A Map Through the Punitive Damages Forest

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Yehuda Adar, Touring the Punitive Damages Forest: A Proposed Roadmap, 1 **Osservatorio Del Diritto Civile E Commerciale [The Civ. & Com. L. Observer]** 275 (2012), available at SSRN.

The questions raised by punitive damages are numerous and varied: Should punishment be a part of the civil system? Are punitive damages awards "out of control"? Should a punitive damages award be split between the State and the individual plaintiff? Should caps be placed on punitive damages? Indeed, the topic of punitive damages has been examined from competing empirical perspectives, from a comparative law analysis, from a historical angle, and the list goes on and on and on.

Enter a new article by Yehuda Adar. In this thought-provoking piece, Adar offers a framework for organizing these various debates about punitive damages. In so doing, Adar provides a convenient and helpful synthesis of both the current objections to punitive damages, and the counter-arguments in support of punitive damages' place in the civil liability system.

Adar contends that three central issues frame the debate regarding punitive damages: (1) Are punitive damages ever appropriate, and if so, for what conduct?; (2) Why are punitive damages part of the civil-private law system, rather than the public law system (either criminal law or administrative law)?; and (3) Why should punitive damages be awarded to the individual plaintiff? Adar initially disclaims that he will advance a specific position on these questions and asserts that his intent is to simply outline the issues. (P. 302.) Nevertheless, Adar ultimately does endorse the role of punitive damages within the civil law system, although he equivocates somewhat on the final question suggesting that "at least a substantial part" of a punitive damages award should be awarded to the individual plaintiff. (P. 347.)

Before exploring the three-part framework, however, Adar begins with a central question: Are punitive damages a form of punishment or are punitive damages merely extra-compensatory? In this part, Adar dives into the compensatory theory debate among punitive damages scholars. Compensation theories of punitive damages assert that punitive damages reflect payment for losses generally suffered by society, or alternatively, payment for harms suffered by others who did not choose to sue. Adar rejects these theories, and instead takes the position that punitive damages are punishment from a practical, descriptive perspective. Adar concedes that compensatory theories of punitive damages may be "normatively attractive" (P. 310), but concludes that the actual practice of awarding punitive damages reflects a judgment about the blameworthiness of the defendant's conduct.

In the rest of the paper, Adar develops his tripartite taxonomy. In doing so, Adar identifies relationships between the many troublesome aspects of punitive damages and a number of secondary, related questions that he fits within the three-part framework.

First, Adar identifies the type of conduct that warrants punitive damages. In language familiar to any first-year law student, he runs through the litany of words used to describe this conduct such as "outrageous," "reprehensible," "malicious," "willful," and "reckless," among others. Adar identifies a two-part test within this vague vocabulary. In Adar's view, punitive damages require a threshold of a "very bad act" and a "very bad mind" together with an overall evaluation that the defendant's conduct was an extreme departure from reasonable standards. (P. 314.) Given this traditional description of the

defendant's conduct, Adar turns to whether the imposition of punitive damages can be justified. Adar examines retribution and deterrence as rationales for awarding punitive damages. Adar posits—and ultimately rejects—the notion that punitive damages violate fairness principles, either by punishing defendants who are not truly blameworthy, by imposing punishment that does not "fit the crime," by punishing the defendant multiple times for the same conduct, or by failing to give the defendant adequate notice of the potential punishment. Adar argues that punitive damages succeed under a deterrence rationale and that any potential over-deterrence is outweighed by the societal good of preventing reprehensible conduct. By deterrence, Adar means whether punitive damages achieve a moral deterrent effect of discouraging the defendant's behavior by imposing a sufficiently high monetary penalty on the conduct. Notably, Adar does not consider the law and economics optimal deterrence rationale of cost-internalization because it does not reflect "real life cases." (P. 323.)

Adar then considers whether punitive damages belong within the civil/private law system. Adar clearly synthesizes the objections to allowing punishment within the private law/civil liability framework. He spends the most time on whether imposing punitive damages without the procedural protections of the criminal/public law system undermines the moral legitimacy of punitive damages' existence within the civil framework. Specifically, Adar notes the possibility of multiple punishment for the same conduct and the use of a preponderance of the evidence standard, not a reasonable doubt standard. Relying on two "important distinctions" between criminal and civil punishment, Adar ultimately rejects the underlying premise that punitive damages are sufficiently similar to criminal punishment to warrant these additional protections. First, Adar points out that the civil system does not risk a defendant's liberty interests, nor entail long-lasting restrictions on the defendant's civil rights. Second, Adar notes that punitive damages do not involve any imbalance between the prosecutorial forces of the State against the individual. Moreover, Adar identifies three advantages to civil punishment: (1) it supplements the efforts of the State, which are subject to budget limits, (2) punitive damages reach anti-social conduct that does not rise to the level of criminal conduct, and (3) punitive damages may be a preferable method of punishment precisely because they are less stigmatizing than incarceration or even a criminal charge.

Finally, Adar addresses the "windfall problem," namely enriching the individual plaintiff with an extra-compensatory award at the expense of the defendant or society. Adar again canvasses the counter-arguments—the plaintiff provided a public service by bringing the lawsuit, the private award is justified under a private retribution theory, and practically, punitive damages provide an incentive to sue where the costs of litigation are high. Adar believes that the "accumulative weight" of these arguments supports awarding "at least a substantial part" of a punitive damages award to the individual plaintiff. (P. 347.) The natural segue at this point would be to examine the issue of splitting the punitive damages award with the State. Although Adar does not explore this area, he does note the topic of split-recovery statutes for the reader.

Adar's framework provides a useful primer on punitive damages, and a good synthesis of the current contentious debates raging in this controversial area. I recommend it as a great introduction to the topic to those new to the field, and a useful synthesis to those scholars well-versed in punitive damages scholarship.

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