secondary importance and, at any rate, unable to exempt wrongdoers from liability. By way of example, in *State Rubbish Collectors Association v. Siliznoff*, Justice Traynor held that administrability reasons such as a steep increase in litigation and in unfounded claims do not override the need of protecting a person's interest in being free from the infliction of emotional distress.⁶⁴ When it comes to intentional torts, their private, relational dimension has much to do with the ideal of individual justice, and the reasons for holding a defendant accountable are principally internal to the wrongdoer-victim relationship. The public dimension of the law of intentional torts is constituted instead by deterrent and punitive ideas, clearly instantiated in the remedy of punitive damages. For reasons of exposition, I will return to them later.

The way courts handle concepts such as duty of care and actual causation (or cause in fact) confirms the relational, inherently private quality of the tort of negligence. A good example is provided by the famous case *Palsgraf v. Long Island Railroad*, in which Cardozo, speaking for the majority, held that a tort plaintiff "sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of a duty to another," and "[w]hat the plaintiff must show is a 'wrong' to herself, i.e., a violation of her own right, and not merely a wrong to some one else, nor conduct 'wrongful' because unsocial, but not a

⁶² See, e.g., *Garratt v. Dailey*, 46 Wn.2d 197 (Wash. Ct. App. 1995) (discussing the tort of battery); *Ellis v. D'angelo*, 116 Cal.App.2d 310 (1953). See, e.g., *GTE Sw., Inc. v. Bruce*, 998 S.W.2d 605 (discussing intentional infliction of emotional distress); *Eckenrode v. Life of Am. Ins. Co.*, 470 F.2d 1 (7th Cir. 1972).

⁶³ For a critical overview of the variants of individual justice, with the exception of civil recourse theory, see John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 563-78 (2003) [hereinafter *Twentieth-Century Tort Theory*].

⁶⁴ 38 Cal.2d 330, 338 (1952).

wrong to any one.”⁶⁵ In other words, the duty of care links the plaintiff to the defendant: the plaintiff recovers in negligence if and only if the harm she suffers is the consequence of the breach of the duty of care the defendant owed her.⁶⁶

Barnes v. Bovenmyer is quite illustrative as to actual causation. There, the court found for the defendant on the ground that his conduct, although negligent, was not the actual cause of the plaintiff’s injury.⁶⁷ That is to say, the notion of cause in fact links the defendant’s negligent conduct strictly to the plaintiff’s harm and is an indispensable requirement for recovery. In sum, the notions of duty of care and actual causation are currently employed in a way that testifies to the profoundly relational quality of the tort of negligence.

However, the existence of a duty of care and of a relationship of actual causation between conduct and injury does not tell courts whether the defendant’s conduct has been reasonable. The test U.S. courts usually use to this end is the Hand, or BPL, formula, elaborated by Judge Learned Hand in *United States v. Carroll Towing*.⁶⁸ This test asks whether the costs of precautions, or burdens, (B) that the defendant could have adopted exceeded the foreseeability of harm (P) multiplied by the magnitude of the loss (L). If $B < PL$, the defendant is liable; if $B > PL$, she is not. This approach reveals a non-relational, efficiency-driven rationale, for it aims at maximizing wealth rather than producing individual justice on a case-by-case basis.⁶⁹ In this respect, the tort of negligence has a public, regulatory posture, for courts “use” it to achieve efficient deterrence.⁷⁰

The upshot is that fault-based torts are characterized by a remarkable private, relational quality that brings together defendant and plaintiff. Moreover, the reasons for holding the defendant accountable are essentially internal to the wrongdoer-victim relationship. Nonetheless, policy reasons are also detectable in courts’ reasoning, especially in the negligence area. With strict torts, the situation changes. As courts articulate it, strict liability is justified on policy reasons, and its relational dimension becomes marginal, though by no means absent.

2. Strict Liability

To begin with strict product liability, U.S. courts usually ground the defendant’s liability on policies such as cost spreading, loss internalization, risk

⁶⁵ 162 N.E. 99, 100 (N.Y. 1928).

⁶⁶ See, e.g., ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995) [hereinafter *IDEA OF PRIVATE LAW*]; *Palsgraf Punitive Damages*, *supra* note 2, at 1764.

⁶⁷ 122 N.W.2d 312 (Iowa. 1963).

⁶⁸ 159 F.2d 169, 173 (2d Cir. 1947).

⁶⁹ Richard A. Posner, *A Theory of Negligence*, 1 J. OF L. STUD. 29, 32-33 (1972).

⁷⁰ See, e.g., *Chi. Burlington and Quincy R.R. Co. v. Krayenbuhl*, 91 N.W. 880 (Ne. 1902); *Osborne v. Montgomery*, 234 N.W. 372 (Wis. 1932); *Davis v. Consol. Rail Corp.*, 788 F.2d 1260, 1263-64 (7th Cir. 1986). See generally RESTATEMENT (SECOND) OF TORTS § 2292 (1979).

reduction, and efficient allocation of resources. For instance, in the famous *Escola* case, Justice Traynor's concurring opinion postulated that the cost of an injury from a defective product "can be insured by the manufacturer and distributed among the public as a cost of doing business."⁷¹ In *Doe v. Miles Laboratories, Inc.*, the court held that "strict products liability . . . affords society a mechanism for a rational allocation of resources."⁷² In *Promaulayko v. Johns Manville Sales Corp.*, another court held that the two fundamental rationales of strict product liability are "the allocation of the risk of loss to the party best able to control it [and] the allocation of the risk to the party best able to distribute it."⁷³ Notwithstanding the fact that courts treat strict product liability as a tool to further socio-economic goals, this tort presents also a private, relational component, though it is somewhat tenuous. Manufacturers who are found strictly liable are in some way responsible, either because something went wrong in the assembly line, or because the product design was flawed, or finally because the product lacked proper warning. In each of these cases, the manufacturer is held accountable because the victim/user has been harmed by a wrongdoing imputable to the manufacturer. On the one hand, without suffering an injury caused by a design, manufacturing, or warning defect, the user cannot claim anything as against the manufacturer. On the other hand, to trigger liability this defect must be within the sphere of control of the manufacturer. These elements appear to unveil a private, relational dimension in strict product liability.⁷⁴

A similar analysis applies to the *respondeat superior* doctrine, according to which the employer is vicariously liable for the damages her employees cause while acting in the scope of their employment. The rationales courts usually adduce to justify this doctrine are cost spreading, for the employer can be considered the one best able to spread the costs of injuries through insurance,⁷⁵ and cost internalization, for the employer can be induced to "consider activity changes that might reduce the number of accidents."⁷⁶ The regulatory posture of *respondeat superior* is counterbalanced by a sometimes-neglected relational quality.⁷⁷ Actually, some courts consider the employer and the employee as a single agent and the harm materially caused by the latter as legally committed by the former: "the enterprise may be regarded as a unit. . . . Employee's acts sufficiently connected with the enterprise are in effect considered as deeds of the enterprise itself."⁷⁸ Similarly, in *Ira S. Bushey & Sons, Inc. v. United States*, the

⁷¹ *Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring).

⁷² 675 F. Supp. 1466, 1471 (D.Md 1987).

⁷³ 562 A.2d 202, 204 (N.J. 1989).

⁷⁴ John C.P. Goldberg & Benjamin C. Zipursky, *The Easy Case for Products Liability Law: A Response to Professors Polinsky and Shavell*, 123 HARV. L. REV. 1919, 1944-46 (2010).

⁷⁵ See, e.g., *Kohlman v. Hyland*, 210 N.W. 643, 645 (N.D. 1926).

⁷⁶ *Konradi v. United States*, 919 F.2d 1207, 1213 (7th Cir. 1990).

⁷⁷ See generally IDEA OF PRIVATE LAW, *supra* note 66, at 185-87.

⁷⁸ See, e.g., *Fruit v. Schreiner*, 502 P.2d 133, 141 (Alaska 1972) (considering cost

court held that although policy goals provide some basis for *respondeat superior*, it is more than anything else the ideal of responsibility that grounds liability.⁷⁹

Finally, strict liability for abnormally dangerous activities⁸⁰ so much constitutes one of the public prongs of tort law that some of the scholars committed to preserving the public/private distinction admit that this sort of liability should be seen as falling outside tort law.⁸¹ Actually, courts usually base liability for abnormally dangerous activities on policies such as cost spreading, the efficient allocation of resources, and cost internalization.⁸² At the same time, however, it seems that this kind of liability is not totally divorced from an idea of “relationality” between defendant and plaintiff. For instance, the Supreme Court of Washington held that, besides problems of proof, strict liability for abnormally dangerous activities rests on “the ultimate idea of rectifying a wrong and putting the burden where it should belong as a matter of abstract justice, that is, upon the one of the two innocent parties whose acts instigated or made the harm possible.”⁸³ Similarly, some private law theorists have tried to reconcile this tort with the tenets of corrective justice by arguing that culpability is not alien to liability for abnormally dangerous activities and that the strict quality of this tort is a function of the necessity to relieve the plaintiff from an otherwise unbearable burden of proof.⁸⁴ The foregoing analysis can be shown in a “nesting” mode:

spreading and cost internalization the main rationales of *respondeat superior*).

⁷⁹ 398 F.2d 167, 171 (2nd Cir. 1968) (“[R]espondeat superior . . . rests not so much on policy grounds consistent with the governing principles of tort law as in a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities.”).

⁸⁰ *Rylands v. Fletcher*, [1868] UKHL 1. For a discussion of U.S. progeny, see *Ball v. Nye*, 99 Mass. 582 (1868); *Shipley v. Fifty Assocs.*, 106 Mass. 194 (1870); *Cahill v. Eastman*, 18 Minn. 324 (1871); *Siegler v. Kuhlman*, 502 P.2d 1181; N.J. Dep’t of Env’tl. Prot. v. *Ventron Corp.*, 468 A.2d 150 (N.J. 1983); *Splendorio v. Bilray Demolition Co.*, 682 A.2d 461 (R.I. 1996). Similarly, no-fault plans such as the Workers’ Compensation Law attribute reparatory awards that are independent of any fault on the part of the employer. See ROBERT E. KEETON ET AL., *TORT AND ACCIDENT LAW—CASES AND MATERIALS* 26 (4th ed. 2004). As regards the Workers’ Compensation Law, employees who suffered harm arising out of and in the course of employment are entitled to monetary benefits, which “are based largely on a social theory of providing support and preventing destitution, rather than settling accounts between two individuals according to their personal deserts or blame.” *Id.*, at 26.

⁸¹ John C.P. Goldberg & Benjamin C. Zipursky, *Civil Recourse Revisited*, 39 FLA. ST. U. L. REV. 341, 353-54 (2011).

⁸² See, e.g., *Chavez v. S. Pac. Transp. Co.*, 413 F. Supp. 1203, 1209 (E.D. Cal. 1976); *Ind. Harbor Belt R.R. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1177 (7th Cir., 1990).

⁸³ *Siegler*, 502 P.2d at 1185.

⁸⁴ IDEA OF PRIVATE LAW, *supra* note 66, at 187-90.

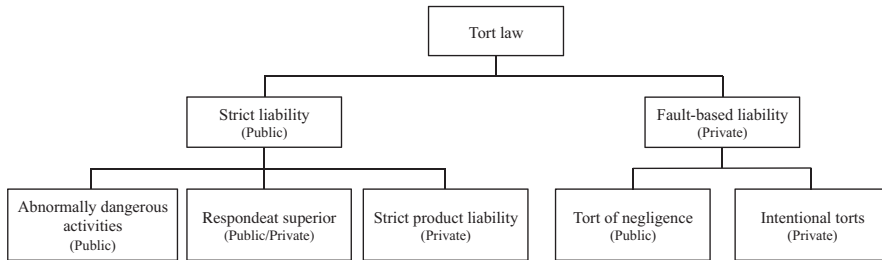


Figure 1

As the analysis of the five areas of liability represented below strict and fault-based liability demonstrates, each of these areas contains public and private elements, allowing their internal public/private distinction to continue further down. Moreover, as one proceeds from the right to the left extreme of the diagram, the relational, private quality of torts diminishes in favor of an increasingly prominent public, regulatory quality. The upshot is that U.S. tort law can be portrayed as a mixture of public and private elements and that theories purporting to establish either that “all law is public law” or that private law is a self-contained system are fallacious.

Against this background, accommodating punitive damages within U.S. law should be easier. Actually, compensatory and punitive damages represent the private and public pole of fault-based liability from a remedial perspective. In the late 19th century, compensatory damages, together with the idea of objective causation, constituted one of the pillars of U.S. tort law. In that mode of legal thought, the restoration of the *status quo ante* had to be the sole goal of tort law, removed from any distributive or redistributive effort. From a remedial perspective, compensatory damages represented the natural arrangement. As noted above, any “more-than-compensatory” award was seen as threatening the purity of tort law by contaminating it with public, regulatory ambitions. Hence, punitive damages came under attack and risked being extruded from tort law.

Today compensatory damages are no longer linked to the ideal of a self-contained private law, nor are they synonymous with corrective justice. Actually, a number of 20th-century theories of tort law suggest more or less plausibly that there are other justifications for compensatory damages than just the settlement of disputes between private individuals. These justifications are identified sometimes with deterrence/compensation,⁸⁵ sometimes with the need to give victims of accidents monetary relief,⁸⁶ sometimes with economic efficiency,⁸⁷ and sometimes with social justice.⁸⁸

⁸⁵ See WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS*, 10, 28 (1941); Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1828 (1997). For a critique of the compensation-deterrence approach, see *Twentieth-Century Tort Theory*, *supra* note 63, at 531-37.

⁸⁶ See, e.g., PATRICK S. ATIYAH, *THE DAMAGES LOTTERY*, 143-50 (1997); Marc A.

All of these theories, supported by abundant case law, tend to attribute a public, regulatory quality to private law and, consequently, to compensatory damages. Yet, it is hardly possible to disregard the intimate connection between the ideal of righting a wrong and compensatory damages. By restoring, as far as money can, the *status quo* the victim enjoyed before the wrongdoing, compensatory damages illuminate the directness of the relationship between plaintiff and defendant.⁸⁹ The plaintiff can hold the defendant accountable because of the harm the latter caused to the former and for which the latter is responsible to the former.

The fact that in most fault-based tort cases the defendant is ordered to pay the victim compensatory damages independently of whether policy goals are thereby promoted,⁹⁰ emphasizes the “privateness” of the relationship between plaintiff and defendant, in the sense that it makes evident that the outcomes of judicial disputes can be independent of, or even contrary to, the policy rationales often attached to tort law. For this reason, compensatory damages can be considered as presenting a profoundly relational, private quality.⁹¹

Punitive damages, in contrast, emphasize the public role of fault-based torts. Because quantitatively well above compensation, they undermine the “relationality” embodied by compensatory damages. Moreover, in some jurisdictions they do not accrue to the victim but rather to some public fund. They must comply with the constitutionally relevant principles of reasonableness and proportionality, as established by the U.S. Supreme Court. Furthermore, in most states of the Union they can be awarded only upon satisfaction of the clear-and-convincing standard of proof,⁹² and they are often dealt with in a separate phase of the trial.⁹³ Finally and most importantly, courts and legislators conceive of punitive damages as pursuing public punishment and deterrence.

It would be erroneous, however, to think that punitive damages are devoid of a private quality. Actually, in a number of jurisdictions they still accrue to the plaintiff. They cannot be granted absent a compensatory award and they are

Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967). For a critique of the enterprise liability approach, see *Twentieth-Century Tort Theory*, *supra* note 63, at 540-44.

⁸⁷ See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS*, 253-57 (6th ed. 2012).

⁸⁸ See, e.g., Anita Bernstein, *Complaints*, 32 MCGEORGE L. REV. 37, 51-53 (2000); Michael L. Rustad, *Torts as Public Wrongs*, 38 PEPP. L. REV. 433 (2011).

⁸⁹ See generally, IDEA OF PRIVATE LAW, *supra* note 66, at 10-11.

⁹⁰ JULES COLEMAN, *RISKS AND WRONGS*, 304-5 (1992); *Twentieth-Century Tort Theory*, *supra* note 63, at 574-75.

⁹¹ If further deconstructed against the background of U.S. tort law, compensatory damages have public and private functions, reproducing the public/private opposition.

⁹² Doug Rendleman, *Common Law Punitive Damages: Something for Everyone?* 7 U. ST. THOMAS L. J. 1, 3 (2009).

⁹³ *Palsgraf Punitive Damages*, *supra* note 2, at 1784.

closely related to compensatory damages from a quantitative point of view. They depend on the reprehensibility of the defendant's conduct. The victim must expressly claim punitive damages and the defendant cannot be ordered to pay for harms caused to persons not part of the litigation. Finally, courts and juries have absolute discretion in deciding whether to award punitive damages or not.

In sum, as currently administered in the United States, within punitive damages law some elements can be seen as public and some as private, reproducing again the distinction between public and private law. Diagrammatically, punitive damages can be represented as in the chart below.

In conclusion, my ordering of U.S. tort and punitive damages law around the public/private distinction reveals that punitive damages are not a legal *monstrum*, but rather one instance, among many others, of public and private elements coexisting in a given legal domain.

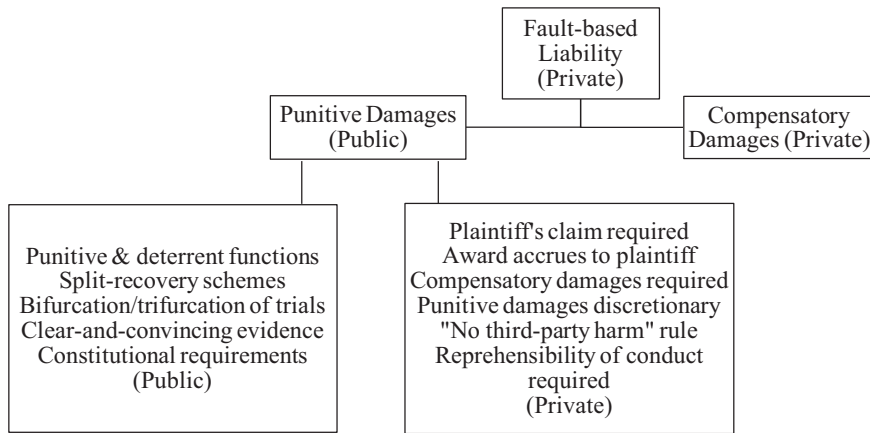


Figure 2

III. ITALIAN TORT LAW AND PUNITIVE DAMAGES

The question of whether punitive damages are compatible with Italian law is a vexed one, and the negative answer given to it thus far seems not to allow for any doubt. Insistence on a rigid separation between tort and criminal law, together with a number of untenable observations put forward by both the Supreme Court and commentators wrongly suggest that Italian tort law is structurally inadequate to host punitive damages.

On the one hand, the Court offers a mono-functional interpretation of tort law as focused exclusively on corrective justice, and it consequently rejects punitive damages. The mistake is twofold: first, the Court advances a dogmatic separation between punishment and deterrence associated with criminal/public law and private law. Second, from this dogmatic assumption it derives a series of rules that in its view inform Italian tort law but that, in reality, do not correspond

to its current status. The Court's misreading of U.S. punitive damages completes the drama.

On the other hand, most Italian jurists criticize the Court's view and posit a multi-functional reading of tort law. According to these jurists, tort law can have deterrent effects or even pursue deterrence, but it cannot serve punitive functions. This position, combined with a poor understanding of U.S. punitive damages and an additional set of untenable arguments, brings virtually all Italian scholars to rule out any possibility for the adoption of punitive damages. How is all of this possible?

A. The 2007 Ruling of the Italian Supreme Court

In 2007, the heir of a motorcyclist who lost his life in an accident because the buckle of his helmet was defective asked the Italian Supreme Court to recognize and enforce a punitive damages award granted by an Alabama court. The Court denied enforcement on the ground that the function of Italian tort law is compensatory, so punishment and deterrence must be alien to it.⁹⁴ In so holding, the Court seemed to disapprove of how closely punitive damages consider the defendant's conduct. The Court seemed to think that the harm the victim suffered, rather than the defendant's wrongful action, should be the central element of the tort law theoretical framework. Furthermore, the Court argued that punitive damages are disproportionate to the harm actually suffered by the victim and that they are related to the wrongdoer's conduct, not to the harm done. Finally, the Court stated that the wrongdoer's conduct and wealth are and must be irrelevant to the idea of compensating damages and to Italian tort law more generally.⁹⁵

Does the decision of the Court accurately reflect the current situation of Italian tort law? Or does the Court mischaracterize it and also fail to understand punitive damages as they are currently administered in the United States? To answer these questions, we need to ascertain the adequacy of the various assertions made by the Italian Supreme Court in the above-mentioned case in light of the way Italian tort law is currently articulated.

⁹⁴ Cass. civ., sez. III, 19 gennaio 2007, n.1183 (It.).

⁹⁵ Cass. civ., sez. III, 19 gennaio 2007, n.1183 (It.). The same view has been vigorously reaffirmed by the Italian Supreme Court in a very recent decision. See Cass. civ., sez. I, 8 febbraio 2012, n.1781. For a harsh critique of this holding, see Paolo Pardolesi, *La Cassazione, i danni punitivi e la natura polifunzionale della responsabilità civile: il triangolo no!*, CORRIERE GIURIDICO, agosto-settembre 2012, 1070.

B. The Supreme Court's Objections to Punitive Damages and Their Critiques

1. Italian Tort Law, Corrective Justice, and the Public/Private Distinction

The first objection to punitive damages the Supreme Court made is that Italian tort law serves only a compensatory function, to the exclusion of any goal other than corrective justice. In particular, the Court seems to have ruled out any role for punishment and deterrence from tort law. Is it really so?

Since the 1960s, a gradual process of transformation of Italian tort law has opened new perspectives on the functions that tort law can perform. The establishment of a constitutionally-oriented interpretation of private law, the rapid expansion of the strict liability regime, the increase in the number of legally-protected interests via tort law, the influence exerted by U.S. efficiency-driven and deterrence-seeking approaches on Italian jurists, and a lively debate on the punitive functions of tort law rules have cast new light on the public/private distinction and have undermined any mono-functional reading of Italian tort law.⁹⁶ These new impulses, accompanied by a steep increase in the number of legislative interventions regulating the law of torts, have contributed to give the impression that many tort law rules constitute the product of policy choices and affect the socio-economic life of individuals no less dramatically than, albeit not as visibly as, public law measures.

The upshot is that Italian tort law is characterized by an internal coexistence of public and private elements that is very similar to that featuring in U.S. tort law. By paralleling the arguments developed with respect to U.S. tort law, I show that strict and fault-based liability represent, respectively, the public and private pole of Italian tort law and that, in turn, they include sub-domains similarly characterized by an internal mixture of public and private elements.

a. Fault-Based Liability

At first blush, the dictates of corrective justice appear to be fully obeyed in this area of tort law. Courts essentially focus on the plaintiff's injury, on the culpability of the defendant's conduct, and on the causal link between the two.⁹⁷ The defendant is ordered to compensate the plaintiff *because of* the injury the latter suffered as a consequence of the former's culpable misconduct. In this respect, fault-based torts are characterized by a strong relational, private quality.⁹⁸

⁹⁶ Giovanni Marini, *Gli anni settanta della responsabilità civile (prima parte)*. *Uno studio sulla relazione pubblico/privato*, RIV. CRIT. DIR. PRIV., 2008, 23, 27-9.

⁹⁷ The general provision governing fault-based torts is Article 2043 of the Italian Civil Code, which states, "any intentional or negligent fact, which causes an unjust harm to others, obliges the author of the fact to compensate the loss."

⁹⁸ All of this is especially true in relation to negligence law. In this area, courts never refer to anything resembling the Hand formula. *See supra* notes 68-69 and

A more in-depth inquiry of extant law, however, shows that the situation is more complex than what one may initially think and that notions such as deterrence and punishment have a role to play in fault-based torts.

Intuitively, the very existence of tort liability for culpable wrongs appears to convey a deterrent message sent by the legal system to individuals. This is also true with reference to purely compensatory damages.⁹⁹ Every person knows that if she wrongfully harms someone else, she may be judicially ordered to pay for the harm caused. The threat of a legal sanction may well make many people desist from their intentional misconduct or act more prudently in carrying on their daily activities (e.g. driving a car).

There is surely a difference between the claim that tort damages can have deterrent effects and the claim that the state has set up tort damages in order to secure deterrence. A number of Italian legislative provisions support the view that the state pursues, at least in some circumstances, deterrence through tort law.¹⁰⁰ At a more general and abstract level, the following idea further supports this view. Even assuming that a state, when initially setting up tort liability and tort damages, has in mind the exclusive objective of allowing the victim to seek redress for the harm suffered, it is unlikely that as soon as it becomes aware of the deterrent potentialities of tort law, the state will not start recalibrating existing tort liability provisions or adding new ones in order to deter potential wrongdoers and increase social peace. To conclude, deterrence is a feature of negligent and intentional torts under Italian law in two senses: first, it is a common effect of tort liability, even if the state does not calculate tort damages with the goal of deterrence in mind; second, as the various provisions analyzed below demonstrate, the state, at least sometimes (especially in relation to intentional torts), pursues deterrence in setting up tort liability provisions.

While the ideal of deterrence appears to inspire both the law of negligence and that of intentional torts, the ideal of punishment pervades only the latter. In this respect, it is worth turning to a number of examples in extant law showing that the domestic tort system, though primarily committed to a compensatory function, is not so reluctant to provide for “more-than-compensatory” damages in cases of outrageous conduct, thus defying the apparently strict adherence to corrective justice as the exclusive preoccupation of Italian tort law.

In specific circumstances relating to the exercise of parental powers during the procedure for obtaining a separation between husband and wife, article

accompanying text. Although some Italian jurists suggest an efficiency-driven rationale for negligent wrongs, courts have thus far not been sympathetic with this approach. This does not mean, however, that Italian *negligence* law is devoid of any public quality.

⁹⁹ E.g., Gardner, *supra* note 59, at 29.

¹⁰⁰ For a discussion of this viewpoint, see Giulio Ponzanelli, *I Danni Punitivi*, in LA FUNZIONE DETERRENTE DELLA RESPONSABILITÀ CIVILE – ALLA LUCE DELLE RIFORME STRANIERE E DEI PRINCIPLES OF EUROPEAN TORT LAW 319, 322 (2011); Pier Giuseppe Monateri, *La Responsabilità Civile*, in 3 TRATTATO DI DIRITTO CIVILE, 21 (1998).

709-ter of the code of civil procedure empowers the judge, if one of the parents does not comply with previous orders issued by the judge herself, to: (i) admonish the non-compliant parent; (ii) condemn him or her to compensate damages inflicted on the child; (iii) condemn him or her to compensate damages inflicted on the other parent; and (iv) condemn the non-compliant parent to pay a monetary administrative sanction. Are measures (ii) and (iii) instances of punitive damages within Italian private law? A majority of courts seem to answer in the affirmative. Distinguishing article 709-ter c.p.c. from articles 2043-2059 of the civil code, the cornerstones of tortious liability in Italy, a court tells us that the monetary obligations imposed by provisions (ii) and (iii) on the non-compliant parent “constitute a form of punitive damages, that is a private sanction not traceable to articles 2043-2059 c.c.”¹⁰¹ Another court adds that, for the purposes of article 709-ter c.p.c., the measure of the sanction may be proportionately related not just to the harm suffered by the victim but also to the “nature and type of the defendant’s conduct.”¹⁰²

This judicial attitude may seem *prima facie* surprising, even disorienting: why attribute a punitive nature to provisions expressly framed in terms of compensatory damages? The reasons, as argued by some scholars, are that (1) the proof of harm is unnecessary to get a damages award¹⁰³ under (ii) and (iii), and (2) the amount of the monetary sanction is not related to the harm the child suffered but rather to the wrongful conduct.¹⁰⁴ A few scholars reject this view and argue that, at most, the discussed provision may have a deterrent function, but not a punitive one, and that in any event it would be erroneous to think of article 709-ter c.p.c. as an instance of punitive damages.¹⁰⁵ Independently of whether article 709-ter c.p.c. represents an instance of punitive damages or not, it is relevant that a majority of courts and commentators agree on the fact that the legislative provision under scrutiny does not serve a merely compensatory function, and that deterrent and/or punitive rationales can be adduced as foundational to it.

Another illustrative piece of legislation is article 4, l. 20 November 2006 n. 281 (article 4), regarding the publication of telephone communication interceptions. In protecting individuals’ privacy, article 4, clause 1 establishes that besides compensatory damages (recoverable under article 4, clause 4), the victim of the wrongful publication can claim a sum of money against the publisher

¹⁰¹ Trib. Messina, 5 aprile 2007, FAM. E DIR., gennaio 2008, 60 (It.).

¹⁰² Trib. Venezia, 14 maggio 2009, n.9234 (It.).

¹⁰³ Angelo Riccio, *I Danni Punitivi non sono, dunque, in contrasto con l'ordine pubblico interno*, in *Contratto e Impresa*, 4-5, 854, 867 (2009); Angela D'Angelo, *Il risarcimento del danno come sanzione? Alcune riflessioni sul nuovo art. 709-ter c.p.c.*, *FAMILIA*, novembre-dicembre 2006, 1048.

¹⁰⁴ Elena La Rosa, *Il nuovo apparato rimediato introdotto dall'art. 709-ter c.p.c.: i danni punitivi approdano in famiglia?*, *FAM. E DIR.*, gennaio 2008, 64, 72.

¹⁰⁵ See, e.g., Francesco D. Busnelli, *La Funzione Deterrente e le Nuove Sfide della Responsabilità Civile*, in *FUNZIONE DETERRENTE DELLA RESPONSABILITÀ CIVILE – ALLA LUCE DELLE RIFORME STRANIERE E DEI PRINCIPLES OF EUROPEAN TORT LAW*, 37 (2011).

that varies according to the means of publication that have been used (radio, television etc.) and to the extension of the catchment area.

Article 4, clause 1 does not establish compensation for a loss possibly suffered by the victim; rather it sanctions a conduct, irrespective of its consequences for the victim's sphere. This provision runs patently contrary to the (not so?) firm principle the Italian Supreme Court asserted, according to which, in tort law, only a *loss* resulting from the defendant's conduct, the latter being totally irrelevant, enables a monetary award.¹⁰⁶ For this reason, one may well argue that article 4, clause 1 does not pursue any compensatory goal. Rather, it serves a punitive function and thereby a deterrent goal.

It has been suggested, in partial disagreement with this view, that article 4, clause 1 is surely a sanction, but not a form of punishment.¹⁰⁷ According to this view, the remedy under discussion is "reparatory," but neither compensatory nor punitive. True, such a remedy is surely not compensatory, given that the sanction established by clause 1 is unrelated to the loss suffered by the victim. But why exclude that the remedy at issue is punitive? Because, it is argued, clause 1 represents an instance in which the legislator did not want to punish anyone, but rather to fix in advance the monetary value of a good the legal system is committed to protect.

Now, there seems to be a *non sequitur* in such reasoning. How does fixing the economic value of a good in advance logically exclude the punitive nature of a remedy consisting in paying that value when the good is harmed? It is correct that such an *ex ante* monetary determination does not necessarily imply punishment. But the reverse is also true, i.e. the monetary pre-determination does not exclude the punitive nature of the sanction. After all, establishing a monetary value in advance for a certain good is a legal technique widely used in criminal law, and no one would argue that criminal fines are not punitive. In discussing the nature of the remedy provided for by article 4, clause 1, a decisive factor is represented by the very large amount of money the defendant may be obliged to pay (€10.000–€1.000.000). This element, coupled with the fact that the remedy is not directly related to the harm inflicted on the victim, may well lead one to think that the sanction is punitive and that it is meant to discourage the defendant and other publishers from taking the same course of conduct in the future.

A clearly punitive provision is represented by article 18, clause 2 of the Italian Workers' Statute. This provision, established in 1970, provides that when an employer unjustly fires her employee, the former will be judicially ordered to "re-hire" the latter and to pay the employee a sum equaling at least the salary due for five months of work, independent of any economic loss the employee suffered as a consequence of the dismissal. The minimum measure of damages awarded in such an instance renders the nature of this provision indisputably punitive and

¹⁰⁶ Cass., sez. III, 4 giugno 2007, n.12929 (It.).

¹⁰⁷ Ponzanelli, *supra* note 100, at 327.

deterrence-seeking, as virtually all Italian commentators acknowledge.¹⁰⁸ It seems inevitable to consider that the punitive remedy granted to the Italian worker who is illegitimately fired is a clear instance of punitive damages.

Finally, article 96, clause 3, of the Italian code of civil procedure establishes that a judge can condemn the losing party to pay the winning party an equitably determined sum if the former adopted a highly reprehensible (typically intentional or grossly negligent) civil procedural conduct. There are various judicial and doctrinal theories regarding the nature of the sanction a judge may impose on the basis of this provision. Particularly interesting, in view of the 2007 Italian Supreme Court decision, is a decision issued by a lower court in 2011¹⁰⁹ that condemned the losing party to pay not just the other party's legal expenses, but also an additional sum equaling the litigation costs, on the grounds that article 96, clause 3, constitutes an instance of punitive damages.¹¹⁰ The lower court so concluded by asserting that (i) this legislative provision requires only the proof of bad faith or gross negligence, and not of the existence of an actual harm to the other party, and that (ii) there are no constitutional provisions prohibiting the legislator from providing for such damages. Other courts tend to focus more on deterrence than on punishment in articulating the reasons behind article 96, clause 3,¹¹¹ as some commentators do as well.¹¹² Regardless of whether it is appropriate to qualify the provision under scrutiny as an instance of punitive damages, what is undisputable is that according to the majority of courts and commentators article 96, clause 3, pursues punitive and/or deterrent goals.¹¹³

What emerges from the foregoing analysis is that even if no one can doubt that corrective justice is a goal of Italian tort law, this domain of the Italian system can pursue other functions when deemed necessary. In contrast, the Supreme Court depicts Italian tort law as concerned only with compensation. It

¹⁰⁸ See, CESARE SALVI, *LA RESPONSABILITÀ CIVILE* 265 (2005).

¹⁰⁹ Tribunale di Piacenza, 15 novembre 2011, *NUOVA GIURISPRUDENZA CIVILE COMMENTATA*, gennaio 2012, 269, with case note by Laura Frata, *L'art. 96, comma 3°, cod. proc. Civ. tra "danni punitivi" e deterrenza*, 271-278.

¹¹⁰ Riccio, *supra* note 103, at 879 (agreeing that the losing party pays not only the other party's legal fees, but an additional sum equaling the litigation costs). Similar conclusions are reached by Trib. Milano, 4 marzo 2011, *FORO ITALIANO*, 2011, I, 2184 (It.); Trib. Rovigo, 7 dicembre 2010, *IL CIVILISTA*, 2010, 10 (It.); Trib. Pordenone, 18 marzo 2011, (It.), <http://www.ilcaso.it/giurisprudenza/archivio/3574.php>; Trib. Varese, sez. Luino, 23 gennaio 2010, *FORO ITALIANO*, 2010, 7-8, I, 2229 (It.).

¹¹¹ Trib. Varese, 16 dicembre 2011 (It.).

¹¹² Ponzanelli, *supra* note 100, at 329, (arguing that the provision here discussed focuses on the wrongdoer's conduct and clearly has a deterrent function, whereas it does not care about any possible harm suffered by the victim). *Contra*, Rosanna Breda, *Art. 96 terzo comma cod. proc. civ.: prove di quadratura*, *NUOVA GIURISPRUDENZA CIVILE COMMENTATA*, gennaio 2011, 439, 442.

¹¹³ See, e.g., Francesco D. Busnelli and Elena D'Alessandro, *L'enigmatico ultimo comma dell'art. 96 c.p.c.: responsabilità aggravata o "condanna punitiva"?*, *DANNO E RESP.*, giugno 2012, 585.

ignores the widely shared idea that tort law, or at least the law of intentional torts, pursues and produces deterrent effects, and it does not take into account a number of instances in which this specific area of tort law serves punitive and deterrent functions. This judicial approach, supported by some scholars as well, is descriptively inaccurate and ought to be rejected.¹¹⁴

b. Strict Liability

Turning briefly to the realm of strict torts, the situation in Italy is similar in some respects to that observable in the United States, and different in others.

Regarding product liability, the two systems have much in common. Under Italian law, the manufacturer can escape liability if she proves that the product was not defective when it entered the market,¹¹⁵ the user was aware of the product's defectiveness and of its consequent dangerousness and yet exposed herself to it,¹¹⁶ or the level of scientific development of the time did not enable the product to be recognized as defective.¹¹⁷ Moreover, if the user is in some way culpable, a comparative fault regime applies.¹¹⁸

Given all these similarities, one might expect to find in the Italian case law language comparable to that of U.S. judges. Such an observer would be sorely disappointed. Italian courts focus on doctrines and rarely refer to policy goals such as those U.S. courts invoke. They do nothing more than ascertain whether the plaintiff meets the burden of proof (damage, defectiveness, causal link) and, if so, whether the defendant puts forward a convincing defense. In this respect, the relational, private dimension of product liability law is quite evident.

But Italian product liability law implements two European Directives¹¹⁹ that overtly refer to policy goals such as the protection of consumers' health, the promotion of scientific and technological development, free competition within the European market, and the fair apportionment of risk among manufacturers and

¹¹⁴ See, e.g., Carlo Castronovo, *Del non risarcibile aquiliano: danno meramente patrimoniale, c.d. perdita di chance, danni punitivi, danno c.d. esistenziale*, EUR. DIR. PRIV., febbraio 2008, 315; Pasquale Fava, *Funzione sanzionatoria dell'illecito civile? Una decisione costituzionalmente orientata sul principio compensativo conferma il contrasto tra danni punitivi e ordine pubblico*, CORRIERE GIURIDICO, gennaio 2009, 525.

¹¹⁵ Compare Codice del Consumo art. 118-b (Consumers' Code), with RESTATEMENT (SECOND) OF TORTS § 402A (1979).

¹¹⁶ Compare Codice del Consumo art. 122, c.2, with the U.S. doctrine of "assumption of risk." RESTATEMENT (SECOND) OF TORTS §402A, cmt. n (1979).

¹¹⁷ Compare Codice del Consumo art. 118-e, with the U.S. doctrine of "state of the art defense." RESTATEMENT (SECOND) OF TORTS §402A, cmt. n.

¹¹⁸ Compare Codice del Consumo art. 122, c.1, with RESTATEMENT (THIRD) OF TORTS §17 (1998).

¹¹⁹ Directive 85/374, art. 95, O. J. (L. 210/29) 1 (EEC); Directive 1999/34, art. 95, O. J. (L. 141/20) 1 (EC).

consumers. Here the public, regulatory quality of European, and hence Italian, product liability law emerges with force.

As regards *respondeat superior*, enshrined in article 2049 of the civil code, Italian law is somewhat similar to U.S. law. A requisite of such vicarious liability is that the servant's misconduct constituted a culpable tort, with the result that the master is liable only if her employee acted intentionally or negligently and if the victim can prove the employee's culpability.¹²⁰ This rule seems to reveal a private, relational quality of *respondeat superior* because it grounds the master's liability on her responsibility for the employee's misconduct. Similarly, some commentators¹²¹ justify *respondeat superior* by relying on the "Weinribian" idea that the tort is committed by the employer-through-the-employee.¹²²

At the same time, the Italian Supreme Court has made clear that the master is liable for the torts of her servants even if she demonstrates the lack of any culpability on her part.¹²³ That is, vicarious liability is quite strict because it is unrelated to the conduct of the employer. The strictness of *respondeat superior* is further confirmed by the rule that even if the employee/tortfeasor is not identifiable, the master is liable.¹²⁴ As to the policy rationales behind *respondeat superior*, some judicial decisions assign a regulatory quality to this tort doctrine by holding that article 2049 codifies the idea of "business risk" and grounds liability not on culpability but on the objective, business interest of the employer.¹²⁵ Jurists too have put forward rationalizing theories that emphasize the public quality of *respondeat superior*: some refer to the apportionment of risks among employers and victims,¹²⁶ some to the efficiency-based argument that the employer must internalize the costs of accidents when these accidents are due to her inability to make her servants act with due care.¹²⁷

Finally, as regards liability for abnormally dangerous activities, the governing rule is enshrined in article 2050 of the civil code, which does not differentiate between abnormally and inherently dangerous activities. Under article 2050, she who carries on a dangerous activity is subject to liability for any resulting injury, *unless* she proves that she adopted all appropriate measures to avoid the harm. By allowing the actor to escape liability, article 2050 gives birth to a liability rule that is neither truly strict nor truly fault-based. In recent times,

¹²⁰ See, e.g., Cass. civ., sez. III, 24 maggio 2006, n.12362, Mass. Giur. it., 2006 (It.); Cass. civ., sez. III, 4 marzo 2005, n.4742, Mass. Giur. it., 2005 (It.); Cass. civ., sez. un., 6 giugno 1986, n.3025, Mass. Giur. It., 1986 (It.).

¹²¹ RENATO SCOGNAMIGLIO, *RESPONSABILITÀ CIVILE E DANNO* 173 (2010).

¹²² *Supra* notes 77-79 and accompanying text.

¹²³ Cass. civ., sez. III, 10 marzo 2000, n. 5957 (It.); Cass. civ., sez. III, 20 giugno 2001, n. 8381 (It.).

¹²⁴ See, e.g., Cass. civ., 10 febbraio 1999, n.1135 (It.).

¹²⁵ See, e.g., Cass. civ., 27 marzo 1987, n.2994, in Rep. Foro it., 1987, voce Trasporto (contratto di), n. 9 (It.); Cass., 26 giugno 1998, n.6341 (It.).

¹²⁶ See, e.g., PIETRO TRIMARCHI, *RISCHIO E RESPONSABILITÀ OGGETTIVA* 57-80 (1961).

¹²⁷ PIER GIUSEPPE MONATERI, *MANUALE DELLA RESPONSABILITÀ CIVILE* 334 (2001).

however, courts have interpreted this provision as establishing an instance of truly strict liability, independent of any culpability on the part of the actor. Courts have reached this result by imposing on the defendant a particularly onerous burden of proof, consisting in giving evidence of a fact that breaks the causal link between the dangerous activity and the plaintiff's injury.¹²⁸ Hence, although the letter of the norm relies on a notion of culpability that entails a relational quality of the tort at hand, the interpretation provided by courts attributes to it a clearly regulatory flavor, based on the policy goal of preventing accidents.¹²⁹

In sum, as the foregoing analysis shows, asserting that tort law is only about compensating victims of wrongs is empirically mistaken. In fault-based torts, notions of deterrence and punishment have an important role to play. In the realm of strict torts, policy goals such as the improvement of free competition, the prevention of accidents, the protection of consumers' health, the promotion of scientific and technological development, and the fair apportionment of risk among firms and individuals, are quite central. Diagrammatically, Italian tort law can be represented in "nesting" mode, as shown in Figure 3.

Similar to what we have observed for the United States, each of the five areas of liability represented at the lowest level of the diagram is characterized by an internal coexistence of public and private elements, allowing for the "nested" public/private distinction to continue further down. Moreover, as one proceeds from the right to the left end of the diagram, torts lose a progressively greater portion of their private quality in favor of a more public, regulatory posture. In sum, public and private coexist throughout tort law and permeate each of its sub-domains in different proportions.

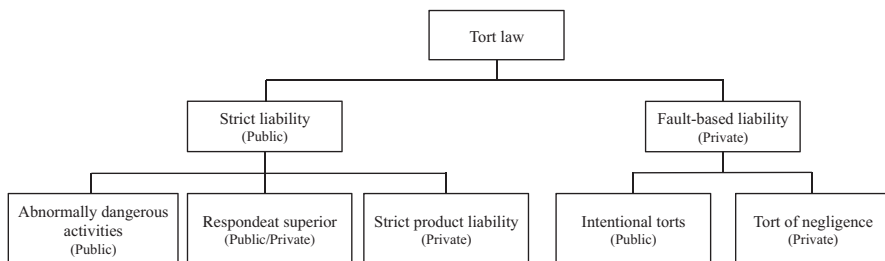


Figure 3

¹²⁸ Camilla Fin, *Responsabilità per esercizio di attività pericolose: prova liberatoria e concorso di colpa del danneggiato*, LA RESPONSABILITÀ CIVILE, marzo 2012, 216, 218. See Cass., 4 maggio 2004, n.8457 (It.); Cass. civ., 10 marzo 2006, n.5254 (It.).

¹²⁹ See, e.g., Arianna Fusaro, *Attività pericolose e dintorni. Nuove applicazioni dell'art. 2050 c.c.*, RIVISTA DI DIRITTO CIVILE, giugno 2013, 1337, 1339.

2. Are U.S. Punitive Damages Disproportionate to the Loss Suffered by the Victim?

The second assertion made by the Italian Supreme Court in opposing punitive damages was that they are “characterized by an unjustifiable disproportion between the damages awarded and the harm actually suffered by the plaintiff.” With reference to the early application of punitive damages, this contention might have been true, but today it has little force because of the U.S. Supreme Court’s “constitutionalization” of punitive damages.

In *Pacific Mutual Life Insurance Co. v. Haslip*,¹³⁰ the Court made a series of important points. First, it acknowledged that courts and juries have a degree of discretion in determining the amount of punitive damages awards, though admonishing them that such discretion had to comply with the principle of reasonableness.¹³¹ Second, the Court sowed the seeds for its future decisions involving the substantive side of the Due Process Clause of the Fourteenth Amendment. By holding that procedural fairness had been guaranteed because the punitive damages award was “not grossly out of proportion to the severity of the offense and ha[d] some understandable relationship to compensatory damages,”¹³² the Court, although not overtly speaking in terms of substantive fairness, used language that seemed to open the door to substantive considerations relating to what constituted a quantitatively “just” punitive award.

Two years later, in *TXO Production Corp. v. Alliance Resources Corp.*,¹³³ the Court issued a decision that explicitly addressed the issue of the “grossly excessiveness” of a punitive damages award. The Court held that, as a general principle, grossly excessive awards violated the Due Process component of the Fourteenth Amendment.¹³⁴ Then, in the well-known case of *BMW of North America Inc. v. Gore*,¹³⁵ the Court set three guideposts for courts to apply in deciding whether or not the amount of the award determined by juries is excessive: (1) the degree of reprehensibility of the defendant’s conduct; (2) the disparity between the harm suffered and punitive damages; and (3) the difference between punitive damages and the civil and criminal penalties imposed in comparable cases.¹³⁶

The first occasion the Supreme Court had to apply this three-prong test came soon after, in *State Farm Mutual Automobile Insurance Co. v. Campbell*.¹³⁷ The Court declined “to impose a bright-line ratio which a punitive damages award cannot exceed” but held that “few awards exceeding a single digit ratio between

¹³⁰ 499 U.S. 1 (1991).

¹³¹ *Id.* at 20.

¹³² *Id.* at 22.

¹³³ 509 U.S. 443 (1993).

¹³⁴ *Id.* at 458.

¹³⁵ 517 U.S. 559 (1996).

¹³⁶ *Id.* at 574-75.

¹³⁷ 538 U.S. 408 (2003).

punitive and compensatory damages, to a significant degree, will satisfy due process.”¹³⁸ Consistently with its flexible approach, the Court added that “because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where ‘a particularly egregious act has resulted in only a small amount of economic damages’”; by the same token, “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.”¹³⁹

What is to be learned from all these cases? One might reasonably argue that, because the Court was mindful that punitive damages are criminal-like sanctions and serve the legitimate state interest of punishing the wrongdoer and deterring her and other potential wrongdoers from committing the same harmful wrong, it felt the need to establish a set of constraints to be applied to punitive damages on both procedural and substantive levels. In other words, while denying that criminal procedural safeguards should be applied to punitive damages, the peculiar criminal-like nature of this civil law remedy counseled the establishment of constraints aimed at avoiding distorting effects potentially resulting from the great measure of discretion afforded to adjudicators.¹⁴⁰

Thus, the Italian Supreme Court’s remark that punitive damages are totally out of proportion with the harm actually suffered by the victim does not reflect how punitive damages are administered in the United States. As noted above, according to the U.S. Supreme Court’s jurisprudence, an award of punitive damages must comply with the principles of reasonableness and proportionality.

Moreover, even if one finds that the metric used today by U.S. courts in determining punitive damages is still irreconcilable with the principles of proportionality and reasonableness as understood by the Italian legal community, this does not counsel against the adoption of punitive damages in Italy. The U.S. metric does not constitute an element that must be imported. Italy may benefit from the U.S. experience and adapt punitive damages to the metric ordinarily used by the Italian legal system in squaring afflictive measures with the principles of reasonableness and proportionality.

3. The Relationship Among Conduct, Harm, and Punitive Damages

Two other relevant, intertwined points made by the Italian Supreme Court in 2007 are: first, punitive damages are not related to the harm done, for they merely look at the wrongdoer’s conduct; second, the wrongdoer’s conduct is irrelevant to Italian tort law. It is certainly true that punitive damages focus more

¹³⁸ *Id.* at 425.

¹³⁹ *Id.*

¹⁴⁰ See *BMW of N. Am. Inc. v. Gore*, 517 U.S. 559 (1996); *St. Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

on the wrongdoer's conduct than on the harm suffered by the victim. This is inherent in the nature of punitive damages, which are meant to pursue the punishment of egregious conduct as one of their fundamental goals. However, as already seen with the U.S. Supreme Court's decision in *Campbell*, there must ordinarily be a close relationship between the amount of the punitive award and the harm suffered by the victim.¹⁴¹ Moreover, it is incorrect from another point of view to say that punitive damages are not concerned with the harm inflicted on the victim, for without such harm neither compensatory nor (consequently) punitive damages can be awarded. As a result, the Italian Supreme Court's assertion that "punitive damages are not related to the harm" is accurate only with these important qualifications.

More fundamentally, it is difficult to understand why the link between punitive damages and the wrongdoer's conduct would render punitive damages unacceptable in Italian tort law. As the Court states, the only possible reason for this conclusion is the irrelevance of the wrongdoer's conduct in Italian tort law. Unluckily for the Court there are, as amply shown above, several legislative provisions and judicial decisions suggesting unequivocally that Italian tort law cares not just about the harm suffered by the injured party, but also about the wrongdoer's conduct.

In general terms, there are two ways that the wrongdoer's conduct is relevant to domestic tort law. First, there are situations in which damages can be awarded only if the wrongdoer's conduct is intentional. By way of example, we may think of all the conduct sanctioned by the legislative provisions assessed in subsection (B)(1)(a) as well as of calumny, defamation, inducement of breach of contract, and diversion of employees. In these and similar cases, the kind of conduct the wrongdoer adopts is relevant to the very existence of a tort.

Second, and more importantly for present purposes, the wrongdoer's reprehensible conduct has a demonstrable impact on the determination of the amount of compensatory damages, particularly when the wrongdoing offends the personal, emotional, and non-economic sphere of the victim. This is something courts never state overtly, but on which many commentators agree.¹⁴² By way of example, in a case regarding a father who violated his obligations towards his son, an appellate court condemned him to pay €2.582.284,00.¹⁴³ Even though the court tried to justify the sum in purely compensatory terms (and on the ground that the father was affluent), the very large amount of the award indicates the court's willingness to punish the wrongdoer because of the particularly high

¹⁴¹ *St. Farm Mut. Auto. Ins. Co.*, 538 U.S. 408, at 425 ("[T]he measure of punishment [must be] both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.").

¹⁴² See, e.g., PAOLO GALLO, *PENE PRIVATE E RESPONSABILITÀ CIVILE* 61 (1996); PAOLO CENDON, *IL DOLO NELLA RESPONSABILITÀ EXTRACONTRATTUALE* 21 (1974).

¹⁴³ Corte d'Appello di Bologna, 10 febbraio 2004, *FAM. E DIR.*, maggio 2006, 511 (It.).

reprehensibility of his conduct.¹⁴⁴ Drawing on the analysis conducted here and in subsection (B)(1)(a), it is plausible to conclude, contrary to the Italian Supreme Court's view, that the wrongdoer's conduct is anything but irrelevant to Italian tort law, at least when it comes to non-economic losses.

4. Is the Wrongdoer's Wealth Irrelevant to Italian Tort Law?

Before assessing the Italian Supreme Court's assertion that the wrongdoer's wealth is irrelevant to Italian tort law, it is necessary to ascertain the extent to which the wrongdoer's wealth is a factor in awarding punitive damages in the United States. This issue is debated among law and economics scholars. Some economists assert that the wrongdoer's wealth should be considered in quantifying the punitive award in order to ensure the optimal level of deterrence when "either the victim's loss or the defendant's gain from wrongdoing is unobservable and correlated with the defendant's wealth."¹⁴⁵ Others, in contrast, argue that this is not the case and that wealth should never be a factor when the wrongdoer is a corporation, whereas it could be relevant, but only in limited circumstances, when the wrongdoer is an individual.¹⁴⁶

For its part, however, the U.S. Supreme Court has taken a clear stance on the issue of the degree to which wealth should be relevant in the determination of punitive damages. In *Haslip* the Court mentioned a number of factors that the Alabama Supreme Court elaborated to assess the reasonableness of punitive awards, including the financial position of the defendant, and concluded that these factors impose "a sufficiently definite and meaningful constraint on the discretion of . . . fact-finders in awarding punitive damages."¹⁴⁷ In *TXO*, the Court stated that the punitive damages award was very large but that many factors, including "the petitioner's wealth," convinced the Court to conclude that such award was not "grossly excessive."¹⁴⁸ In sum, the U.S. Supreme Court holds that the defendant's wealth may be a factor to consider in determining the amount of a punitive damages award. However, its relevance must be properly cabined in the sense that the defendant's wealth cannot legitimize a punitive award not comporting with the constitutional limitations of reasonableness and proportionality the Court itself imposed.

With respect to the situation in Italy, contrary to the Supreme Court's view expressed in 2007, courts frequently refer to the wrongdoer's wealth in determining the amount of damages, especially in the family law context. For

¹⁴⁴ Giovanni Facci, *L'illecito endofamiliare tra danno in re ipsa e risarcimenti ultramilionari*, FAM. E DIR., maggio 2006, 515, 519.

¹⁴⁵ Keith N. Hylton, *A Theory of Wealth and Punitive Damages*, 17 WIDENER L. J. 927, 930 (2008).

¹⁴⁶ Polinsky & Shavell, *supra* note 28, at 910-14.

¹⁴⁷ 499 U.S. 1, 22 (1991).

¹⁴⁸ 509 U.S. 443, 462 (1993).

instance, in the case of the non-compliant father,¹⁴⁹ the court granted very high damages, overtly stating that the wrongdoer's wealth was among the essential elements to be considered in determining the amount of the compensatory award. Some commentators even argue that by astutely "using" the wealth factor, courts camouflage punitive awards by giving them the form of compensatory damages.¹⁵⁰ Whether true or not, what is important to note here is that wealth is surely relevant, at least in the family law context, thus qualifying as not alien to Italian tort law. In conclusion, the wealth-based objection to punitive damages does not seem to be particularly powerful in light of the fact that (i) wealth to some degree is already relevant within Italian tort law; (ii) the U.S. Supreme Court holds that the defendant's wealth *may* be a factor in quantifying punitive damages; and (iii) among U.S. academics the issue of the relationship between the wrongdoer's wealth and punitive damages is unsettled.

5. Is a Windfall Benefitting the Plaintiff in Punitive Damages Cases Consistent with Italian Tort Law?

Corrective justice dominates the interpretations of tort law Italian courts provide. The victim of the wrongdoing can obtain a sum equivalent to the losses suffered from the wrongdoer, and nothing more. If one embraces corrective justice as the theoretical framework for deciding what is normatively desirable and what is not, then justifying the windfall to the plaintiff in punitive damages cases is hardly possible.¹⁵¹

However, legislative provisions confirm that the Italian legislator sometimes entitles the victim to claim more than compensatory damages.¹⁵² They cast doubt on the capacity of the corrective justice framework to provide a descriptively accurate and thorough account of Italian tort law and challenge the absolute rejection of the idea of allowing the victim to get more than purely compensatory damages.

A windfall, usually in the form of more than compensatory (not necessarily punitive) damages benefitting the plaintiff in a tort law case is already a possible occurrence in Italy. In light of this finding, it is not clear why a windfall specifically deriving from a punitive damages award, rather than from a merely more than compensatory award, would constitute an inadmissible abnormality in the domestic system. If there is some reason counseling against

¹⁴⁹ Corte d'Appello di Bologna, 10 febbraio 2004, FAM. E DIR., maggio 2006, 511, 514 (It.).

¹⁵⁰ Angela d'Angelo, *L'art. 709 ter c.p.c. tra risarcimento e sanzione: un "surrogato" giudiziale della solidarietà familiare?*, DANNO E RESP., dicembre 2008, 1199.

¹⁵¹ See Castronovo, *supra* note 114, at 339. For an interesting attempt to justify the discussed windfall of punitive damages as societal damages, see Sharkey, *supra* note 11, at 390-91.

¹⁵² See *supra* Part III, Subsection (B)(1)(a).

the adoption of a punitive remedy, it might at most be identified with the punitive character of the windfall award, not with the windfall in and of itself.

6. Concluding Remarks on the Italian Supreme Court's Decision

The foregoing analysis shows the mistakes the Italian Supreme Court committed in 2007. Besides exhibiting a poor understanding of punitive damages, the Court is blindly devoted to corrective justice and repudiates any non-compensatory significance that Italian tort law may have. It explicitly excludes any punitive function from that area of law. By offering a mono-functional reading of tort law, the Court demonstrates or pretends to ignore not only positive law, but also relevant developments occurring in the past five decades.

In the 1960s and 1970s, Italian legal culture underwent a process of transformation that profoundly affected ways of thinking about the law and about tort law more specifically. Leading scholars have paved the way toward an approach that attributes a plurality of functions to tort law, from preventing torts to allocating their social costs to compensating their victims.¹⁵³

The Supreme Court's rigidity in defining the boundaries of tort law may well prevent this area of law from addressing unresolved issues that could be given appropriate answers by a more flexible approach. In the 2007 decision, the Court did not provide any explanation for its assertions. It declared some general principles and rules as if they were immutable features of tort law. Because of the lack of an elaborated analysis by the Court, it is not easy to fully understand the reasons for its decision. Perhaps the Court is truly committed to keeping the public/private dichotomy as firm as possible, not realizing that this distinction is fluid and that it has been under considerable pressure for many decades. Or perhaps the Court is waiting for other, even more overtly punishment- and deterrence-seeking legislative interventions before recognizing that Italian tort law also pursues punitive and deterrent functions. What is certain is that ruling out the adoption of punitive damages on the ground that this remedy would undermine the alleged purity of Italian tort law constitutes a disservice to the Italian legal community for two reasons. Practically, it deprives Italian tort law of a useful legal tool that may cure remedial deficiencies and other problems affecting the Italian legal system. Theoretically, it conveys a false, mono-dimensional account of Italian tort law.

Introduced to address willful, wanton or reckless misconducts, punitive damages would represent the public pole of fault-based liability by emphasizing its punishment- and deterrence-seeking functions. The private pole would instead

¹⁵³ See, e.g., Rodolfo Sacco, *L'ingiustizia di cui all'art. 2043 cod. civ.*, in Foro Padano, I, 1420 (vol. 15, 1960); Pietro Trimarchi, *supra* note 126; FRANCESCO D. BUSNELLI, *LA LESIONE DEL CREDITO* (1964); STEFANO RODOTÀ, *IL PROBLEMA DELLA RESPONSABILITÀ CIVILE* (1964).

be represented by compensatory damages that, as already seen, are mainly devoted to corrective justice. After the adoption of punitive damages, Italian fault-based liability could be represented in the “nesting” mode as follows:

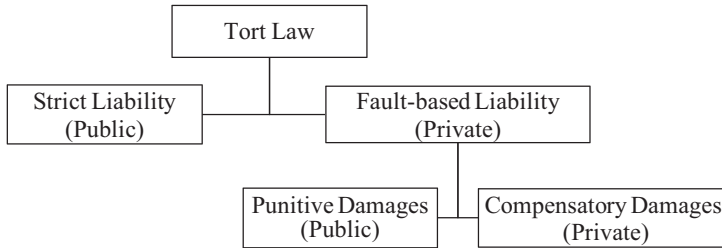


Figure 4

C. Academic Objections to Punitive Damages and Their Critiques

In discussing U.S. punitive damages and their compatibility with the Italian legal system, Italian jurists proffer various objections to the adoption of punitive damages. Some of these commentators fully endorse the indefensible 2007 Supreme Court’s decision by referring to the necessity of preserving the distinction between public and private law.¹⁵⁴ On this account, the idea of introducing a punitive flavor into tort law is unacceptable, and deterrence is admissible only if it operates without undermining the tenets of corrective justice.

Other scholars such as Giulio Ponzanelli criticize the Court’s findings for its failure to grasp the radical changes affecting Italian tort law in the past decades.¹⁵⁵ Nonetheless, they rule out any possibility for the adoption of punitive damages in Italy. In particular, Ponzanelli points to four institutional obstacles that allegedly make evident the uniqueness of U.S. punitive damages and prevent Italy from adopting this foreign juridical creation.¹⁵⁶ Firstly, whereas the Italian separation between tort law and criminal law has determined important differences in their respective adjudicatory procedures, U.S. tort law still retains a “strong criminal character,” and the safeguards guaranteed in criminal trials are not applied to punitive damages.¹⁵⁷ This fact, according to Ponzanelli, argues against the introduction of punitive damages in Italy. Secondly, he maintains that the U.S. jury and its role in the domestic justice system constitute an institutional obstacle to the reception of punitive damages. His reason is that the U.S. jury

¹⁵⁴ See Castronovo, *supra* note 114, at 329; Fava, *supra* note 114, at 526, 529.

¹⁵⁵ Ponzanelli, *supra* note 100, at 321-22. Italian commentators have been looking quite intensely at deterrence as a desirable objective rather than as a merely incidental effect of tort law. *Id.* at 319.

¹⁵⁶ *Id.* at 321-22; Busnelli, *supra* note 105, at 43 (following Ponzanelli).

¹⁵⁷ Ponzanelli, *supra* note 100, at 321.

usually awards very high damages to the plaintiffs, well beyond what would be necessary to successfully perform compensatory and even punitive functions.¹⁵⁸ Thirdly, punitive damages should be read in light of the different rules governing legal expenses. In the United States, each party pays her own attorneys, whereas Italy adopts, at least in principle, the “loser pays system,” whereby the loser pays the attorneys’ fees of the winning party as well as her own. Thus, U.S. judges consciously award (punitive) damages covering attorneys’ fees to ensure that the plaintiff is truly made whole. The unstated conclusion of such reasoning is that U.S. punitive damages cannot be explained without referring to the “American rule,” which, absent in Italy, contributes to rendering the reception of punitive damages unrealizable. Fourthly, the law and economics school of thought has not developed, so the Italian context lacks a powerful voice advocating for punitive damages. This would explain why Italy has not adopted punitive damages.

1. Criminal Safeguards and Punitive Damages

According to the first objection raised by Ponzanelli against the adoption of punitive damages in Italy, the absence of a rigid separation between U.S. tort and criminal law makes it acceptable for the U.S. system to administer punitive damages without the kind of safeguards that characterize criminal proceedings. For instance, the Fifth Amendment double-jeopardy guarantee does not apply to U.S. punitive damages. Moreover, in a good number of states the standard of proof applied with reference to punitive damages is still the traditional “more probable than not” test, despite the unquestionably retributive nature of punitive damages. By contrast, the clear separation between Italian tort and criminal law would make it unfeasible to adopt punitive damages in domestic tort law, for it would be unacceptable to punish a defendant without due procedural protections.

In general terms, the “criminal procedural safeguards” objection certainly has force, as demonstrated by the fact that both U.S. and Italian scholars are aware of it.¹⁵⁹ However, this concern should not bar the introduction of punitive damages into Italy. It rather suggests that if punitive damages are adopted, heightened safeguards should be applied. For instance, with reference to the U.S. system, Owen suggested the adoption of a “mid-level burden of proof, such as that of ‘clear and convincing evidence,’” in order to guarantee a sufficient degree of procedural fairness to the defendant.¹⁶⁰ States have begun to adopt such a

¹⁵⁸ Ponzanelli, *supra* note 100, at 321 (adding that the American jury does not have to give reasons for its determinations and that it is committed, by awarding substantial damages, to offset a poor social security system).

¹⁵⁹ See David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 382-83 (1994); Gallo, *supra* note 142, at 186-211.

¹⁶⁰ Owen, *supra* note 159, at 383 (explaining that in both the United States and Italy “beyond all reasonable doubt” applies to criminal cases whereas “more probable than not” applies to civil cases).

standard and today it is used in half of them.¹⁶¹ This trend may prove to be useful to the Italian legal engineer entrusted with the task of introducing punitive damages in the domestic legal system. By introducing a somewhat higher, mid-level burden of proof benefitting the defendant, Italy may easily resolve one of the most discussed problems surrounding punitive damages.

To be sure, the traditional “more probable than not” standard invariably applies to civil proceedings involving the legislative provisions performing punitive functions.¹⁶² This may *prima facie* suggest that so long as a sanction, independently of its nature, is imposed in civil proceedings the Italian system would not investigate the advisability of requiring heightened standards of proof. However, should the Italian system adopt punitive damages as a general remedy, the issue of the burden of proof would in all likelihood become a relevant and pressing one, to be resolved with the adoption of heightened guarantees.

Turning to the “double-jeopardy” issue, the U.S. Supreme Court held in *United States v. Halper* that if a civil sanction constitutes a form of punishment it triggers the “double-jeopardy” clause.¹⁶³ However, the Court added that the Fifth Amendment guarantee did not apply to private parties’ litigation,¹⁶⁴ meaning that if a public body is not a party to the litigation, the same individual may be punished repeatedly for the same fact. So the “double-jeopardy” guarantee does not apply to U.S. punitive damages in most cases.

Does the “double-jeopardy” concern counsel against the adoption of punitive damages in Italy? One could answer in the affirmative by arguing that the “double jeopardy” guarantee applies to punishment in its broadest meaning, encompassing criminal as well as civil punitive sanctions, with the consequence that no one could be punished more than once for the same misconduct, in either criminal or civil proceedings. This reasoning would be unconvincing because this type of guarantee is enshrined not in some Italian constitutional provision, but rather in article 649 of the code of criminal procedure, according to which no one can be prosecuted twice for the same crime. Hence, the temptation to consider this safeguard a protection linked to the typical content of a criminal sanction (i.e. deprivation of personal liberty through incarceration) is very strong. In sum, it appears correct to draw a line between civil punitive sanctions and criminal sanctions, with the consequence that the procedural safeguards typically characterizing Italian criminal proceedings (e.g. “beyond all reasonable doubt” standard of proof, “double-jeopardy” guarantee) may be deemed to be unnecessary when it comes to civil, even punitive, sanctions.¹⁶⁵

¹⁶¹ Doug Rendleman, *Common Law Punitive Damages: Something for Everyone?* 7 U. ST. THOMAS L.J. 1, 3 (2009).

¹⁶² See *supra* Part III, Subsection (B)(1)(a).

¹⁶³ 490 U.S. 435, 442 (1989).

¹⁶⁴ *Id.* at 451.

¹⁶⁵ See Lorenzo Di Bona De Sarzana, *Il Legal Transplant dei Danni Punitivi nel Diritto Italiano*, in LIBER AMICORUM PER FRANCESCO DONATO BUSNELLI, Vol. I, 563, 572 (2008).

Finally, an aspect that is relevant to the divide between criminal law and tort law involves the principle of legality (*nulla poena sine lege*). According to this principle, only the legislator can set forth the circumstances under which an individual may be punished for her conduct and empower the judge to apply a punitive measure. Adopting the perspective of a corrective justice theorist, one would argue that only the criminal law pursues punishment, that whenever punishment is sought only the legislator can intervene and impose punishment, and that the legislator must do so through clearly stated legislative provisions, identifying all the requirements that must be met in order to trigger punitive sanctions. In contrast, tort law, at least Italian tort law, only pursues compensation. And for this function to be pursued, compliance with the principle of legality is not required because it applies only to punishment, which is alien to Italian tort law.

But what if one concedes, as Italian jurists should, that Italian tort law can also pursue punitive and deterrent goals? In this case the principle of legality raises an issue that must be addressed before adopting punitive damages or any other form of civil punitive sanction. This is so because according to Italian constitutional principles, neither criminal nor civil punitive awards may be granted unless the adjudicator is *ex ante* authorized by the legislator to do so.¹⁶⁶ The solution seems quite simple. Actually, the principle of legality appears not to prohibit, but rather to channel the adoption of punitive damages in the sense of requiring one general (or a series of specific) legislative provision(s) attributing to judges the power to grant punitive awards. Such legislative intervention should be enough to alleviate legitimate concerns of legality, confirming that the *nulla poena sine lege* difficulty is simply a matter of legal engineering.

2. The Role of the Jury

With respect to the relationship between juries and punitive damages, it has been argued that juries are not well equipped to determine the amount of punitive awards and that only judges should be entrusted with such task.¹⁶⁷ The

¹⁶⁶ As applied to criminal sanctions, the principle of legality is enshrined in Article 25, Clause 2 of the Italian Constitution, which states “[n]o one may be punished except on the basis of a law in force prior to the time when the offence was committed.” More debated is the issue of which constitutional provision enshrines the same principle as applied to civil punitive sanctions. Compare Pietro Nuvolone, *Depenalizzazione apparente e norme penali sostanziali*, RIV. IT. DIR. E PROC. PEN., 60 (1968) (maintaining that the relevant source is Article 25, Clause 2 of the Italian Constitution), with Franco Bricola, *Le ‘pene private’ e il penalista*, in LE PENE PRIVATE, 51 (1985) (arguing that the relevant provision is Article 23 of the Italian Constitution, which states “[n]o obligations of a personal or a financial nature may be imposed on any person except by law.”).

¹⁶⁷ Compare Reid Hastie & W. Kip Viscusi, *What Juries Can’t Do Well: The Jury’s Performance as a Risk Manager*, 40 ARIZ. L. REV. 901, 916 (1998), with Marc Galanter &

essential point made by all these scholars is that jurors do not possess the same degree, if any at all, of the experience and competence usually belonging to judges. This situation, in turn, would tend to produce unpredictable results characterized by irrationally and unacceptably large amounts of punitive damages awarded to plaintiffs.

Even if this were true, one wonders why U.S. juries' poor performances in awarding punitive damages should counsel the Italian jurist against adopting punitive damages. Firstly, as a matter of descriptive accuracy, the Italian legal engineer should be aware of the fact that the U.S. Supreme Court has elaborated a series of substantive limitations meant to avoid excessively large amounts of punitive damages by curbing adjudicators' discretion in granting punitive awards. Secondly, and more importantly, why should one think that the jury as an institution represents an *essential* feature of punitive damages, so that the absence of juries as adjudicators in the "importing" legal system would make the transplant of this tort law remedy unfeasible? Punitive damages are not a prerogative of juries. On the contrary, judges often award them as well.¹⁶⁸ This is no surprise given that judges and juries are functional equivalents, i.e. they are both adjudicators. There seems to be no real reason to consider the American jury and its role in punitive damages cases an insurmountable obstacle to the reception of punitive damages in Italy. Punitive damages, if adopted, could and should be awarded by Italian judges, the other form of adjudicator (the jury) being absent.

It is also worth questioning the skepticism academics exhibit toward juries and their performances in punitive damages cases. As demonstrated by an empirical study conducted at the beginning of the 21st century, there is "no evidence that judges and juries differ significantly in their rates of awarding punitive damages, or in the relation between the size of punitive and compensatory awards."¹⁶⁹ In other words, what some Italian as well as U.S. scholars should learn is that the frequency with which judges and juries award punitive damages and the amounts of the awards they grant do not differ in any meaningful way. In conclusion, it appears that the "jury argument" is fallacious. In no way does it present the existence of a genuine obstacle to the adoption of punitive damages in the Italian legal system.

3. Attorneys' Fees

The argument for attorneys' fees links punitive damages to attorneys' fees. In a punitive damages case, this view suggests, U.S. judges increase the amount of punitive damages to cover the legal expenses the plaintiff sustains on

David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1439 (1993) (praising the work of juries).

¹⁶⁸ Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 759 (2002).

¹⁶⁹ *Id.* at 746.

the basis of the “American rule.” Should courts fail to do so, the plaintiff would not be made truly whole considering that “at least one-third of the plaintiff’s recovery ordinarily is expended on legal fees.”¹⁷⁰ Does the fact that punitive awards cover the plaintiff’s legal expenses, coupled with the fact that Italy adopts the “loser pays system,” counsel against the adoption of punitive damages?¹⁷¹

Reasoned analysis suggests that it does not. Actually, the view here criticized would be tenable if the attorneys’ fees owed by the plaintiff accounted for punitive damages in their entirety or for nearly all the amount. But this is not the case. Even assuming that the legal expenses represented one-third or any other considerable fraction of the punitive award, a substantial part of it would still call for a justification. As we know, such justification can be traced to punishment and deterrence. In other words, it is not reasonable to regard punitive damages as merely absorbing plaintiffs’ legal expenses. Apart from this, it is difficult to see in the quite cryptically developed “attorneys’ fees” argument any other detectable line of reasoning capable of supporting the rejection of punitive damages.

4. Economic Analysis of Law

The fourth and final argument made by Ponzanelli suggests that a further reason for not adopting punitive damages in Italy is the absence of a well-developed “law and economics” movement in domestic legal discourse. Unlike the second and third objections, the fourth one seems to be *prima facie* correct, in the sense that the lack of overtly efficiency-based rationales driving policy choices is an unquestionable truth as a matter of Italian history. Whether this argument is right, however, requires some analysis.

To begin, one should be careful to avoid confusing the idea of deterrence with the efficient allocation of resources. The former can be pursued independently of efficiency-driven rationales: there is no better example of this than Italy itself. The Italian legal system certainly pursues deterrence in the field of, say, the criminal law. However, it does so not by applying the instruments elaborated by economists committed to efficiency, but rather by focusing on the idea of fairness. The same is true, *pace* the Italian Supreme Court, also with reference to Italian tort law. As demonstrated, deterrence is one of the goals domestic tort law pursues, but, as has been correctly suggested, efficiency has never been an element consciously used to seek deterrence.¹⁷² In sum, it would be a mistake to think that the notion of deterrence at some point collapsed into that of efficiency simply because of the contribution efficiency-based theories have given, and continue to give, to the pursuit of deterrence.

¹⁷⁰ Owen, *supra* note 159, at 379.

¹⁷¹ Such a regime is established by Article 91 of the Italian Code of Civil Procedure.

¹⁷² Ponzanelli, *supra* note 100, at 322.

Furthermore, one may wonder whether, historically, punitive damages flourished in the United States because of efficiency-driven considerations or because of a desire to pursue deterrence. Given that the birth of punitive damages can be traced back to judicial decisions issued in the mid-18th century¹⁷³ and that the law and economics movement is much younger, one may infer that punitive damages were adopted in the United States to pursue deterrence (and, of course, punishment), but without any precise idea of efficiency in mind.¹⁷⁴ Consequently, it appears fair to conclude that a legal system does not necessarily need law and economics theories before adopting a legal tool such as that represented by punitive damages. This, quite inevitably, fatally weakens the fourth argument.

IV. THE NORMATIVE DESIRABILITY OF ADOPTING PUNITIVE DAMAGES IN ITALY

Does Italy need punitive damages? I believe it does. In general terms, Italy should consider the opportunity to adopt punitive damages with reference to all wrongdoing in which the defendants' conduct is so outrageous and harmful that an enhanced deterrent and punitive response is warranted. More particularly, building on the elaborations of two Italian scholars, and with no pretense of being exhaustive, I suggest that there are at least three situations in which punitive damages would be useful within the Italian legal system:¹⁷⁵ (1) when the wrongdoer's gain exceeds the loss suffered by the victim; (2) when the wrongful action harms personality rights that are now protected by the criminal law; and (3) when a harm is inflicted on a number of people but it is unlikely that many, if any, of them will bring an action seeking damages.

The following analysis should not be understood as a fully developed position but rather as a series of hypotheses intended to suggest the existence of situations that could be ideal for legislative experimentation. The possible solutions put forward in connection with each situation are meant to provoke thought and stimulate further elaboration.

¹⁷³ See *supra* note 4 and accompanying text.

¹⁷⁴ The birth of modern law and economics is generally thought to coincide with Ronald Coase and Guido Calabresi. See Kristoffel Grechenig & Martin Gelter, *The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism*, 31 HASTINGS INT'L & COMP. L. REV. 295, 325 (2008) ("Ronald Coase and Guido Calabresi, who are typically described as the founding fathers of the law and economics movement. . ."). See also Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

¹⁷⁵ Ponzanelli, *supra* note 100, at 324; Gallo, *supra* note 142, at 7-123.

A. The Wrongdoer's Gain Exceeds the Loss Suffered by the Victim

Article 125 of the code of industrial property provides for an ultra-compensatory remedy for when the tortfeasor violates someone else's industrial property rights and gains a profit from such illicit activity. Article 125 makes available a "special" action that permits the victim to obtain either the profits realized by the wrongdoer, independently of any loss on the former's part, or compensatory damages for the loss suffered plus the profits for the amount exceeding the loss. The rationale inspiring article 125 can easily be identified in the legislator's willingness to achieve deterrence by warning the potential wrongdoer that, if "caught," she will be ordered to disgorge the illicit profits.

Unfortunately, article 125 may not be a satisfactory response to a situation in which the wrongdoer's illicit gains exceed the victim's losses. Assume that by willfully committing the tort sanctioned by article 125 the wrongdoer gains a profit of \$100,000 and causes a loss of \$70,000 to the victim. The wrongdoer knows that if she is "caught" she will have to pay, at most, \$100,000 (either as a single sum constituting the illicit profits or as the aggregate of compensatory damages plus the illicit profits for the part exceeding the measure of compensatory damages) plus legal expenses. In such a situation, the disincentive to commit the wrong seems represented only by the possibility of running a risk for nothing, i.e. of committing a wrong without then being able to keep the gains of that illegal conduct. Thus, although representing a step in the right direction (the pursuit of deterrence), article 125 generates a concrete risk of under-deterrence, especially if the potential wrongdoer is wealthy and not afraid of some "extra" legal expenses.

The correctness of this reading appears to be confirmed by the way U.S. federal legislation regulates the type of violations addressed by the Italian code of industrial property. In particular, and by way of example, it is statutorily established that patent infringements can be sanctioned through a sort of modified version of punitive damages, the so-called "treble" damages.¹⁷⁶ Multiplying the recoverable damages by up to three times is a powerful way to discourage a potential wrongdoer from committing an antisocial activity. Applying treble damages to our example, one finds that the wrongdoer now knows that if she is brought to justice she will have to pay not \$100,000 but \$210,000 (\$70,000 multiplied by three). A difference of \$110,000 between the "treble damages" regime and the "article 125" regime suggests that by adopting a treble damages-like remedy, Italy would be able to achieve an increased level of deterrence.

More generally, because article 125 is circumscribed in its scope of application to the situations legislatively addressed in the provision itself, Italian tort law cannot deter tortfeasors who, by committing even extremely deplorable

¹⁷⁶ 35 U.S.C. § 284 ("[w]hen the damages are not found by a jury, the court shall assess them. In either event the court may increase the damages up to three times the amount found or assessed. . .").

wrongs, secure gains exceeding the victims' losses in situations other than the violation of industrial property rights. This is so because under Italian tort law the victim of a wrong entailing economic losses is generally entitled only to one form of monetary reparation: compensatory damages equaling the losses. Thus, even if held accountable, the wrongdoer is incentivized to commit outrageous and remunerative wrongs because of the profits retained after paying compensatory damages to the victim. To this problem as well, punitive damages may give a satisfactory answer. Forcing the tortfeasor to pay a sum substantially higher than the plaintiff's losses would be likely to have powerful deterrent effects.

B. Personality Rights and the Criminal Law/Tort Law Dilemma

Consider the following situation: as part of a deliberate defamatory campaign, an important newspaper gravely offends the honor and reputation of a well-known politician in order to cause a decrease in her rate of approval among Catholic voters by falsely attributing to her Nazi statements or extra-marital affairs. This kind of conduct can expose the responsible persons to both criminal and civil liabilities. In other words, as of today the Italian legal system reacts on two different levels against defamatory conduct: it punishes the wrongdoer for the antisocial misconduct by imposing criminal penalties, and it allows the victim to get compensation for the loss suffered in a civil trial.

On the criminal side, if convicted in a criminal proceeding, the journalist and/or the editor of the newspaper may be sentenced to jail (very unlikely) or condemned to pay a small, *ex ante* legislatively fixed, criminal fine. The choice to treat offenses to honor and reputation as a crime is undoubtedly questionable, and in fact is questioned by many commentators.¹⁷⁷ The huge costs of a criminal trial, the resources spent to run prisons, the intolerable length of criminal trials in Italy, and the advisability of using scarce resources for much more serious and socially alarming crimes than offenses to honor and reputation (deplorable though they are) all suggest that this type of wrong and many others should be punished and deterred through legal tools other than the criminal law.

In some cases, tort law may altogether replace instead of complement the criminal law in addressing conduct that is reprehensible enough to trigger some sort of reaction but not reprehensible enough to trigger the reaction of the criminal law. Certainly, the egregiousness of the conduct exemplified in the initial example calls for a punitive and deterrent response. Surely though, as it stands today Italian tort law would be unable to achieve these goals. What modifications would Italian tort law need to remedy its incapacity? Punitive damages appear to be a promising solution.

Undoubtedly the Italian legal system considers the kind of conduct carried out by the newspaper in our example as constituting a serious violation of

¹⁷⁷ The first author to pose this issue was Cesare Beccaria in 1764. See CESARE BECCARIA, *DEI DELITTI E DELLE PENE* (Renato Fabietti ed., 1973).

personality rights, directly assaulting the dignity, honor, and reputation of the defamed person. Otherwise, such conduct would not constitute a crime under current Italian law. However, for the institutional reasons given above, and more importantly because offenses to personality rights do not seem to be socially alarming enough to deserve a reaction from the criminal law, the criminal justice system is not suitable to address these types of wrongs. Rather, tort law and punitive damages seem to represent a better approach. In this way, the wrongdoer would be punished for her highly reprehensible conduct and other potential wrongdoers would be deterred from adopting the same course of conduct.

C. The “Absent Victims” Situation

Suppose that the poor quality of fabrics employed by a large-scale firm to manufacture a certain product allows the firm to save a good number of dollars per unit if compared to the costs entailed by using materials of higher quality. Suppose also that, because of choosing poor materials, a good number of people will be injured by the product and that only a few of them will file a lawsuit and recover damages. Suppose, finally, that a court will award compensatory damages in an amount far below the profits earned by the firm as a direct consequence of the choice of poor materials.

A first effect of this situation is that the firm “gets away with” a certain amount of “uncompensated injury” because only a few of the victims either sue or manage to obtain compensation. A second effect is that the firm is incentivized to keep marketing defective products because, according to economies of scale, it knows that the reduction in production costs allowed by poor materials outweighs the compensatory damages it will have to pay. The firm’s conduct is particularly reprehensible because it “coldly” calculates its costs of production in order to secure as much profit as possible at the expense of the life or health of consumers, who usually rely on the quality of products and on the manufacturer’s good faith. Punitive damages might represent an adequate response to the deplorability of the firm’s conduct and its effects. If properly quantified, they would likely deter the firm’s reprehensible course of action and reduce the risk of “uncompensated injury.”

It is also true, however, that the “absent victims” situation may generate a relevant problem if addressed through punitive damages. When the wrongdoer harms multiple victims she risks being exposed to multiple punitive damages claims, which means that the defendant would have to pay punitive damages as many times as the number of claimants bringing subsequent actions. This problem, still plaguing U.S. tort law, may be solved in Italy by strengthening the class action mechanism.¹⁷⁸ In particular, it may be possible to convert the opt-in

¹⁷⁸ For an overview of the Italian class action, see ERNESTO CESARO & FERNANDO BOCCHINI, *LA NUOVA CLASS ACTION A TUTELA DEI CONSUMATORI E DEGLI UTENTI*:

model in Italy into an opt-out model and to apply it exclusively to punitive damages claims.¹⁷⁹ An opt-out model would (i) give all victims the chance to get compensatory and punitive damages, with the effect that those victims explicitly deciding not to take advantage of this opportunity would be denied access to courts if they seek punitive damages through subsequent independent actions; and (ii) allow the judge to order the defendant to pay a single punitive award (to be apportioned among the plaintiffs who did not opt out) to avoid exposing her to subsequent and unpredictable claims seeking punitive awards. Thus, so long as the multiple-punishment problem is resolved, it appears that the “absent victims” situation may be effectively addressed by resorting to punitive damages.

V. CONCLUSION

The real controversy about punitive damages turns on the public/private distinction and the way this distinction is articulated in different legal systems. In the United States, jurists “publicize” or “privatize” punitive damages depending on whether they oppose or defend the public/private distinction. By doing so, they fail to satisfactorily accommodate this tort law remedy within domestic law because they do not perceive that public and private elements coexist throughout tort law and that punitive damages, by emphasizing the public pole of fault-based liability, represent one instance of that coexistence.

In light of this, I have argued that the staunch opposition reserved by the Italian Supreme Court and by the vast majority of commentators to the adoption of punitive damages in Italy is unwarranted because it is based on a poor knowledge of U.S. punitive damages and on a portrait of Italian tort law that does not correspond to reality. The time is ripe for Italy to look pragmatically, not dogmatically, at punitive damages and to seriously consider the introduction of a remedial tool whose positive effects would substantially outweigh any possible cost. Punitive damages would be beneficial to Italy in numerous ways. They would give relief to an overloaded criminal justice system by “demoting” certain wrongs from crimes to torts. Their application would very likely improve Italian tort law’s deterrence in specific circumstances, such as when the defendant’s gains exceed the plaintiff’s losses. Finally, they would send members of society a

COMMENTARIO ALL’ARTICOLO 140-BIS DEL CODICE DEL CONSUMO (2012); ANTONIO PALAZZO & ANDREA SASSI, *CLASS ACTION: UNA PRIMA LETTURA* (2012); Roald Nashi, *Italy’s Class Action Experiment*, 43 CORNELL INT’L L.J. 147 (2010); PAOLO FIORIO, *L’azione di classe nel nuovo art. 140 bis e gli obiettivi di deterrenza e di accesso alla giustizia dei consumatori*, in I DIRITTI DEL CONSUMATORE E LA NUOVA CLASS ACTION, 487-536 (2010); VALENTINO LENOCI, *Profili di diritto internazionale: la class action nei paesi anglosassoni*, in I DIRITTI DEL CONSUMATORE E LA NUOVA CLASS ACTION, 537-53 (2010).

¹⁷⁹ Italian class action is governed by Article 140-bis of the Italian Consumers’ Code. Clause 3 establishes that consumers who wish to join the class action can do so, and that “joining class action entails discontinuation of any individual restitutory or remedial action based on the same title.”

message that committing torts is morally wrong and calls for the issuance of afflictive measures, especially when the wrongdoer takes advantage of its economic power to the detriment of weak parties. As to the negative effects of adopting punitive damages, there are none, unless a loss in dogmatic purity is taken to constitute an unbearable cost that prevents the introduction of a new and potentially very useful legal tool.

