Two Wrongs Do Not Make a Right: Reconsidering the Application of Comparative Fault to Punitive Damage Awards

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I. INTRODUCTION

Every once in awhile a legal topic of great importance falls through the cracks of thoughtful case law discussion and scholarly literature, seemingly lost in the seismic shift of a major change in law. When legislatures and courts transitioned en masse, beginning in the 1960s, to comparative fault regimes in order to more precisely compensate injured parties and allocate responsibility for a harm, one such casualty was how that shift in law would affect the imposition of punitive damages.[1] This intersection between comparative fault principles and punitive damages received relatively sparse attention, in part, because the law of punitive damages was also in a very different place at the time.[2] In the mid-twentieth century, awards of punitive damages were both infrequent in occurrence and generally modest in amount.[3] In certain contexts where a harm had not been committed inten-

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1. *See* VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE § 20.01, at 453 (5th ed. 2010) [hereinafter SCHWARTZ, COMPARATIVE NEGLIGENCE] (stating that if a court looked at "the interrelationship between the two issues [of comparative fault and punitive damages], it would have found a barren wasteland of analysis in existing case law"); *see also* Ernest A. Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189 (1950) (discussing the evolution of the comparative fault doctrine).

2. *See* SCHWARTZ, COMPARATIVE NEGLIGENCE, *supra* note 1, § 20.01, at 453 ("At the same time that comparative negligence has become the prevailing rule in the United States, the rule allowing punitive damages for certain kinds of conduct has undergone reexamination and change.").

3. *See* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting) ("As little as 30 years ago, punitive damages were 'rarely

tionally, such as in products liability or professional malpractice, these awards would have been "unthinkable."[4] Courts, therefore, had little occasion to focus on whether and how their state's newly adopted comparative fault system would affect an award of punitive damages.[5] State legislature's enacting comparative fault systems also glossed-over this issue, if it was even identified as an issue at all.[6]

The result of this early oversight is that the intersection of comparative fault and punitive damages has, for decades, not received its due attention. Courts have generally, and almost mechanically, not permitted any adjustment of punitive damages based on the comparative fault of another.[7] When courts have considered this specific issue, they have often provided little analysis, deferring to the "way it has always been" under contributory negligence where the prevailing party received the entire punitive damage award.[8] But this "all or nothing" approach is precisely why a contributory negligence system no longer exists in the vast majority of states; it risks unfairness to parties on either side – i.e. plaintiffs may receive too much or nothing at all from a defendant for their injury and defendants may pay too much or nothing at all for harm they have caused.[9]

The purpose of this Article is to reexamine and appropriately analyze the application of comparative fault to punitive damages. The Article chal-

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assessed' and usually 'small in amount.'") (citations omitted); RICHARD L. BLATT ET AL., PUNITIVE DAMAGES: A STATE BY STATE GUIDE TO LAW AND PRACTICE § 1.2, at 5 (1991) ("[G]enerally before 1955, even if punitive damages were awarded, the size of the punitive damage award in relation to the compensatory damage award was relatively small, as even nominal punitive damages were considered to be punishment in and of themselves."); *see also infra* Part III.B.1.

4. SCHWARTZ, COMPARATIVE NEGLIGENCE, *supra* note 1, § 20.04, at 459.

5. *See id.* § 20.01, at 453.

6. *See infra* Part II.A.

7. *See* SCHWARTZ, COMPARATIVE NEGLIGENCE, *supra* note 1, § 20.04, at 457; Francis M. Dougherty, *Effect of Plaintiff's Comparative Negligence in Reducing Punitive Damages Recoverable*, 27 A.L.R. 4th 318 (1984); *see also infra* Part II.A.

8. *See, e.g.*, Shahrokhfar v. State Farm Mut. Auto. Ins. Co., 634 P.2d 653, 659 (Mont. 1981) ("[P]unitive damages cannot be reduced by the percentage of plaintiff's contributory negligence."); Comeau v. Lucas, 455 N.Y.S.2d 871, 873 (N.Y. App. Div. 1982) (same); Turner v. Lone Star Indus., Inc., 733 S.W.2d 242, 244 (Tex. Ct. App. 1987) (same); *see also infra* Part II.A.

9. *See* Blazovic v. Andrich, 590 A.2d 222, 226 (N.J. 1991) ("The change to a comparative-negligence system eliminated the 'all or nothing' approach to tort recovery in favor of apportionment of liability among all parties to an action in rough equivalence to their causal fault." (citing W. PAGE KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 67, at 468-71 (5th ed. 1984) [hereinafter PROSSER AND KEETON ON THE LAW OF TORTS])); *cf.* Guido Calabresi & Jeffrey O. Cooper, *New Directions in Tort Law*, 30 VAL. U. L. REV. 859, 868-72 (1996) (noting a deep change in tort law compensation from "all-or-nothing to splitting" of fault).

lenges the conventional wisdom that these spheres of law should remain separate. Part II begins with an overview of the development of the law of comparative fault with punitive damages. It discusses the limited attention that has been paid to potential overlap in these areas of law and draws parallels with other developments in the law of comparative fault supporting more accurate and just awards of damages. Part III analyzes the public policy arguments for and against applying comparative fault principles to punitive damage awards. Finally, Part IV proposes practical methods of incorporating comparative fault principles into awards of punitive damages to provide more just awards.

The Article concludes that where punitive damages are awarded, and especially where they are based upon unintentional conduct, comparative fault principles should apply in jurisdictions that have legislatively or judicially adopted such a system. The Article identifies and endorses several ways courts could implement such an approach. While courts have traditionally not been receptive to the idea of applying comparative fault to punitive awards the same way as with economic and noneconomic awards, this Article examines how the same fairness considerations apply.

II. JUDICIAL APPLICATION OF COMPARATIVE FAULT WITH PUNITIVE DAMAGE AWARDS

A. Existing Legal Landscape

Courts have paid relatively scarce attention to whether comparative fault principles may apply to reduce an award of punitive damages.[10] A recurring observation of the few courts and legal commentators that have reviewed this area of law is that "[c]ommentary on this subject is limited."[11] Where specifically addressed in judicial decisions, the analysis has been equally limited.[12] Courts often have dispensed with the notion of applying comparative fault to reduce a punitive award through nothing more than a sentence restating the general proposition that it ought not to be done.[13]

Even in those decisions giving greater attention to this question, the conclusion has frequently been based on the generalized notion that because punitive damages serve a different purpose from compensatory damages –

10. *See* SCHWARTZ, COMPARATIVE NEGLIGENCE, *supra* note 1, § 20.01, at 453.

11. Clark v. Cantrell, 504 S.E.2d 605, 610 n.5 (S.C. Ct. App. 1998).

12. *See* Victor E. Schwartz, *Comparative Fault and Punitive Damages – Balancing the Equities, They Must Intersect*, 23 MEMPHIS ST. U. L. REV. 125, 127 (1992) [hereinafter Schwartz, *Comparative Fault and Punitive Damages*] (noting that "few [courts] have devoted more than a paragraph of analysis to the interaction" and that there is "an [a]lmost [b]lank [s]late of [a]nalysis").

13. *See, e.g.*, *Comeau*, 455 N.Y.S.2d at 873 ("We note only that punitive damages are not subject to apportionment.").

punishment and deterrence as opposed to compensating for a harm[14] – their treatment under comparative fault principles must necessarily be separate.[15] Accordingly, the majority of courts that have considered, at any level of analysis, the application of comparative fault principles to punitive damage awards have declined to recognize an intersection between the two areas of law.[16]

The precise means by which courts have rejected such apportionment of fault have varied.[17] For instance, some courts have not focused specifically on applying comparative fault principles to punitive damages, but rather whether a state's comparative negligence statute applies to intentional acts for which punitive recovery could be implicated.[18] Punitive damages, however, may be awarded for more than just intentional acts, which strains these courts' analyses. Punitive damages are sometimes available where an intentional act has been committed, but may also be available in cases of negligence (often as a "gross negligence" standard) or recklessness.[19] Neverthe-

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14. *See* BMW, Inc. v. Gore, 517 U.S. 559, 568 (1996) ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition.").

15. *See infra* notes 25-36 and accompanying text.

16. *See* HENRY WOODS & BETH DEERE, COMPARATIVE FAULT § 7.5, at 165 (3d. ed. 1996) (stating that the majority of jurisdictions will not apportion punitive damages award according to comparative fault principles); David W. Leebron, *An Introduction to Products Liability: Origins, Issues and Trends*, 1990 ANN. SURV. AM. L. 395, 450 n.272 (1991) ("[C]ourts have split on whether such punitive damages are reduced by plaintiff's comparative fault."). For case examples, see Friley v. Int'l Playtex, Inc., 604 F. Supp. 126, 126 (W.D. Mo. 1984); Amoco Pipeline Co. v. Montgomery, 487 F. Supp. 1268, 1273 (W.D. Okla. 1980); Tampa Elec. Co. v. Stone & Webster Eng'g Corp., 367 F. Supp. 27, 38 (M.D. Fla. 1973); Hondo's Truck Stop Cafe, Inc. v. Clemmons, 716 S.W.2d 725, 726 (Tex. Ct. App. 1986); Danculovich v. Brown, 593 P.2d 187, 193-94 (Wyo. 1979); *see also supra* note 8 and accompanying text.

17. As the Kansas Supreme Court in *Bowman v. Doherty* explained:

> From a review of the cases of states which have addressed this issue, various approaches to this question emerge. Some states, relying on the essential difference between wanton conduct and negligence refuse to allow any damages, actual or exemplary, to be reduced by comparative fault. Other courts refuse to apportion punitive damage awards, keeping intact the policy of punishing wanton or intentional acts.

686 P.2d 112, 121 (Kan. 1984).

18. *See infra* Part II.B.1.

19. *See, e.g.*, FLA. STAT. ANN. § 768.72(2) (West, Westlaw through 2012 Reg. Sess.) ("intentional misconduct or gross negligence"); TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(a)(3) (West, Westlaw through 2011 Reg. Sess.) ("gross negligence");

less, some courts have used the application of comparative fault principles to intentional acts as the predicate for broadly rejecting comparative fault where punitive damages could be at issue in contexts involving unintentional acts.

For example, the New Jersey Supreme Court, in *Blazovic v. Andrich*,[20] held that although the state's Comparative Negligence Act extends beyond ordinary negligence actions to include intentional torts, it does not apply to allow comparative fault apportionment of punitive damages for any type of act.[21] Interestingly, the court rejected "the concept that intentional conduct is 'different in kind' from both negligence and wanton and willful conduct" for the purpose of applying apportionment principles, reasoning that "consistent with the evolution of comparative negligence and joint-tortfeasor liability in this state, we hold that responsibility for a plaintiff's claimed injury is to be apportioned according to each party's relative degree of fault, including the fault attributable to an intentional tortfeasor."[22] But, the court continued, "[w]here tortious conduct merits punitive as well as compensatory damages, a plaintiff's comparative fault will reduce recovery only of compensatory damages."[23] Thus, the court adopted the unique position of permitting apportionment of compensatory damages for intentional torts, yet denying apportionment from *ever* applying to reduce an award of punitive damages, even if pursuant to a less culpable unintended act.[24]

Other courts have more directly addressed the application of comparative fault principles to punitive damages. Instead of distinguishing intentional acts from the scope of comparative negligence statutes, these courts have looked to the specific purpose of punitive damages as compared with compensatory damages. For example, the Iowa Supreme Court, in *Godberson v. Miller*,[25] interpreted the state's statutory comparative fault scheme to find that punitive damages were not subject to comparative fault because "punitive damages are designed to exact a penalty from the defendant for conduct that

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Wisker v. Hart, 766 P.2d 168, 173 (Kan. 1988) ("gross negligence"); Seals v. St. Regis Paper Co., 236 So. 2d 388, 392 (Miss. 1970) (gross negligence and "reckless indifference to the consequences"); Rubeck v. Huffman, 374 N.E.2d 411, 413 (Ohio 1978) ("caused by intentional, reckless, wanton, willful and gross acts or by malice inferred from conduct and surrounding circumstances" (internal quotation marks omitted)); *see also* SCHWARTZ, COMPARATIVE NEGLIGENCE, *supra* note 1, § 20.02, at 454-55 (discussing transition from punitive damages being awarded for intentional conduct to less culpable conduct); James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic that Has Outlived its Origins*, 37 VAND. L. REV. 1117, 1130-38 (1984) (discussing standards of conduct giving rise to punitive damages award).

20. 590 A.2d 222 (N.J. 1991).

21. *See id.* at 231-32.

22. *Id.*

23. *Id.* at 231.

24. *See id.* at 231-32.

25. 439 N.W.2d 206 (Iowa 1989).

is grossly negligent, wanton, willful or reckless."[26] Here, the defendant argued that the comparative fault statute's definition of "fault" as an act "in any measure negligent or reckless" should apply to punitive damages arising from such conduct.[27] While the court noted that the defendant's argument "carries a certain technical appeal," it nevertheless reasoned that "[p]unishment, not compensation, is the goal" of punitive damages and the goal of the statute was "proportional compensation, not punishment."[28]

The Kansas Supreme Court reached a similar result in *Bowman v. Doherty*.[29] Here, the court declined to reduce a $900 punitive damage award resulting from legal malpractice after the trial court reduced the actual compensatory award of $100 by half to account for the plaintiff's negligence (30%) and that of an assistant district attorney (20%).[30] The result, therefore, was that the ratio of punitive damages to compensatory damages owed by the defendant went from nine-to-one to eighteen-to-one following the application of comparative fault to only the compensatory award.[31] The court explained its decision not to apply comparative fault to the punitive award because "[a]n award of punitive damages is to punish the wrongdoer, not to compensate for the wrong."[32] The court reasoned that because these "[c]onsiderations are different," it therefore followed that "[p]unitive damages and comparative fault are separate" and do not intersect.[33]

The majority of other courts specifically deciding whether comparative fault principles may apply to a punitive damage award have adhered to this same basic rationale.[34] Some other courts, however, have expressly declined to decide this issue so as to avoid the risk of painting with too broad of a brushstroke.[35] Still others have declined to address the issue because the parties failed to identify that it was an issue to be considered.[36]

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26. *Id.* at 208; *see also* Reimers v. Honeywell, Inc., 457 N.W.2d 336, 339 (Iowa 1990).

27. *Godbersen*, 439 N.W.2d at 208.

28. *Id.*

29. 686 P.2d 112, 122 (Kan. 1984).

30. *See id.* at 117, 122.

31. *See id.*

32. *Id.* at 122.

33. *Id. But see* Sandifer Motors, Inc. v. City of Roeland Park, 628 P.2d 239, 248 (Kan. Ct. App. 1981) (stating that "where tort liability is predicated on conduct less culpable than 'intentional' the general rule is to compare fault and causation").

34. *See, e.g.*, Waddill v. Anchor Hocking, Inc., 27 P.3d 1092, 1099 (Or. Ct. App. 2001), *vacated on other grounds*, 538 U.S. 974 (2003); Tucker v. Marcus, 418 N.W.2d 818, 828 (Wis. 1988); *supra* note 16 and accompanying text.

35. *See, e.g.*, Downing v. United Auto Racing Ass'n, 570 N.E.2d 828, 843 (Ill. App. Ct. 1991) ("We note that the jury in the instant cause awarded only compensatory damages, and we express no opinion with respect to whether comparative fault principles apply to a plaintiff's award for punitive damages."), *abrogated by* Burke v. 12 Rothschild's Liquor Mart, Inc., 593 N.E.2d 522 (Ill. 1992); Dunn v. Ill. Cent. Gulf

On the opposite end of the spectrum are a handful of cases that have applied comparative fault principles to reduce a punitive damages award.[37] Significantly, this body of case law has supported the intersection of comparative fault with punitive damages under both common law and a state's statutory comparative fault regime. For instance, the Nevada Supreme Court in *Wilson v. Pacific Maxon, Inc.*,[38] affirmed a trial court's award of punitive damages that had been reduced by the opposing party's comparative fault.[39] The case involved competing claims arising from the sale of a business and its eventual return to the seller following the buyer's default.[40] The trial court awarded the seller $10,000 in punitive damages for the "willful and malicious removal of property" and related property damage while the property was briefly in the buyer's possession.[41] The trial court stated that the "[punitive] damages would have been more substantial," but the fact that the seller misrepresented the value of the business by altering the initial appraisal report functioned to reduce the punitive award.[42]

On appeal, the state high court explained that, "[Seller] primarily argues that with regard to punitive damages our stated policies 'to punish the wrongdoer . . . and to deter others from acting in similar fashion,' would be offended if punitive damages were subject to reduction by reason of any fault of the injured party."[43] The court flatly rejected this argument.[44] Instead, it provided a more measured and flexible approach, holding "the trier of fact, in assessing punitive damages, may consider 'all the circumstances attending the particular transaction involved, including any mitigating circumstances which may operate to reduce without wholly defeating such damages.'"[45]

R.R., 574 N.E.2d 902, 910 (Ill. App. Ct. 1991) ("In passing upon plaintiff's cross-appeal, we need not consider plaintiff's contention that any reduction in the punitive damages award on comparative fault principles is contrary to public policy as we have determined no punitive damages award should have been made.").

36. *See, e.g.*, Niver v. Travelers Indem. Co., 433 F. Supp. 2d 968, 994 (N.D. Iowa 2006) ("Niver asserts that comparative fault principles have no application to punitive damages. Travelers apparently agrees, because it states that it will not present any evidence regarding comparative fault.").

37. *See* Leebron, *supra* note 16, at 450, 450 n.272 (noting the "split" among courts on apportionment of punitive damages is based on a plaintiff's comparative fault).

38. 686 P.2d 235 (Nev. 1984) (per curiam), *abrogated by* Ace Truck & Equip. Rentals, Inc. v. Kahn, 746 P.2d 132 (Nev. 1987), *and modified by*, 714 P.2d 1001 (Nev. 1986).

39. *See id.* at 237.

40. *See id.* at 236.

41. *Id.*

42. *Id.* at 237.

43. *Id.* (quoting Bader v. Cerri, 609 P.2d 314, 318 (Nev. 1980)).

44. *See id.*

45. *Id.* (quoting Hannahs v. Noah, 158 N.W.2d 678, 683 (S.D. 1968)).

The Colorado Supreme Court, in *Lira v. Davis*,[46] similarly permitted the application of comparative fault principles when "consider[ing] the interrelationship of the comparative negligence, the pro rata liability, and the exemplary damages statutes" in the state.[47] This case arose out of an automobile accident in which the trial court apportioned fault among five parties, and reduced a punitive damages award against one party who was found 50% responsible for the accident by 50%.[48] The Colorado Court of Appeals reversed this decision, finding that exemplary damages awards could not be reduced by the plaintiff's comparative negligence.[49] The state supreme court, sitting *en banc*, considered this precise issue and reversed the court of appeals' ruling.[50] The Colorado Supreme Court held that while comparative negligence did not apply *directly* to reduce a punitive damages award, the state's statute setting forth a one-to-one ratio of punitive to compensatory damages applied to reduce any punitive damages award to the amount of compensatory damages reduced through the application of comparative fault.[51] Thus, in the instant case, the result was the same as if comparative fault had been applied to directly reduce the punitive damage award.[52]

In *Parr v. Central Soya Co.*,[53] a federal district court in Michigan upheld the application of comparative fault principles to an award of exemplary damages when examining the issue under both common law and statutory authority. In noting that "Michigan has adopted comparative negligence both judicially and legislatively," the court engaged in a careful analysis of Michigan law and the law in "sister jurisdictions" around the country to determine if an award of exemplary damages arising from a defective product could be reduced by the application of comparative fault.[54] The court reasoned that because the Michigan Supreme Court had stated unequivocally that "'comparative negligence should be applied in all common-law tort actions sounding in negligence where the defendant's misconduct falls short of being intentional,'" allowing the application of comparative fault would "comport[] with the policies underlying adoption of pure comparative negligence."[55] In addition, the court found "unpersuasive" the authority of other jurisdictions denying the application of comparative fault principles, holding instead that be-

46. 832 P.2d 240 (Colo. 1992) (en banc).

47. *Id.* at 241.

48. *See id.*

49. *See id.*

50. *See id.* at 246.

51. *See id.* at 243-46.

52. *See id.* at 244. The high court stated that the result of the case, whereby the final punitive damage award was the same as if comparative fault applied directly to reduce the award, would be different given other fact patterns. *See id.* at 244 n.5.

53. 732 F. Supp. 738 (E.D. Mich. 1990).

54. *Id.* at 742, 743 n.3.

55. *Id.* at 743 (quoting Vining v. City of Detroit, 413 N.W.2d 486, 489 (Mich. Ct. App. 1987)).

cause exemplary damage awards in Michigan are, in part, intended "to compensate plaintiffs for injuries," it followed that consideration of comparative fault was part of that calculation.[56]

Other courts have reached similar results.[57] Often they have done so without focusing on the precise question of whether comparative fault applies directly to a punitive damage award, but rather whether the proper consideration of comparative fault for compensatory awards necessarily requires reassessment of punitive damages.[58] For example, the Supreme Court of Alaska in *Shields v. Cape Fox Corp.*,[59] broadly held that it was reversible error to not include a comparative fault instruction for claims arising from an alleged breach of a fiduciary duty.[60] There, the trial court awarded $300,000 in punitive damages against several defendants in relation to such alleged misconduct.[61] In reversing and vacating the decision, the state's high court stated that "[b]ecause comparative fault is relevant to punitive damages, a new trial as to [plaintiff's] entitlement to punitive damages and the amount of punitive damages is also required."[62]

On other occasions, courts have directly applied comparative fault principles to punitive awards without expressly recognizing or explaining such application.[63] At other times, courts keenly aware of the implications of

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56. *Id.* at 743 n.3.

57. *See, e.g.*, Haskell v. Tan World, Inc., No. LACV041637, 2003 WL 24054815, at *1 (Iowa Dist. Ct. Dec. 9, 2003) ("If Plaintiff's negligence were relevant in the awarding of punitive damages, comparative fault would apply to punitive damages."); Pedernales Elec. Coop., Inc. v. Schulz, 583 S.W.2d 882, 884-85 (Tex. Civ. App. 1979) (upholding reduction of punitive damages award by percentage of plaintiffs' negligence); *see also* Leebron, *supra* note 16, at 450; Dougherty, *supra* note 7, § 1.

58. *See, e.g.*, Austin v. Chisick (*In re* First Alliance Mortg. Co.), No. SA CV 01–971 DOC, 2003 WL 21530096, at *9 (C.D. Cal. June 16, 2003) (noting trial court reduced compensatory damages to approximately $5 million based on comparative fault and granted a motion for a new trial on the issue of punitive damages); Watts v. Ferrellgas, L.P., No. B182060, 2006 WL 903709, *5 n.12 (Cal. Ct. App. Apr. 10, 2006) ("Needless to say, the trial court's erroneous summary adjudication ruling, along with its decision to remove the issue of comparative fault from the jury, compel retrial not only on liability but also on the issues of compensatory damages *and* punitive damages.") (emphasis added).

59. 42 P.3d 1083 (Alaska 2002).

60. *See id.* at 1088-90.

61. *See id.* at 1085.

62. *Id.* at 1092.

63. *See, e.g.*, R.J. Reynolds Tobacco Co. v. Townsend, 90 So. 3d 307, 310 n.2 (Fla. Dist. Ct. App. 2012) ("Nothing in the record suggests that the trial court ordered the reduction because it found the $80 million award excessive and a $40.8 million award appropriate; rather, it appears the reduction was simply the result of a mathematical calculation by the trial court based on the comparative fault percentage found by the jury: $80 million x 51% = $40.8 million"); Cotter v. Miller, 54 S.W.3d 691,

whether, and, if so, how comparative fault may apply directly to punitive damage awards have specifically opted to leave the issue open for determination at a later time.[64]

These examples reveal that while the majority of courts that have considered whether comparative fault should apply to awards of punitive damages have declined to recognize an intersection, there exists a significant minority endorsing the practice. In any event, as explained above, the precise issue has not yet received the degree of treatment and analysis by courts necessary to form a clear consensus as to whether an intersection should be recognized. As the next section explains, there are other signs in the development of comparative fault principles and tort law generally that may lead courts to take up or reassess how apportionment might be applied to more justly award punitive damages.

B. Evolutionary Signs

A clear trend in the development of comparative fault principles has been to more carefully parse wrongful conduct among parties and match that conduct to liability and an ultimate award of damages. Indeed, the core concept underlying the widespread change by states from contributory negligence to comparative fault systems was to more carefully tie each parties' actions to their respective liability, and avoid blunt "all or nothing" rules precluding recovery where a plaintiff was even marginally to blame for his or her injury.[65] This trend towards greater precision in liability and damages has continued under modern comparative fault systems. Two ways this has occurred include the application of comparative fault among negligent and intentional tortfeasors and the application of comparative fault among multiple tortfeasors where punitive damages are awarded.

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695 n.1 (Mo. App. W.D. 2001) (noting "[t]he trial court indicated in its order that it intended to apply the percentages of comparative fault to the punitive damages (aggravating circumstances) portion of the case" and declining to disturb that holding); Ali v. Fisher, No. E2003–00255–COA–R3–CV, 2003 WL 22046673, at *4 (Tenn. Ct. App. Aug. 29, 2003) (jury awarded $25,000 in punitive damages and allocated based on comparative fault of two defendants; $20,000 to one found 80% responsible and $5,000 to another found 20% responsible for plaintiff's injury), *aff'd*, 145 S.W.3d 557 (Tenn. 2004); *see also* Perrine v. E.I. du Pont de Nemours & Co., 694 S.E.2d 815, 881 (W.Va. 2010) (reducing total punitive damage award by 40% following court's determination that punitive damages were not available for medical monitoring award that made up 40% of total award).

64. *See, e.g.*, Arch Chemicals, Inc. v. Radiator Specialty Co., No. 07–1339–HU, 2011 WL 597042, at *3 (D. Or. 2011) (analyzing Oregon Supreme Court precedent to conclude that "the question of an apportionment for fault leading to liability for punitive damages remains").

65. *See* Calabresi & Cooper, *supra* note 9, at 868-72.

1. Comparative Fault Applied Among Negligent and Intentional Tortfeasors

Perhaps the most encouraging development with regard to providing fair and efficient compensation to injured parties, whether for punitive damages or other types of damages, is the decision by some state high courts and legislatures to apply comparative fault to both negligent and intentional tortfeasors.[66] Stated plainly, this means that in cases where multiple parties have caused an injury, and at least one acted intentionally in doing so, the court will compare the fault of the intentional and negligent tortfeasors and allocate damages among them as opposed to holding the intentional tortfeasor responsible for the entire injury. Consequently, the intentional tortfeasor is not punished by having to overcompensate an injured party, and a negligent tortfeasor cannot escape responsibility for his or her negligent act. Courts, therefore, view the wrongful conduct as "different in degree," not "different in kind" such that the conduct should be treated separately, and can weigh the egregiousness of each parties' conduct when apportioning damages.[67]

The aforementioned *Blazovic* case presents an example of such a development in the law, even though the court stopped short of applying comparative fault principles to punitive awards and produced the somewhat inconsistent result of applying comparative fault to compensatory awards arising from intentional acts but rejecting comparative fault for punitive awards arising from potentially unintentional acts.[68] Nevertheless, the case illustrates how courts have, at least with regard to compensatory awards, broadly construed comparative fault principles to reach more exacting determinations of damages.

A number of other courts have adopted this approach.[69] For example, in 2006, the Kentucky Supreme Court, in a case of first impression, held that the

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66. *See* Hilsmeier v. Chapman, 192 S.W.3d 340, 344 (Ky. 2006); Reichert v. Atler, 875 P.2d 379, 381 (N.M. 1994); Field v. Boyer Co., 952 P.2d 1078, 1079 (Utah 1998); Bd. of Cnty. Comm'rs *ex rel.* Teton Cnty. Sheriff's Dept. v. Bassett, 8 P.3d 1079, 1083 (Wyo. 2000).

67. Blazovic v. Andrich, 590 A.2d 222, 231-32 (N.J. 1991); *see also* Robbins v. McCarthy, 581 N.E.2d 929, 932 (Ind. Ct. App. 1991) ("Like the issues created by a comparative analysis of fault, the issues produced by the punitive damages concept are inherently issues of degree; for example, was the defendant's conduct slightly negligent, negligent, very negligent, grossly negligent, wanton or heedless?").

68. *See Blazovic*, 590 A.2d at 231-32.

69. *See, e.g.*, Harvey v. Farmers Ins. Exch., 983 P.2d 34, 39 (Colo. App. 1998); Specialized Commercial Lending, Inc. v. Murphy-Blossman Appraisal Servs. Inc., 978 So. 2d 927, 938-39 (La. Ct. App. 2007) ("[A]pplication of Louisiana's pure comparative fault system requires that the fault of both negligent and intentional tortfeasors be assessed by the factfinder"); *Reichert*, 875 P.2d at 382-83 (holding a tavern owner's negligent failure to protect patrons from foreseeable harm may be compared to the intentional conduct of another tortfeasor); *Field*, 952 P.2d at 1080 (holding that

state's General Assembly was "unambiguous" in its intent to have "comparative fault principles apply equally to negligent and intentional [torts]."[70] Similarly, in 2000, the Wyoming Supreme Court interpreted its comparative fault statute to include "willful and wanton or intentional" acts to be compared with negligent tortfeasors.[71] While this approach remains the minority view across the country,[72] such decisions, by both courts and state legislatures, illustrate that this area of law is by no means settled; it continues to evolve in a manner allowing more precise consideration of a party's proportionate fault, regardless of its degree.

2. Comparative Fault Applied to Punitive Damage Awards of Multiple Tortfeasors

A second development or "sign" of changing attitudes to how comparative fault principles have traditionally applied relates to apportionment of punitive damage awards where these damages are awarded against multiple tortfeasors.[73] In such cases, courts have traditionally applied joint liability so that punitive damages could be sought from any of the tortfeasors. Most states now, however, have abolished or modified joint liability – an earlier

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"fault" as contained in Utah's comparative fault scheme included intentional acts). *But see* Le v. Nitetown, Inc., 72 So. 3d 374, 378-79 (La. Ct. App. 2011) (precluding comparative fault statute from applying to reduce nightclub patrons' damages awards against nightclub, even though patron was found twenty per cent at fault for his injuries, where jury found nightclub's bouncers used excessive force against patrons and committed intentional act); Limbaugh v. Coffee Med. Ctr., 59 S.W.3d 73, 87-88 (Tenn. 2001) (where harm arises from the tortious acts of an intentional tortfeasor as a result of a foreseeable risk created by a negligent defendant, each tortious actor is jointly and severally liable for the plaintiff's damages).

70. *Hilsmeier*, 192 S.W.3d at 344-45.

71. *Bassett*, 8 P.3d at 1083.

72. *See* Allan L. Schwartz, *Applicability of Comparative Negligence Principles to Intentional Torts*, 18 A.L.R. 5th 525, § 2a (1994).

73. As the Maryland Court of Appeals in *Embrey v. Holly* explained:

> Many states . . . have adopted the rule that punitive damages may be apportioned between wrongdoers either by providing varying amounts of such awards or by levying exemplary damages against some of the defendants but not others. In our view, this is the most sensible approach to the subject, for punitive damages, in order to be fair and effective, must relate to the degree of culpability exhibited by a particular defendant . . . . Punitive damages, in essence, represent a civil fine, and as such, should be imposed on an individual basis.

442 A.2d 966, 973 (Md. 1982).

evolutionary step towards more just damage awards – so that parties are generally limited to the maximum harm individually caused, or caused when acting in concert with others.[74] But courts are "widely divided" when it comes to whether, in an action against joint or multiple tortfeasors, punitive or exemplary damages may be apportioned among the defendants.[75]

A growing number of courts have held that punitive damages may be apportioned among joint or multiple tortfeasors "depending upon the differing degree of culpability or the existence or nonexistence of actual malice on the part of the defendants."[76] This more flexible, modern approach allows a court to consider varying levels of culpability, while avoiding the harsh result in the case of joint liability of allowing a plaintiff to collect the total punitive damages award from a defendant whose conduct only amounted to recklessness amidst a field of intentional actors.[77] Interestingly, courts have also allowed such apportionment of punitive damages even where the compensatory award was not subject to apportionment.[78]

These gradual shifts in how comparative fault principles have been applied in the time since the vast majority of states abandoned a contributory

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74. According to one survey of state joint and several liability laws:

> [A] majority of states have abolished or modified the traditional doctrine of joint liability. Eighteen states have abolished joint liability and replaced it with pure several liability, under which each defendant is liable for its proportionate share of fault for the harm. Four states have eliminated joint liability for noneconomic damages. Fourteen states have abolished joint liability in cases where the defendant's comparative responsibility is below some threshold level. Some states provide other limits on joint liability. Nine states and the District of Columbia have yet to generally abolish or modify their joint liability rules.

Steven B. Hantler, Mark A. Behrens, & Leah Lorber, *Is the "Crisis" in the Civil Justice System Real or Imagined?*, 38 LOY. L.A. L. REV. 1121, 1148-50 (2005) (footnotes omitted).

75. *See* D. E. Ytreberg, *Apportionment of Punitive or Exemplary Damages as Between Joint Tortfeasors*, 20 A.L.R. 3d 666, § 2 (1968); *see also* Note, *Apportionment of Punitive Damages*, 38 VA. L. REV. 71, 72 (1952).

76. Ytreberg, *supra* note 75, at § 2; *see also* Cheek v. J.B.G. Props., Inc., 344 A.2d 180, 190 (Md. Ct. Spec. App. 1975) ("Those jurisdictions favoring apportionment seem to rely on the reasonable view that a jury should be permitted to vary the damages depending upon the degree of culpability since punitive or exemplary damages are not compensation for injury; instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.").

77. *See supra* notes 66-67 and accompanying text.

78. *See* Ford Motor Credit Co. v. Hill, 245 F. Supp. 796, 797-98 (W.D. Mo. 1965).

negligence system illustrate a trend towards greater flexibility in pinpointing the correct amount of recovery – both compensatory and punitive – against tortfeasors. Juxtaposing the current state of law regarding the application of comparative fault principles to punitive damage awards, there is an avenue for this trend to develop further. As the next section explains, there are sound public policy rationales for endorsing the minority approach across the country and applying comparative fault principles to punitive damage awards.

III. PUBLIC POLICY CONSIDERATIONS FOR APPLYING COMPARATIVE FAULT TO PUNITIVE DAMAGE AWARDS

The decision of whether to apply comparative fault principles to an award of punitive damages is, at bottom, primarily one of policy. Courts have discretion in interpreting the intent and scope of comparative fault statutes and in developing the common law, and, as explained in the previous section, have exercised that discretion on a number of occasions.[79] This section examines the policy considerations for and against applying comparative fault to punitive damage awards to determine the soundest approach for the future development of tort law.

A. Responding to Policy Arguments Against Applying Comparative Fault to Punitive Damage Awards

The most often cited policy argument against applying comparative fault to punitive damage awards is that it is akin to comparing apples and oranges: comparative fault regimes are designed to calculate the appropriate amount of compensatory recovery for a wrongful harm caused by another, and punitive damages exist on an entirely separate plane designed to provide punishment for the reprehensibility of the harm caused and deter its future occurrence.[80] On first glance, this view holds some superficial appeal. The modern purposes behind compensatory damages and punitive damages are indeed different.[81] But the deeper question is whether that difference in purpose overcomes the more fundamental objective of the tort system to properly "right a

79. *See supra* Part II.A.

80. *See supra* notes 25-34 and accompanying text; *cf.* J. Tayler Fox, Note, *Can Apples Be Compared to Oranges? A Policy-Based Approach for Deciding Whether Intentional Torts Should Be Included in Comparative Fault Analysis*, 43 VAL. U. L. REV. 261, 294 (2008) (examining the application of comparative fault principles to intentional torts and arguing that intentional torts should not be included in states' comparative fault schemes).

81. *See supra* note 14 and accompanying text. *But see infra* notes 131-33 and accompanying text.

wrong";[82] an objective that sometimes necessitates an award of punitive damages to accomplish.[83]

Courts rejecting any application of comparative fault to punitive damage awards have often began and ended their analysis with such an apples to oranges justification.[84] They have not considered whether, despite distinct purposes, intersection would achieve the larger objectives of greater fairness and justice to the parties and prevention of disproportionate punitive damage awards.[85] Only a few courts have endeavored to scratch beneath the surface. Of them, the South Carolina Court of Appeals decision in *Cantrell v. Clark* provides one of the more thoughtful discussions.[86] Here, the court affirmed a trial court's decision not to apportion punitive damages according to comparative fault principles in an action arising out of a fatal automobile accident. A jury found the defendant Cantrell 84% at fault for the accident, and liable for actual and punitive damages totaling $78,000 and $25,750 respectively.[87] On appeal, Cantrell argued that "because punitive damages have a compensatory component in South Carolina, they should bear a reasonable relationship to the plaintiff's conduct and should be reduced by the amount of the plaintiff's negligence."[88]

While the court began with the familiar argument that the purposes of punitive damages and compensatory damages are distinct, it did not immediately end its analysis there. Instead, the court acknowledged that after the South Carolina Supreme Court judicially adopted comparative negligence, the court of appeals had "re-examined several traditional tort doctrines" to see how they might be affected.[89] The court also recognized that "punitive damages have received increasing academic criticism in recent years" and calls

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82. *See* DAN B. DOBBS, THE LAW OF TORTS § 9, at 14-15 (2000); VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS 1–2 (11th ed. 2005) [hereinafter PROSSER, WADE AND SCHWARTZ'S TORTS]. *See generally* John H. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315 (1894).

83. *See* DOBBS, *supra* note 82, § 381, at 1062 (2000) ("Because punishment does not adequately describe the bases for [punitive] damages, they are sometimes called extracompensatory damages.").

84. *See supra* Part II.A.

85. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 1 cmt. a (2000) ("Comparative responsibility has a potential impact on almost all areas of tort law.").

86. 504 S.E.2d 605, 609-10 (S.C. 1998); *see also* Virginia Garner Shelley, Clark v. Cantrell*: A Windfall for Negligent Plaintiffs or Preserving the Goals of Punitive Damages?*, 52 S.C. L. REV. 427, 436-37 (2001).

87. *Clark*, 504 S.E.2d at 608. The defendant Cantrell was found to have exceeded the posted 35 mile per hour speed limit while driving with her hazard lights on, purportedly because her gas tank was near empty. *See id.* at 608-09.

88. *Id.* at 609.

89. *Id.*

for reform.[90] Nevertheless, it maintained that "not every tort concept is affected by the adoption of comparative negligence."[91] The court further recognized that the broader purpose of punitive damages in the state is to "vindicate[] a private right," and that "several cases conclude this vindicative quality adds a compensatory purpose."[92] The court even pointed to three other state jurisdictions where "punitive damages are awarded primarily to compensate and incidentally to punish" to support the proposition that punitive damages may also serve a compensatory function.[93] Finally, the court stated that although case law precedent "does not require juries to expressly apportion punitive damages," they may "consider many factors in determining whether to award punitive damages."[94]

However, despite these considerations, the court concluded that the "compensatory purpose served by punitive damages is merely incidental" and the separate purposes of punitive and compensatory damages justified no reduction of the punitive damages award.[95] In reaching this decision, the court expressed its view that the defendant's conduct in causing the fatal accident and showing a lack of remorse was especially "reckless, willful, wanton, [and] malicious."[96] The court, therefore, held that the full amount of punitive damages awarded by the trial court was warranted to adequately deter such conduct in the future.[97]

While *Cantrell* provided a more comprehensive analysis of competing policy considerations, it still reached the same conclusion that the distinct purposes of punitive and compensatory damages nullify potential intersection of comparative fault and a punitive award. The core issue not squarely addressed is whether, and how, the punishment meted out was proportionate to the harm caused or whether there was over-punishment. For example, in the *Cantrell* case, was the defendant who was 84% liable for the harm over-punished by a punitive damage award 16% higher than necessary to serve the punitive function? Such a question may be difficult to answer, especially in light of the volatility and subjective nature of punitive awards.[98] However, that does not mean it should not be answered where a finder of fact has heard all of the evidence and made a determination of the full amount of compensatory and punitive damages.

Such fairness considerations also take on increased significance when a plaintiff has engaged in grossly negligent or reckless conduct that contributes to his or her injury or creates a serious risk of harm to others. For example, if

90. *Id.*
91. *Id.*
92. *Id.* (internal quotations omitted).
93. *Id.* at 610 n.4.
94. *Id.* at 610.
95. *Id.*
96. *Id.*
97. *See id.* at 610-11.
98. *See infra* Part III.B.1.

a plaintiff such as the one in *Cantrell* chooses to drive a motorcycle without a helmet or refrain from wearing a seat belt in a car, such actions create unreasonable risks of harm that should bear on the comparative reprehensibility of a defendant's conduct.[99] If a plaintiff has engaged in reckless behavior creating a risk of harm to others, such as operating a vehicle while intoxicated, there is a compelling public policy argument that such conduct should similarly be compared with that of a defendant so as to not ignore, or even worse reward, the wrongful behavior.[100] Public policy should encourage all parties to exercise due care at all times and be held accountable for their negligent, reckless, or intentional actions, and prevent windfalls to either party by virtue of the happenstance of another. Yet, by viewing punitive damages independently of comparative fault, courts focus only on the "bad acts" of one party – the defendant – and, therefore, place the defendant at risk of over-punishment.

Dismissing such injustice because the underlying purpose of punitive awards differs from compensatory awards, or some other technical justification, masks the more basic public policy goal of "equal justice under law."[101] For instance, the argument that punitive damages must be assessed independently of comparative fault principles because a defendant's wealth may be a factor in awarding them is simply a red herring.[102] Juries may take into account a defendant's wealth in setting and awarding punitive damages, but doing so does not permit them to award disproportionate punishment.[103] Rather, a higher total punitive damage judgment against a wealthy defendant can achieve the policy goal of punishment and deterrence; the "appropriate" amount of such punishment and deterrence would be based upon the defendant's proportionate culpability for causing the harm.[104] A defendant's

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99. *See* Steven B. Hantler, Victor E. Schwartz, Cary Silverman & Emily J. Laird, *Moving Toward the Fully Informed Jury*, 3 GEO. J. L. & PUB. POL'Y 21, 31-35 (2005) (discussing whether juries should be informed of a plaintiff's failure to wear a seat belt).

100. *See id.* at 37-40 (discussing whether juries should be informed of a plaintiff's alcohol and illegal drug use, speeding or sleeping in a motor vehicle accident).

101. *Cf.* Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976) ("The concept of equal justice under law is served by the Fifth Amendment's guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment.").

102. *See, e.g.*, Jordan H. Leibman, *Comparative Contribution and Intentional Torts: A Remaining Roadblock to Damages Apportionment*, 30 AM. BUS. L.J. 677, 680 n.6 (1993) (stating "[l]ogically, punitive damages would be assessed independently of comparative fault principles, because the wealth of the defendant is a factor").

103. *See* BMW, Inc. v. Gore, 517 U.S. 559, 591 (1996) (stating that the wealth of a defendant "provides an open-ended basis for inflating awards," but that "this factor cannot make up for the failure of other factors, such as 'reprehensibility'").

104. *See* Schwartz, *Comparative Fault and Punitive Damages*, *supra* note 12, at 131-32.

wealth merely helps to establish a benchmark for the amount of punishment that is not excessive and is proportionate to the harm caused.[105]

A related argument that has been advanced is that any reduction of punitive damages would reduce the deterrent effect of a punitive award and thus gives parties greater incentive to engage in grossly negligent or intentional misconduct.[106] Such an argument posits that if a defendant's reckless or willful contribution to a harm is very modest, for example only 1%, the deterrent effect would be effectively lost through the application of comparative fault.[107] Consequently, some defendants would have a greater incentive to engage in wrongful acts or not adequately safeguard against harms.

Such a viewpoint also holds some superficial appeal, but ignores the larger issue of whether the law is justly treating the parties for harm that has actually been caused.[108] If a party bears only a small percentage of fault for an injury, yet punitive damages are warranted when considering the reprehensibility of the conduct making up that small percentage, fundamental fairness requires that the party not be disproportionately punished.[109] This notion of fairness is why courts have gradually shifted to apportionment of punitive damages among multiple tortfeasors and apportionment of damages among

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105. *See Gore*, 517 U.S. at 591 ("Since a fixed dollar award will punish a poor person more than a wealthy one, one can understand the relevance of this factor to the State's interest in retribution (though not necessarily to its interest in deterrence, given the more distant relation between a defendant's wealth and its responses to economic incentives).").

106. As the New Jersey Supreme Court in *Blazovic* observed:

> Apportionment of fault between intentional and negligent parties will not eliminate the deterrent or punitive aspects of tort recovery. Where tortious conduct merits punitive as well as compensatory damages, a plaintiff's comparative fault will reduce recovery only of compensatory damages. Because punitive damages are designed to punish the wrongdoer, and not to compensate the injured party, they can neither be apportioned nor subject to contribution among joint tortfeasors. That principle will accomplish the goal of equitably dividing liability for a plaintiff's compensatory damages, while keeping intact the policy of punishing wanton or intentional acts.

Blazovic v. Andrich, 590 A.2d 222, 231-32 (N.J. 1991) (internal citations omitted).

107. *See id.* at 231.

108. *See* Schwartz, *Comparative Fault and Punitive Damages*, *supra* note 12, at 133 ("Deterrence against wrongful conduct works both ways, and the law should apply it both ways.").

109. *See Gore*, 517 U.S. at 580.

negligent and intentional tortfeasors.[110] In addition, and as explained in greater detail in the next section, the Supreme Court of the United States has fashioned guidelines on the limits of punitive damages specifically to prevent disproportionate punitive awards.[111] These criteria cover the precise situation where compensatory damages are modest in amount and a punitive award is many times greater, yet still constitutionally valid.[112]

Further, as a practical matter, the party committing wrongful conduct warranting punitive damages is unlikely to have an incentive to act recklessly or irresponsibly in the future. As courts and commentators have repeatedly appreciated, any punitive damages award can invoke a specter of impropriety about a defendant, regardless of size, stature, or wealth.[113] This shroud of impropriety can adversely impact a defendant in ways beyond the payment of the punitive award, including damaging relations within a community and impairing the defendant's ability to earn a livelihood.[114] Also, if the conduct giving rise to the punitive award is pervasive, such as punitive damages arising from the selling of a product or providing of services, the defendant may be subject to multiple punitive damage awards in other litigation, adding to the deterrent effect.[115]

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110. *See supra* Part II.B.2.

111. *See infra* Part III.B.2.

112. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

113. *See, e.g.*, Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 54 (1991) (O'Connor, J., dissenting) ("[T]here is a stigma attached to an award of punitive damages that does not accompany a purely compensatory award. The punitive character of punitive damages means that there is more than just money at stake."); Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 281 (1989) (Brennan and Marshall, J.J., concurring) (stating that punitive damages can have "potentially devastating" ramifications); Indus. Chem. & Fiberglass Corp. v. Chandler, 547 So. 2d 812, 837 (Ala. 1988) ("Although not imposing the stigma of crime or the unique burdens of imprisonment, punitive damages nonetheless serve to place the defendant on notice that it has engaged in conduct considered intolerable by society and also serves to deter others from following the defendant's example.").

114. *See Haslip*, 499 U.S. at 54-55; *see also* Victor E. Schwartz & Christopher E. Appel, *Putting the Cart Before the Horse: The Prejudicial Practice of a "Reverse Bifurcation" Approach to Punitive Damages*, 2 CHARLESTON L. REV. 375, 388 (2008) [hereinafter Schwartz & Appel, *Putting the Cart Before the Horse*] ("Like many forms of punishment, punitive damages are designed to 'engender adverse social consequences' including, in many instances, debilitating stigma." (quoting Addington v. Texas, 441 U.S. 418, 426 (1979))); Leo M. Romero, *Punitive Damages, Criminal Punishment, and Proportionality: The Importance of Legislative Limits*, 41 CONN. L. REV. 109, 126 (2008) ("Punitive damages, like criminal sanctions, also carry a stigma.").

115. As one commentator wrote: "A single design error, inadequate warning or recurrent manufacturing mistake can permeate an entire product line, resulting in tens, hundreds or thousands of personal injury lawsuits with accompanying punitive damages claims. Individual awards that appear reasonable can aggregate to threaten the very survival of a business entity." Richard A. Seltzer, *Punitive Damages in Mass*

Finally, it is noteworthy that there is no empirical evidence suggesting that a reduction in punitive damages to account for comparative fault would impair the deterrent effect of punitive damages. Several states, for example, do not allow punitive damages, and there is no evidence suggesting that the conduct of either interstate or intrastate defendants is any more egregious or reprehensible in these jurisdictions.[116] Thus, the analogous argument that the application of comparative fault to punitive damages would destroy the deterrent effect of punitive damages is spurious. To the contrary, comparative fault would help courts more accurately and fairly allocate punishment to responsible parties and reduce reliance on ambiguous standards for how punitive damages are awarded.

B. Policy Arguments in Favor of Applying Comparative Fault to Punitive Damage Awards

Beyond the fundamental fairness policy argument rebutting or overriding the distinction in purpose of compensatory and punitive damages, there are several other policy considerations favoring the application of comparative fault principles to punitive damages. First, as discussed at the beginning of this Article, the imposition of punitive damages has changed dramatically since the widespread adoption of comparative fault systems.[117] Punitive damages are awarded in greater size and frequency and may be supported by less culpable conduct than in the past.[118] Second, comparative fault apportionment of punitive damages comports with the United States Supreme Court's gradual case law development seeking to reign in excessive punitive

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Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control, 52 FORDHAM L. REV. 37, 51 (1983); *see also* DOBBS, *supra* note 82, § 382, at 1068 (discussing aggregate imposition of punitive damages); Victor E. Schwartz, Mark A. Behrens & Lori Bean, *Multiple Imposition of Punitive Damages: The Case for Reform* 3-4 (Washington Legal Foundation, Critical Legal Issues, Working Paper Series No. 61, 1995).

116. Nebraska, for example, completely bars punitive damages, and Louisiana, Massachusetts, Washington, New Hampshire, Michigan, and Connecticut generally do not allow punitive damages, except in very limited circumstances. *See* Exxon Shipping Co. v. Baker, 554 U.**S**. 471, 495 (2008) (surveying state law); PRODUCT LIABILITY DESK REFERENCE - A FIFTY-STATE COMPENDIUM (Morton Daller ed., 2008); CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES §78, at 279 (1935) (listing Louisiana, Massachusetts, Nebraska, and Washington as rejecting the common law doctrine of punitive damages). Some commentators have also argued against the imposition of punitive damages. *See* Duffy, *Punitive Damages: A Doctrine Which Should Be Abolished*, *in* DEF. RESEARCH INST., INC., THE CASE AGAINST PUNITIVE DAMAGES 8 (1969).

117. *See supra* notes 1-6 and accompanying text.

118. *See supra* note 3 and accompanying text; *see also* SCHWARTZ, COMPARATIVE NEGLIGENCE, *supra* note 1, § 20.02, at 454 (discussing decisions allowing punitive damages to be awarded for unintentional conduct).

damage awards and introduce greater consistency and fairness for how such awards are determined.[119] Third, applying comparative fault to punitive damage awards would further several positive public policy outcomes, including the reduction of wasteful litigation, fair notice to parties of potential liability exposure, and the more complete fulfillment of the objectives of statutory limits on punitive damages or other civil justice reforms.

1. Punitive Damages: Then and Now

For most courts and legislatures around the country, the debate and major shift from a contributory negligence system to a comparative fault system began during the 1960s.[120] Treatment of punitive damages did not figure prominently in this debate because such awards were relatively uncommon and generally modest in amount.[121] They were reserved for only the most egregious intentional acts.[122] Hence, punitive damages were, at best, an afterthought to how a new comparative fault system would impact longstanding legal claims, defenses, and doctrine that had been part of America since its founding.[123] This effect can be seen by examining the history and development of punitive damages in America.

Punitive damages were first recognized by the English common law in the mid-eighteenth century in cases involving illegal searches and seizures by officers of the Crown.[124] When incorporated into American law, punitive damages were available only in a narrow category of torts involving conscious and intentional harm inflicted by one person on another.[125] Punitive damages provided an auxiliary or "helper" to the criminal law system, which

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119. *See infra* Part III.B.2.

120. *See* PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 9, § 67, at 471 ("[B]y the mid-1960s only seven states had replaced contributory negligence with comparative fault, several states switched over in 1969, and the 1970s and early 1980s witnessed a surge of legislative and judicial action accomplishing the switch.").

121. *See supra* notes 1-6 and accompanying text; *see also* Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 2 (1982) (stating that early awards of punitive damages were "rarely assessed and likely to be small in amount").

122. *See* Schwartz & Appel, *Putting the Cart Before the Horse*, *supra* note 114, at 388 ("Until the mid-twentieth century, punitive damages were available only for a relatively small group of torts involving conscious and intentional harm inflicted by one person on another."); PROSSER, WADE AND SCHWARTZ'S TORTS, *supra* note 82, at 550-51.

123. *See supra* notes 1-6 and accompanying text.

124. *See* Huckle v. Money, (1763) 95 Eng. Rep. 768 (K.B.); Wilkes v. Wood, (1763) 98 Eng. Rep. 489 (K.B.).

125. *See* Victor E. Schwartz et al., *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1007-08 (1999).

in its infancy "punished more severely for infractions involving property damage than for invasions of personal rights."[126]

When first awarded, punitive damages were also firmly rooted in a compensatory purpose, providing a coherent standard for jury consideration and appellate review for excessiveness.[127] They were used to compensate plaintiffs for intangible losses that were not recoverable under the common law.[128] Whether termed "vindictive, exemplary, or punitive damages," such awards were considered so integral to compensation that permitting a jury to reach "another separate sum . . . for the sake of punishment" was considered a reversible error.[129] In 1885, for example, the Texas Supreme Court recognized that "[i]t may be, and is, most likely, true that the whole doctrine of punitory or exemplary damages has its foundation . . . upon which compensation may be given many things which ought to be classed as injuries entitling the injured person to compensation."[130]

By the turn of the twentieth century, American punitive damages had evolved to become vehicles for civil punishment in the majority of courts.[131]

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126. James B. Sales, *The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on the Citadel*, 14 ST. MARY'S L.J. 351, 355 (1983); *see also* Samuel Freifield, *The Rationale of Punitive Damages*, 1 OHIO ST. L.J. 5, 7 (1935); Victor E. Schwartz & Liberty Magarian, *Challenging the Constitutionality of Punitive Damages: Putting Rules of Reason on an Unbounded Legal Remedy*, 28 AM. BUS. L.J. 485, 485-86 (1990); David L. Walther & Thomas A. Plein, *Punitive Damages: A Critical Analysis*: Kink v. Combs, 49 MARQ. L. REV. 369, 371 (1965).

127. As a law review article of the time recognized, "[t]he difficulty of estimating compensation for intangible injuries, was the cause of the rise of this doctrine . . . . [W]hen the early judges allowed the jury discretion to assess beyond the *pecuniary* damage, there being no apparent computation, it was natural to suppose that the excess was imposed as punishment." Edward C. Eliot, *Exemplary Damages*, 29 AM. L. REG. 570, 572 (1881) (presently entitled U. PA. L. REV.) (emphasis in original); *see also* Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 519 (1957) (citing cases of battery, illegal search, and seduction to find that "[i]n the 1760's some courts began to explain large verdicts awarded by juries in aggravated cases as compensation to the plaintiff for mental suffering, wounded dignity, and injured feelings").

128. *See* Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 614-15 (2003). Professor Colby documents that prominent scholars of the time, such as Harvard Law School's Simon Greanleaf, and some courts viewed exemplary damages as wholly compensatory in nature, despite their name. *Id.* at 617-18 (citing 2 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 253, at 240 n.2 (16th ed. 1899); Simon Greenleaf, *The Rule of Damages in Actions Ex Delicto*, 5 W.L.J. 289, 290-96 (1848); Stillson v. Gibbs, 18 N.W. 815, 817 (Mich. 1884); Fay v. Parker, 53 N.H. 342, 379-84 (N.H. 1872)).

129. Bixby v. Dunlap, 56 N.H. 456, 462-64 (N.H. 1876).

130. Stuart v. W. Union Tel. Co., 18 S.W. 351, 353 (Tex. 1885).

131. *See, e.g.*, ARTHUR G. SEDGWICK, ELEMENTS OF DAMAGES: A HANDBOOK FOR THE USE OF STUDENTS AND PRACTITIONERS 86-87 (1896) (outlining objections to the

Yet, as late as the 1930s, some courts continued to limit punitive damages to compensatory purposes.[132] Whether punitive damages were to be constrained to compensatory purposes or allowed for punishment was, at one time, the subject of vigorous scholarly debate.[133] Ultimately, however, the current view of punitive damages as punishment prevailed and "the original compensatory function of exemplary damages came to be filled by actual damages, and courts today are led to speak of exemplary damages exclusively in terms of punishment and deterrence."[134]

It was not until the late 1960s and 1970s that courts began to depart further from the historical moorings of punitive damages and the "intentional tort" requirement.[135] In what has been called an American "tort revolution,"[136] courts began awarding punitive damages in so-called "mass tort liti-

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use of exemplary damages as punishment and finding that they had not generally prevailed).

132. *See, e.g.*, Doroszka v. Lavine, 150 A. 692, 692-93 (Conn. 1930) (finding that the purpose of exemplary damages is "not to punish the defendant for his offense but to compensate the plaintiff for his injuries, and so-called punitive or exemplary damages cannot exceed the amount of the plaintiff's expenses of litigation, less taxable costs"); *see also* Wise v. Daniel, 190 N.W. 746, 747 (Mich. 1922) (recognizing that exemplary damages "may enlarge the compensatory allowance, but they are not to be considered as authorizing a separate sum by way of example or punishment").

133. *Compare* Theodore Sedgwick, *The Rule of Damages in Actions Ex Delicto* (1847) (supporting use of punitive damages as punishment), *with* Simon Greenleaf, *The Rule of Damages Ex Delicto* (1847) (finding that damages in any civil lawsuit are limited to "compensation for some injury sustained"), *reprinted in* 1 THEODORE SEDGWICK, TREATISE ON THE MEASURE OF DAMAGES, OR, AN INQUIRY INTO THE PRINCIPLES WHICH GOVERN THE AMOUNT OF PECUNIARY COMPENSATION AWARDED BY COURTS OF JUSTICE 654-72 (3d ed. 1858).

134. *Exemplary Damages in the Law of Torts*, *supra* note 127, at 520. As the Supreme Court in *Cooper Industries v. Leatherman Tool Group, Inc.* explained:

> Until well into the nineteenth century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time. As the types of compensatory damages available to plaintiffs have broadened, the theory behind punitive damages has shifted toward a more purely punitive . . . understanding.

532 U.S. 424, 438 n.11 (2001) (internal citations omitted).

135. *See supra* note 4 and accompanying text; *see also* PROSSER, WADE AND SCHWARTZ'S TORTS, *supra* note 82, at 554.

136. *See* PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 129 (1988).

gation," particularly in the developing field of product liability.[137] While punitive damages remained available in the traditional one-on-one context for a defendant's intentional wrong to a specific plaintiff, the base for awarding them was broadly expanded to cover conduct that was not intentional in nature. For example, punitive damages became readily available in some states for conduct viewed as reckless, willful and wanton, or grossly negligent.[138]

The focus of punitive damages also shifted away from conduct solely directed toward an actual plaintiff to alleged wrongful conduct by a defendant toward the public at large.[139] For example, while it was difficult to prove that a manufacturer marketed and sold a defective product with the conscious intent of injuring a specific plaintiff, it was easier to establish that the defendant did so "recklessly" in disregard to the possible harm to potential consumers.[140] Similarly, in insurance and other contract cases, courts began to

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137. In 1967, a California appellate court held for the first time that punitive damages were recoverable in a strict product liability action. *See* Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 711-13, 715 (Cal. Ct. App. 1967). Since then, punitive damages awards in product liability cases have proliferated.

138. *See supra* note 19 and accompanying text.

139. *See, e.g.*, Sturm, Ruger & Co. v. Day, 594 P.2d 38, 46-47 (Alaska 1979) (punitive damages available where manufacturer has marketed known defective product in "reckless disregard of the public's safety"), *modified on other grounds*, 615 P.2d 621 (Alaska 1980); Madisons Chevrolet, Inc., v. Donald, 505 P.2d 1032, 1042 (Ariz. 1973) ("[P]unitive damages . . . are applicable where there is a 'reckless indifference to the interest of others'"); Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 382 (Cal. Ct. App. 1981) (interpreting statutory term "malice" to encompass "callous and conscious disregard of public safety" by manufacturer of defective product); Moore v. Jewel Tea Co., 253 N.E.2d 636, 648-49 (Ill. App. Ct. 1969) (plaintiffs were properly allowed to argue that defendant had been "guilty of gross disregard of the rights of the public"), *aff'd*, 263 N.E.2d 103 (Ill. 1970); Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727, 741 (Minn. 1980) (manufacturer "acted in reckless disregard of the public" in marketing non-flame retardant children's pajamas); Wangen v. Ford Motor Co., 294 N.W.2d 437, 442 (Wis. 1980) ("Some commentators speak of the behavior justifying punitive damages as 'flagrant indifference to the public safety.'" (quoting 5 U.S. OF DEP'T COMMERCE, INTERAGENCY TASK FORCE ON PROD. LIAB., PRODUCT LIABILITY: FINAL REPORT OF THE LEGAL STUDY 137 (1977))); RESTATEMENT (SECOND) OF TORTS § 908 cmt. b (1979) ("Reckless indifference to the rights of others and conscious action in deliberate disregard of them . . . may provide the necessary state of mind to justify punitive damages.").

140. In *Toole*, the first case to find that punitive damages were recoverable in a strict product liability action, the California Court of Appeal ruled that the plaintiff was not required to prove that the defendant pharmaceutical company acted with deliberate intent to injure the plaintiff. 251 Cal. App. 2d at 713-14. Rather, the malice in fact standard in California's punitive damages statute applied, and the plaintiff merely had to prove that the defendant acted recklessly and in wanton disregard to the possible harm to others when it marketed, promoted, and sold the anti-cholesterol drug at issue. *See id.* at 715.

allow punitive damage awards in relation to acts of "bad faith,"[141] further broadening the scope of punitive damages while diluting the standard for awarding them.[142]

As a result of these developments, the size and frequency of punitive damage awards "increased dramatically."[143] While traditionally punitive damage awards were comparably sized to the compensatory award, these punitive amounts exploded in the 1970s and 1980s.[144] In addition, "unprecedented numbers of punitive awards in product liability and other mass tort situations began to surface."[145] For example, before 1976, there were only

141. *See* Victor E. Schwartz & Christopher E. Appel, *Common-Sense Construction of Unfair Claims Settlement Statutes: Restoring the Good Faith in Bad Faith*, 58 AM. U. L. REV. 1477, 1483-86 (2009) (discussing the development of insurance bad faith actions at common law); *see also* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 62 (O'Connor, J., dissenting) ("Unheard of only 30 years ago, bad faith contract actions now account for a substantial percentage of all punitive damages awards.").

142. RESTATEMENT (SECOND) OF TORTS § 500 (1965), cmt. f, recognizes that "[r]eckless misconduct differs from intentional wrongdoing in a very important particular":

> While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it. It is enough that he realizes or, from facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless. However, a strong probability is a different thing from the substantial certainty without which he cannot be said to intend the harm in which his act results.

143. George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. CAL. L. REV. 123, 123 (1982); *see also* Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133, 133 (1982) ("Punitive damages are in the air, are on the move. They are now dramatically awarded in cases in which liability of any sort would have been almost out of the question merely fifteen years ago."). Ford Motor Company, for example, reported that less than 0.5% of the products liability complaints filed against it prior to 1970 contained claims for punitive damages, while 27.1% of all such complaints in 1980 sought punitive awards. *See* David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 54 n.258 (1982). If only personal injury lawsuits are considered, the 1980 percentage is higher. *See id.*

144. *See* BLATT ET AL., *supra* note 3, § 1.2, at 5 (1991) ("[G]enerally before 1955, even if punitive damages were awarded, the size of the punitive damage award in relation to the compensatory damage award was relatively small, as even nominal punitive damages were considered to be punishment in and of themselves.").

145. John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 142 (1986); *see also* HUBER, *supra* note 136, at 127; WALTER K. OLSON, THE LITIGATION EXPLOSION 6 (1991).

three reported appellate court decisions upholding awards of punitive damages in product liability cases, and the punitive damages awards in each case were modest in proportion to the compensatory damages awarded.[146] By 1991, the rise in the size and frequency of punitive damage awards led the Supreme Court to conclude that punitive damages had "run wild" in this country.[147] As commentators at the time further recognized, "hardly a month goes by without a multi-million dollar punitive damages verdict . . . ."[148]

Thus, the environment in which courts and legislatures initially failed to address the treatment of punitive damages within a comparative fault system is radically different than it is today.[149] This difference demonstrates the im-

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146. *See* Gillham v. Admiral Corp., 523 F.2d 102, 104, 109 (6th Cir. 1975) ($125,000 compensatory damages, $50,000 attorneys' fees, $100,000 punitive damages); Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 689, 693-94 ($175,000 compensatory, $250,000 punitive damages); Moore v. Jewel Tea Co., 253 N.E.2d 636, 638, 654 (Ill. App. Ct. 1969) ($920,000 compensatory damages, $10,000 punitive damages), *aff'd*, 263 N.E.2d 103 (lll. 1970).

147. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

148. Malcom E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Products Liability Litigation*, 40 ALA. L. REV. 919, 919 (1989), *quoted in Haslip*, 499 U.S. at 62 (O'Connor, J., dissenting). As one scholar further explained:

> In the more than 200 years during which the common law of punitive damages has evolved in this country, only in the last few decades has there been a proliferation of public concerns about the manner in which the law has developed and may continue to develop in the future. . . . [R]ecent years have witnessed explosive growth in the evolution of punitive damage law and practice. This growth manifests itself in the number of cases in which punitive damages are sought; in the variety of causes of action in which they are claimed; and in the different categories of defendants who are exposed to punitive damage awards.

2 JOHN J. KIRCHER & CHRISTINE M. WISEMAN, PUNITIVE DAMAGES: LAW & PRACTICE § 21.1 (2d ed. 2012) (footnotes omitted).

149. Learned Judge Henry Friendly predicted the potential problems of the new expansion of punitive damages law when he wrote in 1967 that,

> The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering . . . . We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.

Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967).

portance of a careful consideration of whether and how comparative fault principles may apply to punitive awards, and the need for some courts to re-examine this issue in light of these and other developments with regard to comparative fault principles over the past half-century.[150]

2. The Supreme Court's Effort to Reign In Punitive Damages

The dramatic rise in the size and frequency of punitive damage awards, coupled with the erosion in standards to allow such awards for unintended conduct, has led the Supreme Court of the United States to closely examine the issue of disproportionate and unjustified punitive awards. The Supreme Court has done so by imposing constitutional limitations on the excessiveness of punitive damage awards; a responsive measure directed at the same public policy goal of curbing disproportionate punishment as the application of comparative fault to punitive damages.

In 1991, when the United States Supreme Court in *Pacific Mutual Life Insurance Co. v. Haslip* recognized that punitive damages awards had "run wild" in this country, the Court indicated that punitive damages are subject to constitutional due process limitations.[151] The Court rooted its decision in the adequacy of procedural protections, finding that the appellate review procedures in the case "impose[d] a sufficiently definite and meaningful constraint on the discretion of [the jury] in awarding punitive damages."[152] Soon after, in *TXO Production Corp. v. Alliance Resources Corp.*,[153] a plurality of the Supreme Court moved the discussion into the realm of substantive due process limits on punitive damages. The Court declined to adopt a bright-line test for the substantive amount of a punitive award, but made clear that "the Due Process Clause of the Fourteenth Amendment imposes substantive limits 'beyond which penalties may not go.'"[154] The Court then returned in *Honda Motor Co. v. Oberg*,[155] to consider the procedural issue of whether a state must provide judicial review of the amount of a punitive damages award, finding that due process requires judicial review of the size of a punitive damages award.

In 1996, the Court in *BMW of North America v. Gore*[156] examined the open question in *TXO* to provide guidance on how to determine whether the

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150. *See supra* Part II.B.

151. *Haslip*, 499 U.S. at 1; *see also* Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 276-77 (1989) (holding that Excessive Fines Clause of the Eighth Amendment does not apply to punitive damages, yet stating in *dicta* that "[t]here is some authority in [the Court's] opinions for the view that the Due Process Clause places outer limits on the size of a civil damages award").

152. *Haslip*, 499 U.S. at 20, 22.

153. 509 U.S. 443, 453-54 (1993).

154. *Id.* at 453-56.

155. 512 U.S. 415, 420, 432 (1994).

156. 517 U.S. 559, 562-63, 568 (1996).

size of a punitive damage award falls outside the limits of due process. In *Gore*, the plaintiff, who purchased a new BMW sedan, experienced $4000 in compensatory damages related to the unauthorized repainting of his car during detailing by the distributor.[157] An Alabama jury returned a $4 million punitive damages verdict, which was later reduced to $2 million by the Alabama Supreme Court.[158] Ultimately, the Supreme Court of the United States decided that the $2 million award still left a punishment that exceeded Alabama's legitimate interests in protecting the rights of its citizens because it relied on out-of-state conduct, and was, therefore, unconstitutionally excessive.[159]

In *Gore*, the Court also provided three "guideposts" for determining whether a punitive damages award is "unconstitutionally excessive."[160] These guideposts include (1) the "degree of reprehensibility of the defendant's conduct,"[161] (2) the ratio of actual damages to punitive damages,[162] and (3) a comparison to "civil or criminal penalties that could be imposed for comparable misconduct."[163] These comparisons of actual damages and punitive damages, and of other similar penalties, serve the same purpose as the application of comparative fault principles to a punitive award. Both are designed to "prohibit[] a State from imposing a 'grossly excessive' punishment on a tortfeasor"[164] and ensure that "a person receive[s] fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."[165]

The Court clarified the *Gore* factors in subsequent cases. In *Cooper Industries, Inc. v. Leatherman Tool Group Inc*.,[166] the Court stated that lower courts must consider all three *Gore* factors when reviewing a punitive damages award for excessiveness and do so through *de novo* review. Then, in *State Farm Mutual Automobile Insurance Co. v. Campbell*,[167] the Court refined these due process factors, instructing courts that the "most important indicium of the reasonableness of a punitive damages award is the degree of

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157. *See id.* at 563-64. The jury apparently calculated the $4 million punitive damage award by multiplying the plaintiff's damage estimate ($4000) by 1000, the number of cars BMW allegedly sold throughout the country under its nondisclosure policy. *See id.* at 564.

158. *Id.* at 565, 567.

159. *Id.* at 585-86.

160. *Id.* at 568, 574-75.

161. *Id.* at 575.

162. *Id.* at 580.

163. *Id.* at 583.

164. *Id.* at 562 (quoting TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 454 (1993)).

165. *Id.* at 574.

166. 532 U.S. 424, 431, 440 (2001).

167. 538 U.S. 408 (2003).

reprehensibility of the defendant's conduct."[168] The Court also declined once again to create a "bright-line ratio which a punitive damages award cannot exceed," but indicated that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[169] The Court noted that in exceptional cases a higher ratio may be justified where "a particularly egregious act has resulted in only a small amount of economic damages."[170] The Court, however, observed that "[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."[171] The Court also reminded lower courts that the "wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award," such that it would allow an otherwise impermissible ratio.[172]

This line of Supreme Court decisions continued in *Philip Morris USA v. Williams*,[173] where the Court explained that juries can consider the harm to others in assessing the reprehensibility of the defendant's conduct, but courts must adequately instruct the jury that it cannot punish the defendant specifically for harm done to others.[174] Rather, the basis for meting out punishment is limited only to harm caused to the particular plaintiff before the court.

These decisions by the Supreme Court show a methodical effort to develop consistent and effective rules to mete out fair, non-excessive punitive damage awards.[175] The application of comparative fault to punitive damages furthers this policy goal. It curbs disproportionate and excessive awards by tethering the award to parties' actual responsibility for the harm and adds greater predictability and fair notice to parties of potential liability. These are stated goals of the Supreme Court in developing the law with regard to punitive damages over the past twenty-five years.

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168. *Id.* at 419 (quoting *Gore*, 517 U.S. at 575) (internal quotation marks omitted).

169. *Id.* at 425.

170. *Id.* (quoting *Gore*, 517 U.S. at 582).

171. *Id.*

172. *Id.* at 427.

173. 549 U.S. 346 (2007).

174. *Id.* at 353 ("[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent . . . .").

175. The Supreme Court has also analyzed the imposition of punitive damages from a common law perspective. *See* Victor E. Schwartz, Cary Silverman & Christopher E. Appel, *The Supreme Court's Common Law Approach to Excessive Punitive Damage Awards: A Guide for the Development of State Law*, 60 S.C. L. REV. 881, 884-91 (2009) (analyzing the Supreme Court's decision regarding punitive damages in Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008)).

3. Comparative Fault Apportionment of Punitive Damage Awards Would Improve the Overall Justice System

A final public policy consideration in evaluating whether to apply comparative fault principles to awards of punitive damages is what this adoption would mean for the justice system as a whole. In addition to improving fundamental fairness in the system by directly tying punitive awards to a parties' actual contribution to a harm, the application of comparative fault to punitive damages could produce other benefits as well. First, it could reduce wasteful litigation whereby parties routinely challenge an amount of punitive damages as excessive and grossly disproportionate to the compensatory award. Litigants today often rely on the Supreme Court's jurisprudence for challenging such awards; comparative fault apportionment could curb these challenges, or, if challenged, encourage settlement by providing parties with less ambiguity in how the award will be evaluated on judicial review. Either of these results could reduce costs to all parties and free up limited judicial resources.

Second, in addition to the fairness and due process considerations in curbing excessive punitive awards, comparative fault apportionment of punitive damages could provide parties with improved notice of their potential liability exposure. This notice helps to provide a level playing field for any potential litigant by reducing the risk of unfair surprise and catastrophic liability. It could also facilitate settlement by giving parties' a better understanding of potential punitive damages award amounts. Further, the public policy supporting such notice is particularly compelling in modern times where a party may not act intentionally to contribute to a harm, but nevertheless be subjected to punitive damages, possibly through multiple litigations involving the same or similar conduct.[176]

Finally, comparative fault apportionment of punitive damages would further the public policy goals in many states that have enacted caps or other limits on punitive damages. Roughly one-half of states legislatively limit the amount of punitive damages that may be awarded, either generally across all actions[177] or in select contexts such as products liability or wrongful death.[178]

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176. *See supra* notes 139-42 and accompanying text.

177. *See, e.g.*, COLO. REV. STAT. ANN. § 13-21-102(1)(a) (West, Westlaw through 2012 1st Extraordinary Sess.) (punitive damages may not exceed compensatory damages); IDAHO CODE ANN. § 6-1604(3) (West, Westlaw through 2012 Reg. Sess.) (punitive damages limited to the greater of $250,000 or three times compensatory damages); IND. CODE ANN. § 34-51-3-4 (West, Westlaw through 2012 Second Reg. Sess.) (punitive damages limited to the greater of three times compensatory damages or $50,000); MO. REV. STAT. § 510.265(1) (Supp. 2011) (punitive damages capped at the greater of $500,000 or five times the net amount of the judgment awarded to the plaintiff against the defendant); MONT. CODE ANN. § 27-1-220(3) (West, Westlaw through 2011) (punitive damage award may not exceed $10 million or 3% of a defendant's net worth, whichever is less).

They have largely done so for the same reasons articulated by the Supreme Court, namely the dramatic increase in the size and frequency of punitive damages over the past several decades and the lack of clear standards in awarding them.[179] Yet caps focus solely on the total amount of punishment awarded; they do not focus on the particular wrongdoing of a plaintiff.[180] This conduct should also be considered in determining punitive damages because often a plaintiff's conduct can cause significant risk of harm to others. It is unsound public policy to allow plaintiffs who are reckless in causing injury to themselves or third parties to recover the full amount of a punitive award, regardless of whether that amount is limited by a legislatively determined maximum amount of punishment.

On balance, the public policy benefits of applying comparative fault principles to punitive damage awards should outweigh the perceived shortcomings. While compensatory and punitive damages support distinct policy goals – although, as discussed above, this divergence was not always the case[181] – the larger policy goal of fairness to litigants through proportionate punishment is the most compelling. Comparative fault apportionment of punitive awards also fits more neatly with the evolution and expansion of punitive damages to include unintentional conduct and the Supreme Court's stated policy goals regarding punitive damages.[182] As the next section will discuss, there are several ways courts can include comparative fault principles in how punitive damages are awarded.

IV. PRACTICAL METHODS FOR APPLYING COMPARATIVE FAULT PRINCIPLES TO PUNITIVE DAMAGE AWARDS

An important preface to deciding whether and how to apply comparative fault apportionment to punitive damage awards is that there is more than one solution. Courts and legislatures can incorporate comparative fault in different ways based on how their states' comparative fault system works. Greater implementation options also allow for incremental development in states that are seeking to more fairly mete out punishment but are cautious about adopting strict, across the board application of comparative fault to punitive damages. Accordingly, this section offers three general approaches for courts and legislatures to consider.

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178. *See* CONN. GEN. STAT. ANN. § 52-240b (West, Westlaw through 2012 Spec. Sess.) (punitive damages in product liability actions limited to two times compensatory damages); ME. REV. STAT. ANN. tit. 18-A, § 2-804(b) (2012) (punitive damages in wrongful death actions limited to $250,000).

179. *See Baker*, 554 U.S. at 506-09 (discussing states' efforts to legislatively limit punitive damages).

180. *See id.* at 511 (recognizing that limits on ratios of punitive damages to compensatory damages reflect a "legislative judgment" of a "reasonable limit overall").

181. *See supra* notes 124-30 and accompanying text.

182. *See supra* Parts III.B.1-2.

A. Punitive Damages Apportionment Based Upon Pure Comparative Fault

The simplest and most straightforward application of comparative fault principles to punitive damages is where these awards are treated the same as compensatory damages. For instance, in a pure comparative fault system where each tortfeasor is assigned a percentage of fault and pays that percentage of the total compensatory award, the tortfeasor's punitive award would likewise be limited to the tortfeasor's percentage of fault.[183] A numerical illustration would be where a jury finds that four defendant tortfeasors wrongfully caused an injury for which each is 25% responsible: if the jury awards $10,000 in compensatory damages and $20,000 in punitive damages, each defendant tortfeasor must pay $2500 in compensatory damages and $5000 in punitive damages.

The benefit of such a system, aside from its simplicity, is that each party pays its fair share to compensate for the harm actually caused and for the penalty associated with that harm.[184] Where the plaintiff bears some responsibility for his or her injury, this measure of comparative fault would also be reflected through a reduction in both a defendant's compensatory and punitive damages award. Similarly, if punitive damages were assessed against some, but not all, of the defendants, each defendant would still only pay that percentage of compensatory and punitive damages for the harm they individually caused.

This approach is also readily compatible with a modified comparative fault system, which most states adopt.[185] The same direct application of

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183. *Cf.* Gail D. Hollister, *Using Comparative Fault to Replace the All-Or-Nothing Lottery Imposed in Intentional Torts Suits in Which Both Plaintiff and Defendant Are at Fault*, 46 VAND. L. REV. 121, 122-24 (1993) (arguing that comparative fault principles should be applied in certain intentional tort cases as a matter of fairness).

184. *Cf.* Eckhardt v. Charter Hosp., Inc., 953 P.2d 722, 731 (N.M. Ct. App. 1997) ("Punitive damages are personal to the wrongdoer, and imply nothing with regard to the liability of or damages owed by other defendants.").

185. As one recent survey states:

> [I]n the United States, five states adopt the contributory negligence rule, which completely bars a plaintiff from getting damage compensation even if the plaintiff has slight negligence. Thirty-three states adopt the "modified" comparative negligence rule, which completely bars a plaintiff from recovery if the plaintiff's negligence is larger than the defendant's fault. The remaining states adopt the "pure" comparative negligence rule, which awards a plaintiff damage compensation according to her relative fault.

comparative fault would apply, presuming the claim itself may be brought. Depending on the jurisdiction, this simply requires that the plaintiff is not more than 50% or 51% at fault for his or her injury.[186] Hence, the approach, adapted to either a comparative fault or modified comparative fault system, embodies the principles of comparative fault in their most pure and unadulterated form.

B. Punitive Damages Apportionment Based Upon Degree of Reprehensibility of Defendant's Conduct Given Plaintiff's Negligent Conduct

A second, more moderate approach to incorporating comparative fault principles into awards of punitive damages is to reduce the punitive damages to reflect the plaintiff's fault for his or her injury. Under this approach, the court would take into consideration the plaintiff's conduct for the exclusive purpose of determining whether the defendant's conduct is less reprehensible, and thus deserving of lesser punishment.[187] For example, if a defendant manufacturer was grossly negligent in designing a product and a jury awarded punitive damages, that amount could be reduced if the plaintiff's negligence increased the total risk of the injury occurring such that the defendant's conduct, when viewed in totality, was less reprehensible. The classic example would be where an automobile accident is alleged to be the result of a manufacturing defect and punitive damages are implicated, but the plaintiff contributed to the accident by driving the car under the influence of alcohol or illegal drugs.

Importantly, this approach is different from directly applying comparative fault apportionment to the punitive damage award in the same manner as under a pure comparative fault system. It would not reduce the amount of punitive damages by the percentage of the plaintiff's fault for the harm requiring compensation, but rather insert a comparative fault analysis of the reprehensibility of the defendant's conduct independent of the compensatory harm and award. The reprehensibility of a party's conduct is, again, "[p]erhaps the most important indicium of the reasonableness of a punitive

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Xinyu Hua, *Product Recall and Liability*, 27 J.L. ECON. & ORG. 113, 114 (2011).

186. *See, e.g.*, IDAHO CODE ANN. § 6-801 (West, Westlaw through 2012 Reg. Sess.) (applying comparative fault when plaintiff is fifty per cent or more at fault); HAW. REV. STAT. ANN. § 663-31 (West, Westlaw through 2012 Reg. Sess.) (applying comparative fault when plaintiff is 51% or more at fault).

187. *See generally* Leonard Charles Schwartz, *The Myth of Nonapportionment Between a Plaintiff and a Defendant Under Traditional Tort Law and Its Significance for Modern Comparative Fault*, 11 U. ARK. LITTLE ROCK L.J. 493, 503-05 (1989) (presently entitled U. ARK. LITTLE ROCK L. REV.) (discussing the development of apportionment by both causation of loss and degree of blameworthiness under tort law).

damages award."[188] Therefore, this approach focuses comparative fault apportionment only on the degree of reprehensibility of a defendant's conduct in light of the plaintiff's conduct.

Building from the example above, if a jury found that a product was defective and the manufacturer was reckless in marketing it, and the jury decided to award punitive damages, that award would be reduced by any culpable conduct of the plaintiff. For instance, if the plaintiff misused the product in a manner contributing to his or her injury or ignored clear warnings for the product's safe use, that conduct could serve to reduce the punitive award against the product manufacturer. In essence, this approach ensures that an award of punitive damages is not arrived at in an isolated manner that only examines the defendant's conduct, but rather, under an analysis that takes into account the totality of the circumstances. As a practical matter, this approach would likely be effectuated by a jury instruction stating the conduct of all of the parties is to be considered in returning a punitive award.

In addition, such an approach is moderate in that it is unlikely to significantly disturb the determination of punitive damage awards for intentional conduct. Stated plainly, where a tortfeasor intentionally or maliciously causes harm to another, the comparative negligence of the plaintiff is unlikely to diminish the comparative reprehensibility of the defendant's intentional act. Therefore, the punitive award would likely be unaffected or only nominally reduced.

Further, because most states do not adopt a pure comparative fault system, and instead apply a modified system,[189] this option might be a preferred "middle ground" choice. The approach incorporates comparative fault principles, yet more indirectly, and can, as a practical matter, leave unaltered those punitive damage awards based on the most egregious, intentional misconduct. Also, when applied to less culpable conduct under a modified comparative fault system, it can provide a relatively narrow window since it is known that the defendant bears primary responsibility for the injury. If the plaintiff was 50% or 51% or more at fault, depending on the state's modified comparative fault rule, the claim could not be brought in the first place.[190]

Moreover, this approach is designed to operate where a plaintiff is less than 50% or 51% at fault for his or her injury, yet still significantly contributed to it, and the injury was not based upon any intentional act by the defendant(s). In such a limited scenario, a court should instruct a jury to apply comparative fault principles in evaluating the reprehensibility of the defendant's conduct and adjust a punitive damages award accordingly.

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188. BMW, Inc. v. Gore, 517 U.S. 559, 575 (1996).

189. *See supra* note 183 and accompanying text.

190. *See supra* note 186 and accompanying text.

C. Punitive Damages Apportionment Based upon Tortfeasor's Contribution to Total Punitive Award

A final way to insert comparative fault principles into the determination of a punitive damages award is to apply a separate comparative fault analysis to the punitive award. This approach represents a middle ground option between the two approaches discussed previously. Here, a percentage of fault would be assigned among each of the parties for their conduct warranting a punitive award, making each party responsible only for that proportionate amount. This analysis would be separate from the direct application of comparative fault based on the contribution to the compensatory damages; it would provide a direct application of comparative fault principles to the reprehensibility of each party's conduct.

An illustration helps to explain the differences. Here, product liability again provides a useful illustration because punitive damages may be awarded where the defendant manufacturer has not committed an intentional tort.[191] Also, a plaintiff may be culpable in some respect for contributing to his or her injury due to a variety of factors, including product misuse or ignoring adequate warnings. There may also be other defendants involved, some of whom share in the blame for the injury and are deserving of punishment, and others who do not deserve to be punished despite a significant contribution to the total compensatory damages incurred.

For example, consider a plaintiff, severely injured in an automobile accident, who sues the automobile manufacturer seeking punitive damages claiming the manufacturer was reckless in allowing the product to be marketed and sold with an alleged defect. If the plaintiff driver was drunk behind the wheel at the time of the accident, this grossly negligent or reckless conduct would be compared with the reprehensibility of the defendant's conduct and each party would be assigned a percentage to apply to the total punitive award. Also, if another driver negligently contributed to the accident and was a defendant in the case, the reprehensibility of her conduct would be considered in the same manner.

In such a scenario, an application of comparative fault to the punitive damages award might not necessarily reflect each party's comparative fault for the compensatory harm. For instance a jury could find that the drunk driving plaintiff was 30% at fault, the automobile manufacturer 20% at fault, and the other driver 50% at fault for the compensatory damages stemming from the accident. But, that same jury could find that the other driver's conduct, which contributed most to the injury, was merely negligent and undeserving of any punitive damages. Both the plaintiff and automobile manufacturer's conduct, however, could be held to rise to a level of reprehensibility deserving of punishment. In such a scenario, the jury could apportion com-

191. *See supra* notes 135-38 and accompanying text.

parative fault – which could also be stated as comparative reprehensibility – as 60% for the plaintiff, 40% for the manufacturer, and 0% for the other driver. The manufacturer's punitive damage award would then be reduced by 60% or the total comparative reprehensibility of the other parties. Thus, the manufacturer in this hypothetical would end up paying 20% of the compensatory award and 40% of the punitive award.

While somewhat more complex than the other approaches discussed, this option of incorporating comparative fault principles is arguably the most precise and consistent with how punitive damages are intended to function. It focuses the comparative fault analysis on the reprehensibility of *all* parties' conduct and allocates a specific percentage to each. In doing so, the approach recognizes that the reprehensibility of a party's conduct will not always closely track that party's contribution to the harm requiring compensation.

There are undoubtedly other approaches courts could consider to incorporate a comparative fault analysis into how punitive damage awards are determined. Because courts have shown reluctance in the past to directly acknowledge an intersection between comparative fault and punitive damages, this Article simply presents three approaches that could be readily adapted to a state's existing comparative fault or modified comparative fault system. Each approach finds support in sound public policy ensuring fairness to all litigants and curbing disproportionate punishment, as well as in the gradual development of comparative fault principles over the past half-century.[192]

V. CONCLUSION

When most states jettisoned contributory negligence in favor of comparative fault, there was little occasion to consider the impacts on punitive damages. Rare in occurrence and modest in amount, these awards were dependent upon malicious and intentional acts that did not obviously relate to notions of shared responsibility and disproportionate punishment. This environment totally changed as the law of punitive damages totally changed; awards increased dramatically in size and frequency and were awarded absent any intentional wrongdoing.[193] Few courts, however, have taken the opportunity to reexamine how comparative fault principles can or should intersect with punitive damages in this changed environment.[194] They can hardly be blamed for inaction, as few counsel have endeavored to bring the issue to courts' attention.[195]

As this Article has shown, there are sound public policy considerations supporting such inclusion, namely the overarching goal of the tort system to

192. *See supra* Part III.B.1.
193. *See supra* Part III.B.1.
194. *See supra* Part II.A.
195. *See supra* note 36 and accompanying text.

provide fundamental fairness and avoid disproportionate punishment.[196] This goal is shared by the Supreme Court of the United States in its decisions reigning-in disproportionate punitive damage awards, and it can be seen generally in the development of comparative fault principles to consider the relative fault of intentional tortfeasors with negligent tortfeasors and among multiple parties against whom punitive damages are awarded.[197] In light of these developments over the past half-century, courts should reconsider, or address for the first time, whether and how comparative fault principles apply to punitive damage awards. This Article provides some basic approaches for courts to adopt.[198] In a truly just system, comparative fault principles cannot be segregated from punitive damages forever. In fashioning legal rules, it must also be remembered that deterrence is not a one-way street; plaintiffs who create a substantial risk of harm to themselves and others should not be treated the same way as innocent plaintiffs in cases where punitive damages are awarded. It is finally time for courts to give this issue its due attention.

196. *See supra* Part III.A.
197. *See supra* Part III.B.2.
198. *See supra* Part IV.