Revisiting the Noninsurable Costs of Accidents

Catherine M. Sharkey

Follow this and additional works at: http://digitalcommons.law.umaryland.edu/mlr

Part of the Torts Commons

Recommended Citation
Catherine M. Sharkey, Revisiting the Noninsurable Costs of Accidents, 64 Md. L. Rev. 409 (2005)
Available at: http://digitalcommons.law.umaryland.edu/mlr/vol64/iss1/17
REVISITING THE NONINSURABLE COSTS OF ACCIDENTS

Catherine M. Sharkey*

Abstract

This Article offers a fresh perspective on the longstanding debate over the insurability of punitive damages. Prepared for the Symposium, Calabresi's The Costs of Accidents: A Generation of Impact on Law and Scholarship, the Article takes as its starting point Calabresi's insight that the line separating insurable "costs" from noninsurable "penalties" should be grounded upon the distinction between accidental and intentional misconduct. The Article asks: Should punitive damages be insurable in a Calabresian world? In order to answer this question, the Article chronicles the insurability debate itself, from its origins in the 1960s up to the present. Close study of the divergent legislative, judicial, and insurance industry approaches reveals two competing insurance coverage dividing lines: one separates compensatory and punitive damages, relying heavily upon public policy considerations as set forth by legislatures and courts; the second forges a line between accidental and intentional conduct, resting primarily upon moral hazard economic principles followed by insurance companies.

The Article argues that the traditional contours of the public policy-driven debate, which focuses on the nature of the damages—i.e., compensatory or punitive—should give way to the market-driven intentionality line, which focuses on the nature of the underlying conduct. A switch to the Calabresian/insurance industry line respects the changing and expanding multifaceted roles of punitive damages. Since the insurability debate arose in the 1960s in the context of drunken driving cases, punitive damages have entered the more complex realms of products liability, mass torts, employment discrimination, and other civil rights violations—disputes that implicate common-law and statutory punitive damages serving a range of not only penal, but also remedial or compensatory purposes.

* Associate Professor of Law, Columbia Law School. I am especially grateful to my colleagues Vince Blasi, Jack Coffee, Katherine Franke, Victor Goldberg, Sam Issacharoff, Henry Monaghan, Susan Sturm, and John Witt for helpful discussions and comments on previous drafts. Thanks also to Robert Ahdieh, Tom Baker, Ina Bort, Richard Ericson, Noah Feldman, Mark Geistfeld, John Goldberg, Ariel Porat, Gil Seinfeld, Jennifer Wriggins, and Ben Zipursky for comments; to fellow Symposium panelists Mike Rustad and Tony Sebok for lively discussion; and to Jonathan Peck and Scott Rader for excellent research assistance. It is a great honor to contribute to a Symposium celebrating the work of Guido Calabresi, whose wisdom guided me as his student and judicial law clerk and continues to inspire me today.
Finally, the Article acknowledges the difficulties posed by the accidental-intentional line drawing, as exemplified in drunken driving cases, and identifies statutory multiple damages as a future challenge for the insurability debate.

INTRODUCTION .................................................... 410

I. INSURANCE AND MISCONDUCT IN CALABRESI'S COSTS ...... 413
   A. Insurance as Rejection of the "Bilateral" View of
      Accidents ............................................ 414
   B. Noninsurable Tort Fines and Penalties .................. 416

II. INSURABILITY OF PUNITIVE DAMAGES ....................... 419
   A. Compensatory vs. Punitive Damages: A Public Policy-
      Based Divide ........................................ 422
      1. The Emerging Debate at the Time of The Costs of
         Accidents ....................................... 423
      2. The Continuing Debate in Our Time ............... 427
         a. Insurance Prohibited ....................... 427
         b. Insurance Allowed .......................... 430
   B. Accidental vs. Intentional Conduct: A Market-Based
      Divide ............................................. 432
      1. State Law .................................... 432
      2. Insurance Industry Practice .................... 434

III. THE LINK BETWEEN INSURABILITY AND THE ROLE OF
    PUNITIVE DAMAGES ..................................... 440
   A. Industry Practice vs. Tort Doctrine ..................... 440
   B. Expanding Roles of Punitive Damages ................... 442
   C. Link to Insurability Debate ........................... 446

CONCLUSION: INSURABILITY DEBATE AS HARBINGER OF CHANGE .. 450

INTRODUCTION

Thirty-five years ago, with the publication of The Costs of Accidents, Guido Calabresi called for a transformative reconceptualization of accident law. He sketched the outlines of a new theoretical foundation and provided a critical appraisal of the existing fault system's inability to achieve what he identified as the two primary tort goals: accident cost reduction and justice. In an early review of The Costs of Accidents, Frank Michelman confessed to being filled with "despair" by the task of attempting to distill Calabresi's "amazing concoction of cragginess and grace, of homely example and mindcracking neologism, of lucid-

ity and abstrusity, of steadfast focus and spiraling digression. More than a quarter-century later, with the added weight of accumulated influence over generations of scholars and practitioners, engaging Calabresi's Costs still inspires awe, reverence, and (not insignificant) trepidation.

In the category of "mindcracking neologism," Calabresi suggested that any system of accident law must decide "what-is-a-cost-of-what" and "what-is-the-cost." By the former, Calabresi meant "[t]he question of which acts or activities 'cause' which accident costs," whereas the latter question involved "what value to give to accident costs." "What-is-a-cost-of-what" (which Michelman termed "the liability question") has received the lion's share of academic attention and commentary. Here, however, I would like to focus on the remedial end: the assessment of damages, and in particular, what are termed "punitive" damages. In one sense, this simply entails a shift in emphasis to Calabresi's second neologism, "what-is-the-cost" (which Michelman termed "the cost-valuation question"). But in a deeper sense, it calls for a shift in the traditional approach to tort theory and doctrine, from its virtually exclusive emphasis upon the liability side of the equation to a more sustained focus upon remedies.

Calabresi's key insight was that there was no necessary link between compensating victims and deterring or punishing injurers. Challenging the traditional "bilateral" or "bipolar" view of torts, Calabresi imagined a system whereby our treatment of injurers and wrong-


3. Michelman, *supra* note 2, at 648. I have it on good authority that Professor Michelman used "neologism" in its primary meaning of "a new word, usage, or expression," as opposed to its secondary meaning as "a meaningless word coined by a psychotic." *MERRIAM WEBSTER'S COLLEGIATE DICTIONARY* 778 (10th ed. 1996).


5. Id.


doers might be decoupled from our treatment of their direct victims. And he held up the widespread availability of insurance as evidence of movement in this direction in the realm of automobile accidents.

How far does this insurance rationale carry us? Put differently, in a Calabresian world, should all “costs” or damages be insurable? What about punitive damages in particular? It may come as something of a surprise to learn that The Costs of Accidents contains not a single reference to punitive damages. This is perhaps indicative of a predominant view of “costs of accidents” as questions of liability first, and of remedy more as afterthought. Notwithstanding its relative neglect of remedies, however, Calabresi’s Costs provides a key—and until now overlooked—insight that is relevant to the ongoing debate over the insurability of punitive damages.

While Calabresi did not mention punitive damages by name, he did discuss some continuing reluctance to insure willful misconduct because of its negative impact upon deterring wrongdoing. Calabresi suggested that such resistance to insurance could be overcome, and adequate deterrence achieved, by the imposition of noninsurable tort fines and penalties upon intentional misconduct. Calabresi drew the line between insurable “costs” and noninsurable “penalties” grounded upon a distinction between accidental and intentional misconduct. Interestingly, in practice, insurance companies likewise tend to draw the coverage line at intentionality. We might say that the insurance industry, in line with Calabresi’s view, is ultimately more concerned with the nature of the conduct of the wrongdoer, as opposed to the nature of the damages awarded.

If the Calabresian/insurance industry line were heeded, several implications follow for the debate regarding the insurability of punitive damages, which “continues to plague the courts, insurers and insureds.” First, the contours of debate grounded in public policy-based distinctions between insurance coverage of punitive as opposed to compensatory damages—remarkably similar today to its 1960s origins—are misguided. Second, a switch in focus to the accidental-intentional conduct divide not only defers to market-driven insurance

10. Id. at 239-41.
11. Id. at 47-50, 240-41.
12. Id. at 305.
13. Id. at 269, 305.
14. Id. at 269-71, 305.
industry practice, but also is consistent with the modern expansion of punitive damages. Since the origins of the insurability debate in the 1960s in the context of drunken driving accidents, punitive damages have entered the more complex realms of products liability, mass torts, employment discrimination, and other civil rights violations—disputes that implicate common-law and statutory punitive damages serving a range of not only penal, but also remedial or compensatory purposes. Third, the switch from emphasis upon the nature or classification of damages to the intentional nature of underlying conduct brings with it its own new set of difficulties, which must be confronted.

I will explore these issues in turn, following a brief review of Calabresi’s discussion of insurance and misconduct in *The Costs of Accidents*. Part I summarizes Calabresi’s conception of a tort system characterized by widespread general insurance combined with a narrow set of noninsurable fines and penalties. Part II expands the scope of inquiry to the debate over the insurability of punitive damages. I argue that the traditional contours of the public policy-driven debate, which focuses upon the nature of the damages—i.e., compensatory or punitive—should give way to the market-driven intentionality line, which focuses on the nature of the underlying conduct. Insurance companies, as private regulators, are well positioned to achieve deterrence through experience rating of firms and other actors, as well as by providing risk management services. Part III questions the tenuous link at present between insurability and the role of punitive damages, and it argues that the accidental-intentional divide would respect the changing and expanding multifaceted roles of punitive damages. Finally, I conclude with acknowledgement of difficulties posed by the accidental-intentional line drawing in the context of drunken driving cases—challenges themselves unwittingly presaged in Calabresi’s *Costs*.

I. INSURANCE AND MISCONDUCT IN CALABRESI’S COSTS

Calabresi’s ideas about deterrence, penalties, and insurance should be examined in the wider context of the debate over the insurability of punitive damages—a debate that emerged roughly contemporaneously with *The Costs of Accidents*, and continues to present day. From our vantage point today, when punitive damages have emerged as a controversial, prominent feature of tort doctrine and practice (and, more gradually, theory), we are better poised to assess the interplay between the changing role of punitive damages and the ongoing

16. I use the adverb “unwittingly” here with Judge Calabresi’s blessing.
insurability debate. We are also afforded a unique lens through which to examine Calabresi’s early ideas.

A. Insurance as Rejection of the “Bilateral” View of Accidents

Calabresi’s Costs ushered in a sustained era of criticism of the traditional “bilateral” (or “bipolar”) view of torts, defined as “the notion that justice require[s] a one-to-one relationship between the party that injures and the party that is injured.”17 Calabresi’s basic insight—that “[t]here is, of course, no logical necessity for linking our treatment of victims, individually or as a group, to our treatment of injurers, individually or as a group”18—has spawned seminal work by law and economics scholars, who have experimented in various ways with “decoupling” the law’s treatment of plaintiffs and defendants involved in the same lawsuit.19

Calabresi discusses two alternative notions of individualized treatment. The first is a conception of “victims’ rights”: “that the victim—or his family—has the right to see that retribution is exacted.”20 Calabresi disparages this notion, which “smacks more of revenge than of deterrence or compensation.”21 Calabresi accords more respect to a second alternative notion of individualized treatment that “holds that the injurer should pay damages according to the degree to which he wronged the victim.”22 He further describes this view as the idea that, as between parties involved in an accident, “it is better that the loss be

17. THE COSTS OF ACCIDENTS, supra note 1, at 297.
18. Id.; see Jules L. Coleman, The Costs of The Costs of Accidents, 64 Md. L. Rev. 337, 343 (2005) ("[Calabresi's] great innovation ... was to present the problem of tort law not as one between particular actors, but as a social problem: the problem of accidents.").
19. E.g., A. Mitchell Polinsky & Yeon-Koo Che, Decoupling Liability: Optimal Incentives for Care and Litigation, 22 RAND J. ECON. 562 (1991); David Rosenberg, Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss, 88 VA. L. Rev. 1871 (2002). Many of these more complicated models might be seen as extensions of Calabresi’s basic intuition that the key question in our society is “how much all injurers should pay, in relation to their individual wrongdoing, into a fund to compensate all victims, in relation to their injuries and their wrongdoing.” THE COSTS OF ACCIDENTS, supra note 1, at 302.
20. THE COSTS OF ACCIDENTS, supra note 1, at 298.
21. Id. The victims’ rights notion, moreover, is, according to Calabresi, “analogous to the ancient right of the homicide victim’s family to indict the alleged murderer criminally.” Id. It is also reminiscent of the French practice of combining the victim’s civil suit for damages with the criminal trial. See JOHN H. LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY 111-12 (1977); see also Thomas B. Colby, Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs, 87 MINN. L. Rev. 583, 635 (2003) (arguing in favor of a bilateral view of punitive damages, which should be “thought of as an intellectual precursor to the modern victims’ rights movement in the criminal law”).
22. THE COSTS OF ACCIDENTS, supra note 1, at 299.
borne by the one who has committed acts carrying moral stigma than by the one who has not." While somewhat more sympathetic toward this view, Calabresi nonetheless rejects it as "simplistic" in the context of our "multilateral world with a whole population of injurers and victims."

Calabresi's rejection of the bilateral view of tort law spawned the rise of the corrective justice theorists' defense, a defense that has been sustained for over thirty years, and which continues to morph into different varieties. I do not wish to revisit this "clash" between the economically minded deterrence theorists and philosophically minded corrective justice theorists. Instead, I want to focus upon Calabresi's support for his notion that "justice" (at least in its tort incarnation) does not require that an individual injurer compensate his individual victim.

Here, Calabresi rests heavily—as an empirical if not as a theoretical matter—upon the wide availability (and acceptance) of insurance. As a general matter, Calabresi asserts that "the allowance of insurance for faulty parties is clear indication that this notion [that justice does not require that individual injurers compensate individual victims] is accepted." Indeed, "the general acceptance of insurance strongly suggests that we do not worry too much about whether the individual faulty party pays his victim, so long as the victim is paid." Again, corrective justice theorists have responses to Calabresi's insurance

23. Id.
24. Id. at 301.
25. See, e.g., Jules L. Coleman, Risks and Wrongs 209 (1992) ("I want to argue not only that identifying and vindicating rightful claims to repair are legitimate aspirations of a law of tort, but that the best explanation of current Anglo-American tort law sees the practice primarily in terms of its efforts to meet these demands of justice—what I call corrective justice."); id. at xvi ("Many of the ideas developed here first came to my attention upon reading [Calabresi's] The Costs of Accidents. There is every reason to believe, however, that he continues to disagree with me at nearly every turn."); Ernest J. Weinrib, The Idea of Private Law 63 (1995) ("Presenting corrective justice as a quantitative equality captures the basic feature of private law: a particular plaintiff sues a particular defendant."); see also Benjamin C. Zipursky, Civil Recourse, Not Corrective Justice, 91 Geo. L.J. 695, 707 (2003) ("What is essential to tort law's structure is that courts infer from a defendant's wrongful injuring of a plaintiff that the defendant must compensate the plaintiff for the injury imposed.").
27. The Costs of Accidents, supra note 1, at 304-05.
challenge, but I will not rehearse these responses here. What is important for present purposes is to examine how far Calabresi is willing to push his argument about the availability of insurance.

What then, on Calabresi's account, are the appropriate outer bounds for insurance coverage? Somewhat cryptically, Calabresi asserts that "we do—with some misgivings—generally allow insurance against liability for wanton and willful misconduct." The source of "our misgivings" is further explained: "[W]e sometimes fear that noninsurable fines proportionate to the wrongdoing and adequate to achieve deterrence will not in fact be placed on wanton and willful wrongdoers. If they were, we would not be troubled by the fact that liability beyond such fines could be insured against."

In other words, the apparent fear about insuring willful misconduct is due to its negative impact upon deterrence of wrongdoing. Calabresi suggests that such resistance to insurance could be overcome, and adequate deterrence achieved, by the imposition of noninsurable tort fines and penalties upon intentional (or wanton and willful) misconduct. Calabresi thus draws a dividing line between insurable "costs" and noninsurable "penalties" based upon a distinction between accidental and intentional misconduct. This raises the question: To what extent might these noninsurable penalties be likened to punitive damages?

B. Noninsurable Tort Fines and Penalties

Although the words "punitive damages" are nowhere to be found in The Costs of Accidents, Calabresi's discussion of tort fines and penalties echoes (or really, foreshadows) two issues raised by their close

28. As Jules Coleman argues:

There is another way of looking at the relationship between insurance and tort law . . . . According to this account, it is important to distinguish between insurance as an institution that arises in order to enable individuals to discharge their substantive duties under the law and insurance itself as a goal of the law, as capable of providing independent grounds for imposing substantive duties under the law.

COLEMAN, supra note 25, at 206; see also id. at 207 ("Because insurance depends on the existence of liability rules, it cannot provide a ground or reason for imposing liability in one way rather than another.").

29. THE COSTS OF ACCIDENTS, supra note 1, at 305.

30. Id.

31. Id. Of course, separate and apart from deterrence-based concerns might be concerns based upon retributive goals. But here I follow Calabresi in highlighting the deterrence-based objection as the main source of concern.

32. Id. at 268-70.
analogue in the tort system. First, there is the issue of choosing the appropriate size and type of "penalty." Perhaps no single issue in punitive damages has captured the attention of scholars, policymakers, and lawyers alike than the debate over the size of punitive damages, and whether or not they are irrational and outrageously large or, alternatively, fairly predictable and reasonably related to the size of compensatory damages. What is often (albeit not invariably) overlooked is the want of theory that would suggest that punitive damages should, in fact, conform to some multiple of compensatory damages. On this score, Calabresi mentions the possibility of making the tort penalties greater "if serious harm results than if it does not," but only if "the degree of preaccident wrongdoing can to some extent be gauged by the seriousness of the resulting damages."

Second, Calabresi mentions the possibility that tort penalties might vary with the income level of the wrongdoer. Here too, Calabresi places his thumb on a heavily contested scale, that of gauging the appropriate role for defendant’s income or wealth in assessing punitive damages.

33. Analogues might also be found in criminal or regulatory fines. Defending penalties within the tort system (as opposed to the criminal or administrative systems) is beyond the scope of this Article. But clearly the policy considerations with regard to insuring punitive damages could change if criminal law imposes sanctions on the wrongdoer for the same behavior. For an interesting perspective on mass torts that brings the law of attempt to the tort system, see Richard A. Nagareda, Outrageous Fortune and the Criminalization of Mass Torts, 96 Mich. L. Rev. 1121 (1998).

34. Compare, e.g., Theodore Eisenberg et al., Juries, Judges, and Punitive Damages: An Empirical Study, 87 Cornell L. Rev. 743, 745 (2002) ("[J]uries rarely award [punitive] damages, and award them especially rarely in products liability and medical malpractice cases. . . . When juries do award punitive damages, they do so in ways that relate strongly to compensatory awards." (footnotes omitted)), with, e.g., Joni Hersch & W. Kip Viscusi, Punitive Damages: How Judges and Juries Perform, 33 J. Legal Stud. 1, 2 (2004) ("[T]he tendency of large punitive awards to be the result of jury decisions is consistent with the experimental evidence as well as popular perceptions. Analysis of these very large awards indicates that they bear no statistical relation to the compensatory awards.").

35. The Costs of Accidents, supra note 1, at 270 n.5. Calabresi concludes that "only by the merest coincidence would the appropriate penalty be equal to the damages caused, let alone to the increase in the insurer’s insurance premiums resulting from his having had an accident." Id.

36. Id. at 128 n.25, 270 n.5.

37. Compare, e.g., Kenneth S. Abraham & John C. Jeffries, Jr., Punitive Damages and the Rule of Law: The Role of Defendant’s Wealth, 18 J. Legal Stud. 415, 415 (1989) ("[T]he defendant’s wealth is irrelevant to the goal of deterring socially undesirable conduct and is an improper consideration in assessing the basis for retribution."), with, e.g., Jennifer H. Arlen, Should Defendants’ Wealth Matter?, 21 J. Legal Stud. 413, 428-29 (1992) ("[T]o the extent that punitive damage awards correct for underdeterrence resulting from the use of purely compensatory damages, current law permitting juries to take defendants’ wealth into account . . . may be theoretically correct . . . ." (footnote omitted)).
Before we embrace the view that Calabresi's noninsurable tort fines and penalties are tantamount to punitive damages (which by extension should be noninsurable), however, it is worth examining more closely Calabresi's account on its own terms. According to Calabresi, it is crucial, as a conceptual matter, to disentangle tort penalties (or fines) from the "fault system." While critical of the latter, Calabresi wants to hold onto (or reinvent) the former. Calabresi's discussion here is quite abstract and theoretical; nonetheless, he gives us one concrete example which we will explore: drunken driving.

Drunken driving is, to Calabresi, the quintessential example of an activity that is best deterred by a system of noninsurable penalties:

[W]henever we are dealing with activities that can be defined independently of accidents, such as drunken driving, a system of appropriate noninsurable penalties is more likely to be an effective deterrent than the fault system, which allows a substantial part of the penalty to be both shifted and prepaid through insurance. Calabresi explains further that "whenever normal individuals can choose whether or not to engage in wrongful conduct before an accident, an appropriate noninsurable penalty is necessarily a more effective deterrent than an already paid insurance premium." Calabresi also recognizes that the deterrent effect may go beyond the restraining effect on the individual wrongdoer: "If it can be assumed that charging a penalty after an accident will in the future deter the doer and others like him from other acts that would ex post be collectively deemed undesirable, then it may not be irrational to have such after-the-fact penalizations."

Calabresi's requirement that the penalty be noninsurable is tied specifically to the way the insurance market operates:

38. See The Costs of Accidents, supra note 1, at 273 ("Once again, what we are considering is the fault-insurance system itself, not the noninsurable penalties that go along with the system."); id. at 277 n.3 ("If we can use noninsurable penalties to supplement civil liability based on fault, we can certainly use them to supplement civil liability based on market control.").

39. Id. at 269.

40. Id. at 269-70. Noninsurable penalties deter more effectively than insurable fault payments, in which the only financial deterrent that can be effective at the time of the choice between doing or not doing a wrongful act is the possibility of higher premiums in the future—a possibility that exists even when an accident is not due to a wrongful act by the insured." Id. at 270 (footnote omitted); see infra note 115 and accompanying text (noting disagreement over whether the possibility of increased premiums has a deterrent effect).

41. The Costs of Accidents, supra note 1, at 123.
The aim of penalizing conduct defined after the accident is to influence behavior . . . immediately before any accident. The notion behind such ex post allocations of fines has to be that individuals can at the last minute before an accident estimate what would be penalized better than insurance companies can when, long before the accident, they make up actuarial groups and set rates for them.42

Although not fully fleshed out, I believe what Calabresi has in mind here is the notion of moral hazard, or the ability of an individual to affect the likelihood that a particular probabilistic occurrence materializes—an issue to which we will return when we consider insurance industry practice in the next Part.43 For the moment, it is worth emphasizing that Calabresi draws the line between insurable costs and noninsurable penalties based upon the distinction between accidental and intentional misconduct.

We will now explore the way in which the insurability debate has played out on somewhat different terms in the legislatures and the courts. As we shall see, the insurance industry’s embrace of the Calabresian accidental-intentional conduct line suggests a reframing of the insurability debate that not only would promote clarity and efficiency, but is also consistent with the modern evolution of punitive damages doctrine and practice.

II. Insurability of Punitive Damages

Punitive damages, although around for centuries, may seem a distinctively modern preoccupation. The debate over the insurability of punitive damages did not begin until the 1960s. At that time, notwithstanding the well-entrenched existence of punitive damages in American common law, “[s]trangely enough, there [was] only a slight sprinkling of cases on the question of the insurer’s liability for puni-

42. Id. at 126. This assumes that insurance companies cannot reduce risks ex ante. Imagine instead, for example, that insurance companies could provide a discounted rate for cars that have breathalyzer systems that prevent driving by persons with alcohol on their breath. For discussion of insurance companies’ provision of such “risk management services,” see infra notes 144-146 and accompanying text.

43. Calabresi concedes that “[w]hile the reason for this may seem obvious, the analysis is actually rather complex, and the problem deserves separate attention.” THE COSTS OF ACCIDENTS, supra note 1, at 125. George Priest answered this call in his article, Insurability and Punitive Damages, in which he presents a lucid application of the modern understanding of the economics of insurance to the issue of the insurability of punitive damages. George L. Priest, Insurability and Punitive Damages, 40 ALA. L. REV. 1009, 1033-35 (1989); see infra notes 127-132 and accompanying text.
tive damages." In his treatise *Damages to Persons and Property* (1961), Howard Oleck wrote that "[i]t would seem that insurance against exemplary damages frustrates their purposes and should be considered contrary to public policy."

As a historical note, up until about 1830, a similar view prevailed among courts and treatise writers regarding insurance for injuries caused by negligence. Oleck's statement is remarkably similar to that of Willard Phillips, who wrote in his *Treatise on the Law of Insurance* (1823) that insurance against losses voluntarily incurred seems to be so obviously opposed to the general interest of a community, that it could hardly be enforced by any legal tribunal. And there is the same objection, in a smaller degree, against sustaining a contract to indemnify a man against the consequences of his own negligence. By such an agreement one man would consent to put himself wholly in the power of another, and it could operate only to the injury of the parties, and of the community of which they were members.

As Kenneth Abraham documents, it was not until "the dawn of the twentieth century [that] the courts were rejecting the concern that liability insurance would so undermine safety incentives that this new form of insurance was against public policy."

The insurability issue has two main components: contract interpretation and public policy. Courts generally employ a two-step analysis. First, courts look to the language of the policy, using standard

---

44. Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432, 436 (5th Cir. 1962). In *McNulty*, the court went on to note that "[i]n most of these cases the court has held there was coverage, without discussing what to us seems more important—the question of public policy." *Id.* The lack of attention devoted to the insurability issue may be due in part to the fact that, in most cases, the sums of money at stake were relatively small.


46. E.g., Morton J. Horwitz, *The Transformation of American Law, 1780-1860*, at 202 (1977). Horwitz notes that "[a]fter 1830 . . . judicial opinion abruptly shifted to allow individuals to insure against losses arising from their own negligence." *Id.* This doctrinal shift was reflected by Chancellor Kent, who wrote in his revised Commentaries (1832), "whether the negligence and frauds which the insurance of property from fire has led to, did not counterbalance all the advantages . . . the public judgment in England, and in this country, has long since decided the question with perfect satisfaction." *Id.* (quoting 3 James Kent, Commentaries on American Law 370 (2d ed. 1832)). Nonetheless, "it was quite some time before legal writers could fully rationalize this new doctrine." *Id.*

47. *Id.* (quoting Willard Phillips, *Treatise on the Law of Insurance* 158 (1823)).

If the policy appears to cover punitive damages on its face or as interpreted, the next step is to determine whether insuring punitive damages is contrary to public policy in that state. The typical "standard-form" liability insurance contract provides that the insurance company will pay "all sums" the policyholder is obligated to pay as "damages" due to bodily injury or property damage arising from an incident covered by the policy. The contract interpretation approach to the insurability question relies upon the language of the contract, coupled often with the principle that any ambiguities in language should be read against the drafter of the contract (in most cases the insurance company). In some states, the contract interpretation approach is determinative.

The vast majority of courts, however, give some heed to public policy considerations, which predominate in the resolution of the insurability issue. Public policy is defined loosely to mean the public good. Courts and legislatures holding that insurance coverage for punitive damages violates public policy generally do so on the theory that insurance would undermine the socially beneficial goals of punishment and deterrence. Those taking the opposite position, sustaining the insurability of punitive damages, dispute the diminished deterrence theory.

49. See, e.g., Harrell v. Travelers Indem. Co., 567 P.2d 1013, 1014-15 (Or. 1977) (examining the language of the policy in question and noting that "the primary rule of contract interpretation, including insurance contracts, is to ascertain the intent of the parties").

50. Id. at 1015. Several courts have reversed this process, given that, logically, a determination that public policy prohibits insurance coverage for punitive damages would render moot any analysis of the specific contract terms. See, e.g., Mazza v. Med. Mut. Ins. Co., 319 S.E.2d 217, 220-23 (N.C. 1984) (considering public policy arguments first, then parsing the language of the policy).

51. See, e.g., Harrell, 567 P.2d at 1014.

52. Mazza, 319 S.E.2d at 222-23; Harrell, 576 P.2d at 1015; Lazenby v. Universal Underwriters Ins. Co., 383 S.W.2d 1, 5 (Tenn. 1964). In a similar vein, courts have also interpreted policies in part based upon what an average policyholder would expect to be covered. Mazza, 319 S.E.2d at 222-23; Harrell, 576 P.2d at 1015; Lazenby, 383 S.W.2d at 5.

53. See, e.g., Greenwood Cemetery, Inc. v. Travelers Indem. Co., 232 S.E.2d 910, 913-14 (Ga. 1977) (finding that "all sums" language in an insurance policy covers directly assessed punitive damages and thus refusing to deny coverage on public policy grounds); Carroway v. Johnson, 139 S.E.2d 908, 910 (S.C. 1965) (holding that an insurer was required to pay punitive damages under broad "all sums" language of an automobile insurance policy).

54. Lazenby, 383 S.W.2d at 5 ("Public policy is the present concept of public welfare or general good. Public policy is practically synonymous with public good . . . ." (citation omitted)).

55. See infra Part II.A.2.a ("Insurance Prohibited").

56. See infra Part II.A.2.b ("Insurance Allowed").
So the question naturally arises: Should punitive damages be insurable in a Calabresian world? In order to answer this question, it is useful to chronicle the insurability debate itself, from its origins in the 1960s up to the present. In particular, close study of the divergent legislative, judicial, and insurance industry approaches reveals two competing insurance coverage dividing lines: one separates compensatory and punitive damages, relying heavily upon public policy considerations as set forth by legislatures and courts; the second forges a line between accidental and intentional conduct, resting primarily upon moral hazard economic principles followed by insurance companies.

Several insights follow from the fact that the insurance market apparently draws a line different from that drawn by traditional tort doctrine and, for that matter, state practice. While traditional tort doctrine places significance upon the characterization of damages as compensatory or punitive, the insurance market segments claims along an accidental-intentional dichotomy that cuts across the categories of compensatory and punitive damages. We might say that the insurance company is ultimately more concerned with the nature of the conduct of the wrongdoer, as opposed to the nature of the damages awarded. In sum, it appears that the insurance market has already answered the insurability question along Calabresian lines.

A. Compensatory vs. Punitive Damages: A Public Policy-Based Divide

The two leading cases in the punitive damages insurability debate arose in the early 1960s in the automobile accident context, addressing the plight of intoxicated drivers. They staked out opposing positions: Northwestern National Casualty Co. v. McNulty railed against insurance for punitive damages, which it likened to criminal penalties, on public policy grounds; Lazenby v. Universal Underwriters Insurance Co., in contrast, championed the pro-insurance position, disparaging the deterrence-based policy arguments of McNulty.

McNulty and Lazenby continue to define the terms of the modern insurability debate. Of the forty-five states that permit common-law punitive damages, thirty-four states have conclusively resolved the in-

57. It bears repeating that Calabresi is primarily concerned with deterrence-based objections to insurability, as opposed to those based upon theories of retribution. See supra note 31 and accompanying text.
58. 307 F.2d 432 (5th Cir. 1962).
59. 385 S.W.2d 1 (Tenn. 1964).
60. Nebraska does not allow punitive damages in any circumstance, either by common law or statute. Distinctive Printing & Packaging Co. v. Cox, 443 N.W.2d 566, 574-75 (Neb.
survability issue, either by statute or by a ruling of the highest state court: nine have adopted the McNulty position and twenty-five apparently side with Lazenby.61

1. The Emerging Debate at the Time of The Costs of Accidents.—The two judicial opinions just mentioned emerged in the early 1960s, and, as I said, they would define the warring positions for decades to follow. They deserve to be examined in some detail.

McNulty, a prominent Fifth Circuit opinion written by Judge Wisdom, is the progenitor of the anti-insurance position. In that case, Walter Smith, a drunken driver, lost control of his vehicle and hit Edward McNulty’s car from behind.62 Smith fled the scene, and was arrested several miles away when his car ran out of gas.63 McNulty suffered serious injuries, including permanent brain damage.64 The jury returned a verdict for McNulty, awarding him $37,500 in compensatory damages and $20,000 in punitive damages.65 McNulty (joined by Smith) brought a successful action to recover on Smith’s $50,000 liability insurance policy.66 The insurance company appealed on the ground that the punitive damages portion was not recoverable either under the terms of the contract or as a matter of public policy.67

Judge Wisdom was influenced by the “fact that death and injury by automobile is a problem far from solved by traffic regulations and criminal prosecutions.”68 He went on to conclude that “there are especially strong public policy reasons for not allowing socially irresponsible automobile drivers to escape the element of personal punishment in punitive damages when they are guilty of reckless

---


61. See infra note 92 (listing the states that prohibit insurance for punitive damages); infra notes 93-94 (listing the states that have determined that punitive damages are insurable); see also Appendix, infra (categorizing all 50 states and the District of Columbia by insurability status and listing relevant statutory and case law authority).

63. Id.
64. Id.
65. Id.
66. Id.
67. Id. The policy was standard form, in which the insurer was responsible “[t]o pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of... ‘bodily injury’... [or] injury to or destruction of property.” Id. The court decided the case on public policy grounds, and therefore found it unnecessary to construe the contract. Id. at 434.
68. Id. at 441.
slaughter or maiming on the highway.” Judge Wisdom made two main arguments in support of this view, starting from the premise that the purposes of punitive damages are to punish and to deter.

First, Judge Wisdom reasoned that allowing the wrongdoer to shift his burden to an insurance company would undermine the punishment goal: “Where a person is able to insure himself against punishment he gains a freedom of misconduct inconsistent with the establishment of sanctions against such misconduct.” By contrast, personal payment of the award ensures that the wrongdoer suffers punishment. Judge Wisdom invoked an analogy to criminal law: Just as it is against public policy to enable an individual to insure himself against criminal liability, it is equally repugnant to allow him to purchase insurance against punitive damages. Moreover, “there is no point in punishing the insurance company; it has done no wrong.”

Second, Judge Wisdom emphasized the incompatibility of punitive damages insurance with the deterrence goal. He argued that an insured tortfeasor, immunized from the burden of punitive liability for his wrongdoing, could not be held up as an example to deter the general public. And he was convinced that

[i]t is no answer to say, society imposes criminal sanctions to deter wrongdoers. . . . [For while] [a] criminal conviction and payment of a fine to the state may be atonement to society for the offender[,] . . . it may not have a sufficient effect

69. Id.
70. Id. at 434-36. The court looked to the substantive law of punitive damages of both Florida (where the accident occurred) and Virginia (where the insurance policy was issued). Id. The court concluded that, in each state, punitive damages are awarded for the dual purposes of punishment and deterrence. Id. at 434-35 & n.5.
71. Id. at 440. As a general matter, according to Wisdom, “[i]f [a] person were permitted to shift the burden to an insurance company, punitive damages would serve no useful purpose.” Id.
72. Consider the analogy in the corporate context, where “[t]he classic reason offered for using the criminal law when financially equivalent civil remedies are available has been that the criminal law uniquely can focus public censure upon the guilty defendant.” John C. Coffee, Jr., “No Soul to Damn: No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 Mich. L. Rev. 386, 447 (1981). Coffee, by contrast, is primarily focused on deterrence. He cautions that “[t]he study of corporate criminal responsibility too long has been led astray by commentators seeking to fashion retributive justifications.” Id. at 448.
73. McNulty, 307 F.2d at 440 ("It is not disputed that insurance against criminal fines or penalties would be void as violative of public policy. The same public policy should invalidate any contract of insurance against the civil punishment that punitive damages represent.").
74. Id.
75. Id.
on the conduct of others to make the public policy in favor of punitive damages useful and effective.\textsuperscript{76}

Moreover, according to Judge Wisdom, common industry practice would further diminish the deterrence goal. Insurers required to indemnify their clients for adverse punitive damages judgments would simply pass that significant cost on to the general public through higher premiums.\textsuperscript{77} Society as a whole, then, would bear the burden for the wrong committed by the individual policyholder, and the individual’s motivation to refrain from such wrongful conduct would be weakened.\textsuperscript{78} To ensure instead that punitive damages adequately fulfill their deterrence objective, Judge Wisdom stressed that “the delinquent driver must not be allowed to receive a windfall at the expense of purchasers of insurance, transferring his responsibility for punitive damages to the very people—the driving public—to whom he is a menace.”\textsuperscript{79} As we shall see, the basic structure of Judge Wisdom’s two-part attack on insurability has withstood the test of time. It remains to this day the bulwark of the anti-insurance position.\textsuperscript{80}

Two years after McNulty, the Tennessee Supreme Court decided Lazenby v. Universal Underwriters Insurance Co., the first and still leading challenge to McNulty.\textsuperscript{81} Lazenby, too, involved a drunken driver, Norman Frank Crutchfield, who injured a minor, Frances Jean Lazenby, in an automobile accident.\textsuperscript{82} Lazenby was awarded $4,000 in damages, of which $1,087 was punitive damages.\textsuperscript{83} Crutchfield’s insurance company refused to pay the punitive damages portion of the judgment.\textsuperscript{84} The trial court found against the insurance company.\textsuperscript{85} On

\textsuperscript{76} Id. at 441-42.
\textsuperscript{77} Id. at 440-41.
\textsuperscript{78} Id. According to Judge Wisdom, “considering the extent to which the public is insured, the burden would ultimately come to rest not on the insurance companies but on the public, since the added liability to the insurance companies would be passed along to the premium payers.” Id. Ironically, “[s]ociety would then be punishing itself for the wrong committed by the insured.” Id. at 441.

This argument parallels one of the arguments for municipal immunity from punitive damages. See City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 263 (1981) (“In general, courts viewed punitive damages [assessed against municipalities] as contrary to sound public policy, because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised.”); Ciraolo v. City of New York, 216 F.3d 236, 239-40 (2d Cir. 2000) (Calabresi, J.) (elaborating upon the Newport rationale that imposing punitive damages upon municipalities would burden “innocent taxpayers”).

\textsuperscript{79} McNulty, 307 F.2d at 442.
\textsuperscript{80} It likewise remains sharply contested by the pro-insurance position, which challenges the link between deterrence and noninsurability. See infra Part II.A.2.b.
\textsuperscript{81} 383 S.W.2d 1 (Tenn. 1964).
\textsuperscript{82} Id. at 2.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
appeal, the insurance company urged the Tennessee Supreme Court to adopt the McNulty court's position.  

Notwithstanding the fact that, in Tennessee, punitive damages are awarded in order to punish willful misconduct and to deter others by providing an example or warning—in other words, the same “dominant purpose for the allowance of punitive damages” considered in McNulty—the court reached the opposite result on public policy grounds. First, the court was highly skeptical of the McNulty deterrence rationale: “We...are not able to agree [that] the closing of the insurance market, on the payment of punitive damages, . . . would necessarily accomplish the result of deterring [socially irresponsible drivers] in their wrongful conduct.” Second, the court relied upon the fact that the standard-form language of the insurance policy had been construed by previous courts to cover both compensatory and punitive damages. Accordingly, “the average policy holder reading this language would expect to be protected against all claims, not intentionally inflicted.” Third, the court maintained that “[t]here is often a fine line between simple negligence and negligence upon which an award for punitive damages can be made.”  

McNulty and Lazenby defined the emerging judicial debate on the insurability of punitive damages in the context of drunken driving accidents—a prevailing preoccupation of tort lawyers and scholars of the time. Moreover, even as the paradigmatic automobile accident has retreated in the face of the expansion of tort liability into products liability, civil rights violations, employment disputes, and mass harms, McNulty and Lazenby have continued to focus the terms of the debate.  

85. Id.  
86. Id. at 2-3.  
87. Id. at 5.  
88. Id. In the words of a concurring Justice: “It would be pure speculation to conclude that by denying coverage that accidents on the highways would decrease or that operators of automobiles would be any more careful in their driving habits or the care with which they operate them.” Id. at 8 (White, J., concurring).  
89. Id. at 5.  
90. Id. Once again, the insurance policy at issue was the typical standard form, requiring the company to pay “all sums” the insured is “obligated to pay as damages” for injuries “caused by [automobile] accident.” Id. at 2 (quoting the insurance policy). Indeed, the court ultimately concluded that freedom of contract should prevail over public policy concerns. Id. at 5.  
91. Id. In the words of a concurring Justice, whereas the McNulty jury awarded both compensatory and punitive damages (and the court held the latter uninsurable), “on identical facts, another jury might have returned an award limited to compensatory damages only in which case the wrongdoer would be fully protected under provisions of a policy such as here.” Id. at 7 (White, J., concurring).
2. The Continuing Debate in Our Time.—McNulty and Lazenby still represent the respective positions in the insurability debate. Although McNulty must concede its minority position status, insurance for punitive damages is still prohibited on public policy grounds in several states. Nine states have conclusively determined (by statute or decision of the highest state court) that insuring punitive damages would contravene public policy.92 Lazenby commands the clear majority. The insurability of punitive damages has been assured, by state legislative proviso or decision of the highest state court, in twenty-five states. Four states—Hawaii, Montana, Nevada, and Virginia—permit that coverage by statute.93 In the remaining states, insurability has been upheld either strictly as a matter of contract interpretation, as a matter of public policy, or both.94

a. Insurance Prohibited.—McNulty has served as the basis for other states’ adoption of public policy proscriptions against insuring punitive damages. In fact, almost all of the subsequent courts that

92. These states include California, Colorado, Florida, Kansas, Minnesota, New York, Ohio, Oklahoma, and Utah. Utah has enacted a comprehensive bar to any coverage of punitive damages. UTAH CODE ANN. § 31A-20-101 (2001) ("No insurer may insure or attempt to insure against... punitive damages."). Ohio has enacted a somewhat more limited statutory prohibition. OHIO REV. CODE ANN. § 3937.182 (Anderson 2002) (proscribing insurance coverage for punitive damages as part of any policy of motor vehicle insurance or any policy of casualty or liability insurance, including fidelity, surety, and guaranty bonds). The statutory prohibition has, nonetheless, been interpreted rather broadly by the Ohio courts. See, e.g., Casey v. Calhoun, 531 N.E.2d 1348, 1350-51 (Ohio Ct. App. 1987) (refusing to allow an insurance company to indemnify an individual, pursuant to a personal injury liability policy, for punitive damages awarded in a slander case). In the remaining states, the highest state court has spoken on the matter. See Appendix, infra.

Moreover, the public policy prohibition position has been espoused by lower state courts and/or federal courts (sitting in diversity) in Illinois, Indiana, Missouri, New Jersey, and Pennsylvania. See id.

93. Virginia’s statute expressly declares that no public policy prohibition exists against insuring punitive damages. VA. CODE ANN. § 38.2-227 (Michie 2002). Nevada’s statute does not reference public policy, but allows an insurer to “insure against legal liability for exemplary or punitive damages that do not arise from a wrongful act of the insured committed with an intent to cause injury to another.” NEV. REV. STAT. ANN. 681A.095 (Michie 2003).

By contrast, Hawaii and Montana prohibit construction of an insurance policy to provide coverage for punitive damages unless specifically included in the policy. HAW. REV. STAT. § 431:10-240 (2001); MONT. CODE ANN. § 33-15-317(1) (2003).

94. These states include Alabama, Alaska, Arizona, Arkansas, Connecticut, Delaware, Georgia, Idaho, Iowa, Kentucky, Maryland, Mississippi, New Mexico, North Carolina, Oregon, South Carolina, Tennessee, Vermont, West Virginia, Wisconsin, and Wyoming. See Appendix, infra. Washington, which only allows punitive damages authorized by statute, see supra note 60, otherwise belongs in this group as well. See Appendix, infra. States in which lower state courts or federal courts have taken the pro-insurance position include Michigan and Texas. See id.
have found punitive damages uninsurable on public policy grounds have relied to a substantial degree upon Judge Wisdom’s analysis. In sum, “public policy prohibits insurers from assuming any obligation for indemnity of punitive damages. Otherwise, the legal and social purposes for punitive damages would be defeated.” Punitive damages continue to be analogized to criminal fines. Their “dominant” purposes—punishment and deterrence—are stressed as inconsistent with an insurability norm. Moreover, “[c]ommon sense demands that the burden of satisfying a punitive-damage award should remain with the wrongdoer and should not be cast upon the blameless shoulders of the other insureds.” Refuting the more modern “consumer expectations” argument (as more jurisdictions have adopted the pro-insurance position), these states hold firm to their belief that “a person has no right to expect the law to allow him to place responsibility for his reckless and wanton acts on someone else.”

In a sweeping generalization, the California Supreme Court has proclaimed that the justification for the public policy prohibition “applies whatever the basis for the punitive damages award.” The breadth of this public policy prohibition is not, alas, without carve-outs, as indicated by the pervasiveness of the vicarious liability exception.

Most of the states that prohibit insurance for punitive damages on public policy grounds nonetheless permit that insurance when punitive damages are vicariously (as opposed to directly) assessed against


97. See, e.g., Crull v. Gleb, 382 S.W.2d 17, 23 (Mo. Ct. App. 1964) (“If a person is able to insure himself against punishment, he gains a freedom inconsistent with the establishing of sanctions against such misconduct. It is undisputed that insurance against criminal fines would be void as violative of public policy.”); see also Koch v. Merchs. Mut. Bonding Co., 507 P.2d 189, 196 (Kan. 1973) (“The objective to be attained in imposing punitive damages is to make the culprit feel the pecuniary punch, not his guiltless guarantor.”); Wojciak v. N. Package Corp., 310 N.W.2d 675, 680 (Minn. 1981) (“[W]e are satisfied that in most instances public policy should prohibit a person from insuring himself against misconduct of a character serious enough to warrant punitive damages.”).

98. United States Concrete Pipe Co. v. Bould, 437 So. 2d 1061, 1064 (Fla. 1983) (“The Florida policy of allowing punitive damages to punish and deter those guilty of aggravated misconduct would be frustrated if such damages were covered by liability insurance.”).


a defendant. Vicarious liability results when the policyholder is held liable for another person's actions, solely on the basis of a particular relationship between the two parties, such as employer and employee. Once again, McNulty led the pack with the rationale that "if the employer did not participate in the wrong the policy of preventing the wrongdoer from escaping the penalties for his wrong is inapplicable." In other words, the dual purposes of punishment and deterrence lose their force when the party whose liability is vicarious has not acted in any "blameworthy" manner.

George Priest has remarked that the rationale for the exception allowing insurance coverage when vicarious liability is implicated "is not well worked out." In particular (and setting to one side the retribution-based concern with culpability or blameworthiness), "[c]ourts have not explained why there should be less concern over diminishing the deterrent effect of vicarious liability." At least one New Jersey court seems to take the view, in fact, that there is no defensible rationale on deterrence grounds. In Johnson & Johnson v. Aetna Casualty & Surety Co., a New Jersey court held that a corporation cannot indemnify itself for punitive damages in a products liability case, the vicarious liability exception is recognized in some form in California, Florida, Illinois, Indiana, Kansas, Maine, Minnesota, Oklahoma, and Pennsylvania. Kansas is the only state to have codified this exception. Kan. Stat. Ann. § 40-2, 115 (2001). The remaining states recognize a common-law exception. See Appendix, infra. New Jersey apparently prohibits insurance of punitive damages in vicarious liability situations. See Johnson & Johnson v. Aetna Cas. & Sur. Co., 667 A.2d 1087 (N.J. Super. Ct. App. Div. 1995); infra notes 108-111 and accompanying text.


104. Id. at 440; see also United States Concrete Pipe Co. v. Bould, 437 So. 2d 1061, 1064 (Fla. 1983) ("[P]ublic policy is not violated by construing a liability policy to include punitive damages recovered by an injured person where the insured did not participate in or authorize the act." (quoting Sterling Ins. Co. v. Hughes, 187 So. 2d 898, 900 (Fla. Dist. Ct. App. 1966))).

Hence, the critical debate becomes whether an entity may be held directly liable for injuries caused by its agents. See, e.g., Norfolk & W. Ry. v. Hartford Accident & Indem. Co., 420 F. Supp. 92, 96-97 (N.D. Ind. 1976) (distinguishing the situation where a corporation itself is found to have acted "maliciously or oppressively" from that where "the corporation, without itself being guilty of willful misconduct, is held to respond in damages for the intentional tort of its agent").

105. The same arguments raised against insuring punitive damages are applicable to the question of whether the law should impose vicarious liability for punitive damages. In many respects, the effects of vicarious liability are similar to those of insurance. For this reason, some states reject altogether the imposition of punitive damages in vicarious liability situations. See, e.g., Dalton v. Johnson, 129 S.E.2d 647, 651 (Va. 1963) ("[S]ince exemplary or punitive damages are awarded not by way of compensation to the sufferer but by way of punishment to the offender, such damages can only be awarded against the one who has participated in the offense.").

107. Id.
regardless of whether the corporation is held directly or vicariously liable. Accord-
ing to the court:

Punitive damages "serve the public interest by encouraging corporations to keep defective products . . . out of the marketplace." Permitting a shift of responsibility for punitive damages from the manufacturer to its insurance company in a product liability case would thwart those purposes.

The court emphasized that it was necessary to "punish 'the corporation itself,' and to deter the corporation and others from engaging in similar conduct in the future." In this regard, a vicarious liability exception would "frustrate those goals."

b. Insurance Allowed.—If the jurisdictions were evenly divided on the insurability issue in the 1960s and 1970s, the legislative and judicial trend in the past several decades has been squarely in the direction of expanded insurability. As George Priest has noted, "[t]he current trend toward allowing punitive coverage builds on modern skepticism of any deterrent effect of punitives at all or of any independent deterrent effect." In the words of the Oregon Supreme Court:

It has long been recognized that there is no empirical evidence that contracts of insurance to protect against liability for negligent [or reckless] conduct are invalid, as a matter of public policy, because of any "evil tendency" to make negligent conduct "more probable" or because there is any "substantial relationship" between the fact of insurance and such negligent conduct. . . . Conversely, neither is there any such evidence that to invalidate insurance contract provisions to protect against liability for punitive damages on grounds of public policy would have any substantial "tendency" to make such conduct "less probable," i.e., that to do so would have any "deterrent effect" whatever upon such conduct.

108. 667 A.2d 1087, 1092 (N.J. Super. Ct. App. Div. 1995). In two underlying products liability cases, juries awarded $517,500 and $2.75 million in punitive damages against defendants Johnson & Johnson and its subsidiary Ortho, respectively. Id. at 1088-89. The corporations then filed a declaratory judgment action against their insurer, seeking indemnification for the awards. Id. at 1089.

109. Id. at 1092 (citation omitted).

110. Id. (citation omitted).

111. Id.

112. Priest, supra note 43, at 1031.

113. Harrell v. Travelers Indem. Co., 567 P.2d 1013, 1017 (Or. 1977). The Oregon Supreme Court criticized the McNulty decision and its policy arguments with impunity, labeling its reasoning "fallacious." Id. at 1020. Indeed, the court could have cited the nineteenth-century critique of insurance for injury caused by negligence. See supra note 47 and accompanying text (noting the nineteenth-century disfavor of liability insurance).
The Wyoming Supreme Court expressed this skepticism a decade later:

We know of no studies, statistics or proofs which indicate that contracts of insurance to protect against liability for punitive damages have a tendency to make willful or wanton misconduct more probable, nor do we know of any substantial relationship between the insurance coverage and such misconduct. ¹¹⁴

Other courts have been convinced that the provision of insurance does not alter the deterrent effects of punitive damages, either because insurers can raise premiums after awards, or else insurers can build the expected cost of punitives ex ante into their premiums.¹¹⁵ As for the argument that allowing such coverage would shift the burden onto the public, courts have responded that this overlooks the fact that, by charging an additional premium, insurance companies can collect a separate fund for the express purpose of paying such judgments.¹¹⁶ In other words, “an insurance company which deliberately enters into a contract to provide coverage against liability for punitive damages is free to charge either a separate or additional premium for that risk.”¹¹⁷

¹¹⁴. Sinclair Oil Corp. v. Columbia Cas. Co., 682 P.2d 975, 981 (Wyo. 1984); see also Skyline Harvestore Sys., Inc. v. Centennial Ins. Co., 331 N.W.2d 106, 109 (Iowa 1983) (“[W]e doubt that ordinary potential tortfeasors make calculations to determine if the expected benefits of a harmful act are outweighed by the potential costs of punitive damages, insured or uninsured.”).

¹¹⁵. E.g., Price v. Hartford Accident & Indem. Co., 502 P.2d 522, 524 (Ariz. 1972) (reasoning that even with liability insurance a tortfeasor would still be subjected to considerable automobile insurance premiums, as well as facing possible criminal actions and loss of license); First Nat'l Bank v. Fid. & Deposit Co., 389 A.2d 359, 366 (Md. 1978) (“[T]hose who are demonstrated by experience to be poor risks encounter substantial difficulty in obtaining insurance, a fact such persons know.”); see also LEE R. RUS$ COUCH ON INSURANCE § 101:29, at 101-99 (3d ed. 1999) (noting that the deterrence argument “underestimates the impact that a large payment by an insurer would have on the insured’s ability to obtain future insurance coverage, and the amount of premiums that would have to be paid”).

Incidentally, Calabresi rejected this rationale on two grounds. First, he argued that “the manner in which insurance rates change as a result of accidents clearly is so haphazard and arbitrary under the fault system that the possibility of rate increases cannot conceivably be as good a collective deterrent as an intelligently fixed noninsurable fine.” THE COSTS OF ACCIDENTS, supra note 1, at 271 n.6. Second, he noted that “even this risk of going into a higher risk actuarial subcategory by reason of accident involvement could conceivably be insured against.” Id. at 125 n.23.

¹¹⁶. Price, 502 P.2d at 524 (reasoning that “since [the insurance company’s] premiums were based on its exposure, it may be presumed that holding it liable for what it has promised to pay would not result in additional burdens on the driving public”).

¹¹⁷. Harrell, 567 P.2d at 1019. This rationale also stems from underlying support for the principles of freedom of contract. See id. at 1016 (“It is elementary that public policy re-
B. Accidental vs. Intentional Conduct: A Market-Based Divide

The public policy-based approach to the insurability question, consistent with traditional tort doctrine, would treat compensatory damages as separate and distinct from punitive damages. However, a line drawn on the basis of intentionality of conduct would cut across these damages categories. The intentional act exclusion—which excludes from coverage acts "intended" or "expected" by the insured—thus presents a rather striking alternative to the public policy-based compensatory versus punitive damages approach. The intentional act exclusion might be described as a competing "market-based" approach, save for the fact that it is often enshrined as part of state law, indeed on public policy grounds that resonate with those explored above in Part II.A. But the state law approach is in some intellectual disarray; namely, the very same public policy deterrence rationale that had been used to justify the blanket proscription on insuring punitive damages is now put forth in defense of the narrower intentional act exclusion. In light of the public policy approach's failure to establish a clear-cut distinction (and hence acknowledging its manipulability), it is worth exploring whether insurance industry custom and practice might yield a more satisfactory approach. In the Sections that follow, I explore in turn the intentional act exclusions employed by our public and private insurance regulators.

1. State Law.—Although a majority of the states have concluded that punitive damages are insurable, most explicitly except intentional misconduct.118 As the Alabama Supreme Court has explained, "[t]here can be no valid insurance coverage which will protect or indemnify the insured or indemnitee against a loss which he may purposely and willfully create, or which may arise from his immoral,

quires that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice . . . ." (quoting Eldridge v. Johnston, 245 P.2d 239, 251 (Or. 1952))). Many courts have held that, except in compelling cases, public policy should not be used to override contracts between private parties. E.g., DeVetter v. Principal Mut. Life Ins. Co., 516 N.W.2d 792, 794-95 (Iowa 1994); First Nat'l Bank, 389 A.2d at 364.

118. These states include Alabama, Arizona, Arkansas, Connecticut, Iowa, Kentucky, Louisiana, Montana, Nevada, Oregon, Texas, Virginia, Washington, and West Virginia. See Appendix, infra. Two additional states have statutory intentional act exclusions: California (where it has been read consistent with the public policy prohibition against insuring punitive damages), and North Dakota (where, at least in a limited context, the policy of freedom of contract has trumped statutory policy considerations, in favor of insuring punitive damages). See id.
fraudulent, or felonious conduct." The Iowa Supreme Court recently agreed, explaining that "[b]arring coverage in these circumstances discourages insureds from intentionally harming others, as intentional wrongdoers cannot then rely on the availability of insurance to shield them from the civil consequences of their misconduct." The Virginia and Nevada legislatures have codified this distinction, allowing insurance for punitive damages, but not intentional acts. Virginia's provision proclaims: "It is not against the public policy of the Commonwealth for any person to purchase insurance providing coverage for punitive damages arising out of the death or injury of any person as the result of negligence, including willful and wanton negligence, but excluding intentional acts."

In theory, these states draw a different exclusionary line, circumscribing intentional acts only (whether resulting in compensatory or punitive damages), as opposed to punitive damages more gener-

119. Fid.-Phenix Fire Ins. v. Murphy, 146 So. 387, 390 (Ala. 1933); see also Cont'l Ins. Co. v. McDaniel, 772 P.2d 6, 8 (Ariz. Ct. App. 1988) ("[O]nce one intentionally commits an act against another and injury results as a natural and probable consequence of the intentional act, the injury is intended and expected and therefore excluded from coverage.").

An interesting parallel exists in federal securities law. A public policy-based prohibition—derived from insurance law— restricts a corporation from indemnifying its directors and officers for securities law violations predicated upon their intentional or reckless conduct. See Globus v. Law Research Serv., Inc., 418 F.2d 1276, 1288 (2d Cir. 1969) ("It is well established that one cannot insure himself against his own reckless, willful or criminal misconduct."). While courts' application of this principle of insurance law has been inconsistent, most courts that have disallowed indemnification for intentional, reckless, or criminal acts on the ground of public policy have focused on the deterrent effect of the statute violated by those seeking indemnification. See, e.g., id. ("Civil liability under [the Securities Act] . . . was designed not so much to compensate the defrauded purchaser as to promote enforcement of the Act and to deter negligence by providing a penalty for those who fail in their duties.").

120. Grinell Mut. Reins. Co. v. Jungling, 654 N.W.2d 530, 538 (Iowa 2002). These states nonetheless have deferred to competing interests—such as malicious prosecution claims against the state, e.g., Titan Indem. Co. v. Riley, 679 So. 2d 701, 705-07 (Ala. 1996); discrimination claims against the state, e.g., Harris v. County of Racine, 512 F. Supp. 1273, 1280-82 (E.D. Wis. 1981); or compensating the innocent victims of the misconduct, e.g., Jungling, 654 N.W.2d at 541—when they acquiesce to the provision of insurance for intentional conduct.

121. VA. CODE ANN. § 38.2-227; NEV. REV. STAT. ANN. 681A.095.

122. VA. CODE ANN. § 38.2-227.

123. Although, as indicated above, supra note 120, courts may be likely to depart from strict enforcement of the public policy exclusion of intentional acts where compensatory damages are at stake and a victim might otherwise go uncompensated. See also St. Paul Fire & Marine Ins. Co. v. Jacobson, 826 F. Supp. 155, 164-65 (E.D. Va. 1993) (recognizing an exception to Virginia's public policy against insurance coverage for intentional acts where an infertility specialist fraudulently inseminated patients with his own semen, and noting that "countervailing considerations, i.e., compensating [defendant's] innocent victims, decidedly outweigh the concern that [defendant] will unjustly benefit from the extension of coverage").
ally. But the rationales put forth by courts hardly validate any clear-cut distinction. A line of Texas decisions provides an apt illustration. Texas is a jurisdiction in which at least the lower courts have rejected a general public policy proscription against insuring punitive damages, in part on the now widely shared view that "[i]t is doubtful whether the denial of insurance coverage for liability against punitive damages actually deters culpable actors." Nonetheless, the very same deterrence rationale is put forth to justify the narrower intentional act exclusion recognized in Texas law: "The rationale behind the [intentional act exclusion] is that the insured is more likely to engage in behavior which is harmful to society if he believes that he will not have to bear the financial costs of his intentional indiscretions."  

2. Insurance Industry Practice.—Perhaps, then, it would prove more fruitful to look to insurance industry custom and practice for a more satisfactory rationale of the intentional act exclusion. Insurance policies typically contain exclusions for "expected" or "intended" acts.  

George Priest has provided a rich account of the basic economic underpinnings of insurance law and practice. Simply stated, two related conditions must be met in order for a risk to be insurable. First, the losses must be probabilistic. "A loss that is certain to occur in some particular period cannot be insured against; one can only accumulate savings before the loss occurs or after the loss is suffered to restore the previous economic position." Second, the ever-present problem of


126. The typical provision excludes coverage for bodily injury and property damage that is "expected or intended from the standpoint of the insured." Tom Baker, Reconsidering Insurance for Punitive Damages, 1998 Wis. L. Rev. 101, 119 (quoting 1 Susan J. Miller & Phillip Lefebvre, Miller's Standard Insurance Policies Annotated 409 (1996)). An analogous exclusion in automobile liability insurance contracts provides that injury or damage must be "caused" by accident. See, e.g., Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432, 433 (5th Cir. 1962) (quoting a standard-form automobile insurance policy that excluded coverage for "bodily injury or property damage caused intentionally by or at the direction of the insured").  

127. Priest, supra note 43, at 1020. The insured loss may be probabilistic "either as to whether the losses will occur at all (for example, whether a product will prove defective) or as to when losses certain to occur actually will occur (for example, whether one will die
moral hazard must be restrained. Moral hazard describes the behavioral effects of insurance on the insured; thereby, if insurance lowers expected injury costs, the insured will proceed with risky activities, increasing the likelihood of injuries to others. To guard against this, "[i]nsurers will constrain or, at the limit, exclude coverage of losses particularly susceptible to insured moral hazard," i.e., occurrences "intended" or "expected" by the insured. The insured, who now faces the prospect of paying for such losses himself, will exercise greater care to avoid the risk altogether. This is especially important in situations where the insured's actions significantly affect the probability that losses will materialize. In this way, coverage exclusions are an effective means of controlling the threat to deterrence posed by moral hazard.

Expanding upon Priest's insight, Tom Baker has argued that "insurance companies have a strong financial incentive to construct the insurance relationship in a manner that answers the theoretical objections to insurance for punitive damages." Moreover, "insurance companies [tend to] underwrite and draft insurance contracts in ways that appear to be consistent with that incentive." Insurance companies typically include intentional act exclusions as well as exclusions for "fines" and "penalties." Why then do they

before or after full life expectancy)." In other words, there can be interpersonal loss spreading, as well as intertemporal loss spreading.

128. Id. at 1023-24. To limit risks and thus make insurance widely available by reducing its costs, insurers must be able to "narrow the assortment of risks within a risk pool." Id. at 1022. In Priest's view, "[a] court that wanted to maximize insurance availability in the society would adopt policies that encouraged maximally effective discrimination in order to segregate risks into the narrowest possible pools." Id. at 1023. Priest notes that Calabresi instead emphasized the role of spreading losses in The Costs of Accidents. Id. & nn.53, 54.

129. See Richard A. Epstein, Imperfect Liability Regimes: Individual and Corporate Issues, 53 S.C. L. Rev. 1153, 1158 (2002) ("The purchase of insurance creates a dilemma that is easy to state but impossible to solve: the insured defendant may be more likely to engage in activities that cause harm precisely because he is aware that someone else will be there to foot the bill for defense costs and liability once the losses happen.").

130. Priest, supra note 43, at 1024. Priest notes that "the exclusion serves to control moral hazard by removing the incentive that providing large monetary amounts to beneficiaries would add to other forces compelling the act." Id.

131. Id.

132. Id.

133. Baker, supra note 126, at 126.

134. Id. Baker also states that ":[b]ecause of intentional harm exclusions, the liability insurance that is actually provided through the insurance market poses much less an insurance-deterrence tradeoff than the simple model of insurance that is employed in most economic theory." Id. at 103.

not simply add explicit exclusions for punitive damages.\textsuperscript{136} After all, they have been on notice, at least since \textit{McNulty}, that they should warn their insureds of their intention to deny coverage on punitive damages claims.\textsuperscript{137} Moreover, courts have increasingly weighed the absence of any punitive damages exclusion as a strong factor in favor of concluding that punitive damages fall within the policy's coverage.\textsuperscript{138}

Priest confronted this punitive damages exclusion puzzle.\textsuperscript{139} According to Priest, the "basic principles of insurance provide an answer"; namely, "[t]he reluctance of insurers to amend basic policies to more precisely exclude coverage of punitive liability reflects responsiveness to consumer demand for liability insurance."\textsuperscript{140} A related ex-

\begin{quote}
\textsuperscript{136} See Lazenby v. Universal Underwriters Ins. Co., 383 S.W.2d 1, 8 (Tenn. 1964) (White, J., concurring) ("[I]f the insurance industry feels that punitive damages protection should not be afforded under automobile liability policies, it can very easily make a provision in the exclusions section to that effect.").

Punitive damages exclusions can take a variety of forms, including language either expressly excluding punitive damages or else expressly including only compensatory damages. \textit{See, e.g.,} DeShong v. Mid-States Adjustment, Inc., 876 S.W.2d 5, 7 (Mo. Ct. App. 1994) (interpreting language in a policy that stated that the insurer would pay amounts it was "legally required to pay to compensate others" as excluding punitive damages). According to Tom Baker, punitive damages exclusions are rare, although they are slightly more likely to appear in umbrella and excess liability insurance policies. Baker, \textit{supra} note 126, at 119, 122. On top of intentional harm exclusions and punitive damages exclusions, insurance companies might also include claim-specific exclusions, such as for asbestos, sexual harassment, assault, or pollution claims. \textit{Id.} at 122. Claim-specific exclusions, which are added for a variety of reasons, have the ancillary effect of excluding from coverage claims that might commonly result in unpredictably large punitive damages judgments. \textit{Id.}

\textsuperscript{137} See Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432, 443 (5th Cir. 1962) ("The Court is shocked that this insurer failed to put the insured on notice of its intention to deny liability for punitive damages."); \textit{see also} First Nat'l Bank v. Fid. & Deposit Co., 389 A.2d 359, 367 (Md. 1978) (noting that insurance companies have been on notice since \textit{Lazenby} that they might be held responsible for paying punitive damages claims).


\textsuperscript{139} Priest, \textit{supra} note 43, at 1083 ("The puzzle remains, however, why insurers have not modified policies to exclude coverage of punitive liability despite invitations to do so by the courts.").

\textsuperscript{140} \textit{Id.}; \textit{see also} Baker, \textit{supra} note 126, at 122 ("[E]fforts to include [punitive damages] exclusions in the industry-wide standard form primary policies have been rejected on marketing grounds.").
planation might be the soft (highly competitive) insurance market, at least throughout the 1990s.\footnote{141}

One significant effect of the expanding and changing nature of punitive damages (which I will explore in Part III)—whereby punitive damages have expanded into realms such as products liability and employment disputes, and are increasingly assessed for grossly negligent or reckless conduct, as opposed to fraud, oppression, or malice—is that risks of losses leading to punitive damages awards have become more probabilistic and less subject to insured moral hazard.\footnote{142}

As a result, there is not only greater consumer demand for such coverage, but it also makes economic sense for insurers to offer such coverage.\footnote{143} From the insurer’s perspective, it does not matter whether damages (or expected losses) are legally described as compensatory or punitive. What is key is not only the insurer’s assessment of the risks for a class of losses, but also its ability to control costs. Victor Goldberg highlights the importance of the ability of insurance companies to control risks ex ante; in essence, they sell “risk manage-

\footnote{141. This was the predominant reason given independently by two insurance professionals—a lawyer and a broker with more than fifty years’ combined experience in the industry—whom I interviewed confidentially. Telephone Interviews with Anonymous Lawyer and Insurance Broker (June 16, 2004) [hereinafter Telephone Interviews]. Additional reasons included “ignorance” on the part of the consumer market and brokers and possible resistance by state insurance regulators. \textit{Id.}}

\footnote{142. In a related vein, Jennifer Wriggins has made the case for expanding liability insurance even further, to cover domestic violence torts:

\begin{quote}
Liability insurance . . . is not limited to coverage for harms that are produced unintentionally. . . . Insurance has developed over the last decade for employers covering their liability for employees’ intentional acts such as sexual harassment. As new forms of liability emerge, insurance often follows. Despite early challenges in pricing employers’ liability insurance, this insurance has become widely available. It should also be possible to determine prices for the insurance proposed here [for domestic violence torts].
\end{quote}


\footnote{143. In other words, it becomes more feasible for the pricing of general liability insurance to anticipate paying a certain amount of punitive damages. This general understanding was echoed by the insurance broker with whom I spoke. Telephone Interviews, \textit{ supra} note 141.}
ment services including inspection, litigation, and administration of compensation."

A particularly salient modern example exists in the market for terrorism insurance. Here, as Richard Ericson and Aaron Doyle emphasize, "[i]nsurers play key but often hidden roles in establishing preventive security and loss prevention infrastructures, whether based on environmental design, electronic surveillance technologies, or private security operatives." Insurance coverage may thus serve not only to spread losses, but to reduce them as well.

Simultaneously, however, a certain amount of ambiguity surrounding punitive damages coverage may suit insurers, who are able to remain competitive by satisfying consumer demand for such coverage, and still reserve the right, after the fact, to disclaim liability for losses.


For example, for steam boiler and elevator insurance, inspection costs account for over twenty percent of the insurance premium. If insurance companies are more efficient at providing these services, other firms would pay them to do so, regardless of attitudes toward risk.

Id. Indeed, as Kenneth Abraham points out, "[a]s early as the turn of the century, . . . the Travelers Insurance Company was inspecting the premises of its policyholders and giving them reductions in premiums for complying with safety standards." Abraham, supra note 48, at 590.

The modern role of insurers in risk management varies enormously by insurance line, market conditions, and the like. See Richard V. Ericson et al., Insurance as Governance 267-310 (2003) (discussing myriad ways in which insurers mobilize the insured in loss prevention activities).

145. Richard V. Ericson & Aaron Doyle, Catastrophic Risk, Insurance and Terrorism, 33 Econ. & Soc'y 135, 139 (2004); see id. at 154 ("Insureds in need of terrorism coverage could be compelled to 'target harden' their persons and property by hiring more security personnel, buying more electronic surveillance technologies, and opening up to audits of their employees, operations, security infrastructure, and so on."). Indeed, according to Ericson and Doyle, "[t]he New York City Comptroller reported that, in 2001, over 1 percent of all workers in New York City were security guards"—a result largely driven by tightened insurance requirements. Id. at 164.

Susan Sturm is less optimistic about the risk management role served by insurers in the employment context. See Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, 101 Colum. L. Rev. 458, 549 (2001) ("Unless encouraged to do so by authoritative public actors, the insurance industry also faces serious obstacles to moving beyond a narrow, reactive definition of risk management in their interactions with employers about equity concerns.").

146. Priest, supra note 43, at 1021-24. Priest likewise emphasized the dual roles played by insurance in terms of risk spreading and risk reduction, but did not consider insurance companies' superior ability to control risks ex ante. See id. at 1021 ("[T]o the extent the losses and accompanying risks are truly independent, their aggregation not only spreads them, diminishing the impact of a loss on an individual insured, it also reduces the total risk level of the pool below the preaggregated sum of individual risks.").
punitive damages. With cover from the public policy exclusion, insurance companies can thus have their cake and eat it, too. Indeed, some state legislatures have intervened (no doubt as a result of insurance company efforts) to provide that such coverage will not be presumed absent an express inclusion of coverage by the insurance companies. Absent such legislative direction, however, courts increasingly refuse to exclude coverage where not specified in the insurance contract.

147. Insurance companies have attempted to argue that punitive damages, which are akin to "private fines" or "civil penalties," should not be included under the rubric of "damages" as contemplated in insurance contracts. See, e.g., Collins & Aikman Corp. v. Hartford Accident & Indem. Co., 436 S.E.2d 243, 246 (N.C. 1993).

148. In a similar vein, Tom Baker has commented: Insurance companies largely have chosen to limit punitive damages coverage indirectly, rather than by explicitly excluding coverage for punitive damages. Notwithstanding the freedom of contract ideology that still animates much of insurance practice, liability insurance companies regularly refuse to pay punitive damages claims on the grounds that public policy forbids it. Baker, supra note 126, at 123-24 (footnote omitted). Baker explores a few possible explanations for the insurance industry's approach, including the existence of a kind of "prisoners' dilemma," whereby "even though offering [punitive damages] insurance may be in the best interests of the industry as a whole . . . the contrary interests in the individual situations overwhelm that collective interest." Id. at 125.


Punitive damages inclusions can take a variety of forms. A recent development (within the past ten years) is the inclusion of "most favorable venue" language, a kind of "choice-of-law" provision that specifies, for example, that if an issue arises regarding punitive damages, the carrier will apply the law and public policy of an applicable state with the "most favorable" view of insurance coverage for punitive damages. Telephone Interviews, supra note 141. The insurance professionals with whom I spoke reiterated that the existence of punitive damages inclusions were a sign of sophistication on the part of underwriters and insurance brokers, and bespoke a heightened awareness on the part of insurance buyers of various states' public policy exclusions and the like. Id.

A more sensible approach, given potential asymmetries of information between consumers and insurance companies, might be a statutory provision that presumed coverage absent express exclusion, and thus worked akin to an information-forcing penalty default. See infra note 212 and accompanying text (outlining this approach).

150. See supra note 138 (noting cases where courts have cited the absence of an express exclusion as grounds for holding that punitive damages are covered). The insurance professionals with whom I have spoken confirmed that the majority of policies in the United States are silent with respect to punitive damages. Telephone Interviews, supra note 141. It would be interesting to know, as an empirical matter, how frequently punitive damages exclusions are employed, and whether their use has increased in recent years along with the growth and expansion of the punitive damages doctrine. It would also be interesting to track whether an increasing number of off-shore policies—specifically guaranteeing that punitive damages would be paid in jurisdictions where there is either a state legal or public policy prohibition against such coverage—are sought.
III. THE LINK BETWEEN INSURABILITY AND THE ROLE OF PUNITIVE DAMAGES

Perhaps insurance companies are onto something in focusing on the insured’s moral hazard risk as opposed to the nature of damages. So we must ask: What difference does it make to draw the line of insurability at intentional conduct, as opposed to punitive damages? Other scholars—primarily Priest and Baker—have recognized the divergence between tort doctrine and insurance industry practice with respect to the insurability debate. What has yet to receive sufficient attention is the link between the insurability question and the changing and evolving roles assumed by punitive damages.

As the grounds for punitive damages expand, it would make sense that insurance would follow suit, for two reasons. First, as the risk of punitive damages increases in an ever-widening array of cases, insurance for punitive damages makes economic sense for insurance companies, which are attuned to probabilities and moral hazard concerns. Second, as punitive damages are more frequently awarded outside of the confines of malicious conduct, the force of public policy prohibitions based upon criminal penalty analogues diminishes.

A. Industry Practice vs. Tort Doctrine

What is one to make of the divergence between tort doctrine and insurance industry practice on the question of the insurability of punitive damages? George Priest read that disconnect as evidence that something is awry in the nature of punitive damages, namely, the modern expansion of punitive liability. According to Priest, “insurance principles . . . demonstrate the very close relationship between the economic grounds for excluding punitive coverage and the moral grounds for awarding punitive damages in the first instance.” Priest posited “an inverse relationship between feasible insurance of punitives and the moral or instrumental justification for punitive awards,” such that as punitive liability insurance expands, “the special moral force of punitive liability [necessarily] disappears.”

Tom Baker has taken a different tack. For him, insurance company practice—primarily drafting contracts with intentional act exclusions and other carve-outs (discussed above in Part II)—confirms that “punitive damages insurance does not pose all the problems suggested in the theoretical discussion, nor is prohibiting such insurance the

151. Priest, supra note 43, at 1011.
152. Id.
153. Id. at 1034.
panacea that a purely theoretical or doctrinal approach might suggest.""}

Baker concluded that "from both a prevention and retribution perspective, it makes little practical difference whether punitive damages are insurable or not."\textsuperscript{155}

In its modern incarnation, however, the debate over the insurability of punitive damages highlights important issues that are neither lamentable nor irrelevant on theoretical or practical grounds. First, while historically it might have been true that punitive damages aligned rather comfortably on the "intentional harm" side of the divide, that is not the case in modern tort law.\textsuperscript{156} Nor may this modern expansion be explained away simply in terms of the disappearance of "the special moral force of punitive liability."\textsuperscript{157}

Second, it is no longer tenable for courts and state legislatures to make sweeping public policy declarations regarding insuring punitive damages without unpacking further, and in a more nuanced fashion, the underlying roles and purposes of punitive damages. The public policy component of the insurability issue implicates the central goals or purposes of punitive damages within our tort system. With respect

\textsuperscript{154} Baker, \textit{supra} note 126, at 126.

\textsuperscript{155} \textit{Id.} at 129. Baker makes clear "that this does not mean, of course, that it might not make a great difference to individual parties in individual cases." \textit{Id.} And, in a separate article, Baker explores various practical consequences of a public policy against insurance for punitive damages, including increasing nominally "compensatory" payments at the settlement stage. \textit{See} Tom Baker, \textit{Transforming Punishment into Compensation: In the Shadow of Punitive Damages}, 1998 Wis. L. Rev. 211, 214 (relying on interviews with personal injury lawyers practicing in Florida—a jurisdiction that prohibits insurance for punitive damages on public policy grounds).

Here, I want to emphasize the likely effect of increasing the amount of compensatory settlements. For example, if a defendant anticipated a trial outcome of a compensatory verdict of $500,000 and a punitive damages award of $2 million, it should rationally prefer to settle for $1.5 million in compensatory damages, all of which would be insured. The plaintiff, moreover, has no reason to resist this characterization. The same phenomenon is at work in some other areas where insurance is barred by law. For example, in the securities law context, where directors' and officers' insurance covers violations of the duty of care, but not violations of the duty of loyalty, parties have an incentive to settle all claims as "duty of care" violations. \textit{See} John C. Coffee, Jr., \textit{Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions}, 86 COLUM. L. REV. 669, 716 n.128 (1986).

\textsuperscript{156} Priest and Baker both appreciate this development; Priest sees it as cause for alarm, whereas Baker is seemingly agnostic. \textit{See} Priest, \textit{supra} note 43, at 1011 ("To the extent that the expansion of punitive damages awards in modern times increases the feasibility of insuring punitive liability, it diminishes the underlying moral justification for punitive damages."); Baker, \textit{supra} note 126, at 121 ("The relationship between the punitive damages fault line and the intentional harm fault line is not straightforward. Not all cases of intentional harm will meet the applicable tort law standard for punitive damages, nor will all punitive damages cases meet the applicable insurance law standard for intentional harm." (footnote omitted)).

\textsuperscript{157} Priest, \textit{supra} note 43, at 1034.
to states that have adopted a prohibition on insurance for punitive damages, most have seemingly adopted McNulty's bottom line with scant consideration of the nuances of the underlying reasoning regarding the character and function of punitive damages. And as to states that have allowed such insurance, there is just as frequently no direct correspondence between the policy rationales governing insurability and the underlying purposes of punitive damages.

Third, the insurability debate is certainly not moot, or of slight practical significance. For more than four decades, insurance companies have been on notice of their potential liability for punitive damages in some states, and their corresponding ability to include punitive damages exclusions, akin to the typical intentional act exclusions. Nonetheless, the debate continues to resurface, albeit in slightly different guises. What I hope to demonstrate next is that this recurring debate—which promises to continue, if for no other reason than that the issue has yet to be conclusively determined in thirteen states—pushes us in our understanding of the multifaceted roles of punitive damages.

B. Expanding Roles of Punitive Damages

What was true at the time of McNulty—namely a "general lack of agreement on the meaning of the term 'punitive damages'"—has only become more pronounced in the ensuing decades. Over the years, the concept of punitive damages has evolved and expanded, spawning an ongoing debate over the changing goals and purposes of the doctrine, as it has been applied in new types of cases and contexts.

158. See supra notes 92, 95-101 and accompanying text (citing cases that have followed McNulty and examining the justifications advanced in those cases).

159. See supra notes 93-94, 113-117 and accompanying text (examining cases that have held that punitive damages are insurable and that insuring punitive damages is not violative of public policy).

160. States where the battleground is unsettled—i.e., not yet decided conclusively by either the legislature or else the highest state court—including Illinois, Indiana, Maine, Massachusetts, Michigan, Missouri, New Jersey, New Hampshire, North Dakota, Pennsylvania, Rhode Island, South Dakota, Texas, as well as Washington, D.C. See Appendix, infra. The Texas Supreme Court was on the verge of deciding the issue as this Article went to press. See infra note 192.

161. 307 F.2d 432, 442 (5th Cir. 1962). In a concurring opinion, Judge Gewin went even further, asserting that the term "punitive damages" is "a chameleon of the law—changing its hue to the color of the situation in which it may be used." Id. at 443 (Gewin, J., concurring). Judge Gewin also stated that "[t]he term is too loose, vague, indefinite and uncertain; and its meaning often varies from state to state, court to court, and jury to jury." Id. (Gewin, J., concurring).
While the earlier cases frequently pertained to automobile accidents (in particular drunken driving), the expansion of punitive damages into the spheres of products liability, civil rights, and employment disputes has raised the stakes of the debate. For example, in Oregon, punitive damages can be awarded in cases where "the violation of societal interests is sufficiently great and the conduct involved is of a kind that sanctions would tend to prevent." Pursuant to such a standard, punitive damages may be assessed for "a wide spectrum of conduct that would impose liability not only upon automobile drivers, but also upon business and professional persons, firms and corporations, as well as upon ordinary persons when engaged in a wide variety of activities." In the same vein, the Montana Supreme Court has noted that "juries and judges typically award punitives for a broad range of conduct."

The general consensus surrounding the standard, articulated purposes of punitive damages—to punish and to deter—in fact masks deep and significant disagreement both in terms of relative emphasis of one goal over the other, as well as the exclusivity of these punitive roles. For some time, in the academy and in legal briefs, the "retributivist" paradigm, emphasizing moral desert and punishment, has been pitted against the "deterrence" paradigm, the law and economics in-

---


163. See Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 351 n.12 (2003) (presenting statistics, derived from the "most comprehensive data set available of punitive damages awards in civil trials," that demonstrate that punitive damages are awarded, for example, in higher percentages of employment disputes won by plaintiffs (12.5% to 26.8%) than the overall average for punitive awards in cases won by plaintiffs (4.5% to 5.9%) would suggest).


165. Id. at 1018 (citing punitive damages awards in cases of medical malpractice, creditor's wrongful possession, wrongful arrest, and misrepresentation). Other courts have echoed this concern. E.g., First Nat'l Bank v. Fid. & Deposit Co., 389 A.2d 359, 366 (Md. 1978). As the Maryland Court of Appeals reasoned:

If we were to determine that it is against public policy for one to protect himself by insurance against exemplary damages, such a small businessman could be crippled or virtually wiped out by an assessment of exemplary damages in a malicious prosecution action where he proceeded with what he regarded as good reason to prosecute a shoplifter but the courts found that he lacked probable cause for such pursuit.

spired conception that punitive damages are necessary only where compensatory damages will not adequately deter, such as where wrongdoing is concealed and/or harms go undetected. Moreover, in addition to punishment and deterrence rationales, several states embrace compensatory goals—either the historical role of compensating individuals for intangible injuries, or else the more innovative modern role of societal compensation.

Elsewhere I have argued that the expansive modern punitive damages doctrine and practice has placed pressure upon the "individual harm paradigm," which conceives punitive damages as individually oriented, retributive punishment. Moreover, I have argued that the U.S. Supreme Court's latest word on the subject, State Farm Mutual Automobile Insurance Co. v. Campbell, was cryptic at best. On the one hand, the Court seemed to reassert the traditional "bilateral view" that punitive damages should be limited to punishment for specific wrongs inflicted on particular individual plaintiffs. In this vein, the Court admonished that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the repre-

167. Compare Marc Galanter & David Luban, Poetic Justice: Punitive Damages and Legal Pluralism, 42 Am. U. L. Rev. 1393, 1451 (1993) ("[R]etribution forms the fundamental basis of punitive damages . . . Efficiency plays no role in the normative universe of punitive damages as we conceive of it."); with A. Mitchell Polinsky & Steven Shavell, Punitive Damages: An Economic Analysis, 111 Harv. L. Rev. 869, 870 (1998) ("Punitive damages ordinarily should be awarded if, and only if, an injurer has a significant chance of escaping liability for the harm he caused.").

168. See Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 438 n.11 (2001) ("Until well into the 19th 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."). But see Anthony J. Sebok, What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today, 78 Chi.-Kent L. Rev. 163, 180-95 (2003) (rejecting the Supreme Court's conclusion in Cooper and arguing that the historical rationale for punitives included a punishment goal).

169. See Sharkey, supra note 163 (examining the innovative concept of societal compensation, i.e., the notion that one purpose of punitive damages is to compensate nonplaintiff individuals not before the court for the harms caused by the defendant who is before the court).

170. Id. at 359-63. The individual-retributive harm conception of punitive damages has a close parallel in the victims' rights conception of individualized treatment that Calabresi describes. See supra note 21 and accompanying text.


172. See id. at 420 (chastising the Utah Supreme Court for having "condemned" State Farm "for its nationwide policies rather than for the conduct directed toward the [plaintiffs]"); id. at 425 ("A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.").
hensibility analysis." On the other hand, the Court explicitly conceded the potential relevance of harms inflicted beyond the individual plaintiffs (in this case, extending to "harm to the people of Utah"), at least when caused by a defendant's similar acts. Attempting to reconcile these seemingly divergent views, I argued that while it may be the case that Campbell seemingly put the brakes on nationwide assessment of damages for widespread harms by limiting the extraterritorial or out-of-state reach of punitive damages, it left open the possibility of classwide assessments at the state (or more localized) level.

And indeed, recent history seems to have borne this out: the modern trend of jurors' assessments of classwide punitive damages in single or multi-plaintiff cases has continued in Campbell's wake. Judge Richard Posner's recent decision in Mathias v. Accor Economy Lodging, Inc. is a case in point. Two plaintiffs, who were bitten by bedbugs in an infested hotel, sued the hotel operator for negligence. The jury awarded each plaintiff $5,000 in compensatory damages and $186,000 in punitive damages. According to Judge Posner, "[i]t is probably not a coincidence that $5,000 + $186,000 = $191,000/191 = $1,000: i.e., $1,000 per room in the hotel." In other words, the jury may have awarded damages sufficient to measure the harm not just to the two plaintiffs, but to the other harmed guests in the bug-ridden hotel. The court upheld the jury's punitive damages award, notwithstanding the fact that it was 37.2 times the compensatory award—i.e., larger than the "single-digit ratio" strongly suggested by the Supreme Court in Campbell.

173. Id. at 423. As I have explained elsewhere, "[t]he Court premised this due process right on the need to cabin the 'possibility of multiple punitive damages awards for the same conduct,' which arises because 'in the usual case nonparties are not bound by the judgment some other plaintiff obtains.'" Sharkey, supra note 163, at 362 n.36 (quoting Campbell, 538 U.S. at 423).
175. Sharkey, supra note 163, at 350. We might then add societal roles for punitive damages (whether compensatory or punitive) as another indicator of the demise of the bilateral view of torts. Recall that Calabresi argued that the widespread availability of general liability insurance demonstrated a rejection of the bilateral view. See supra text accompanying notes 26-27.
176. 347 F.3d 672 (7th Cir. 2003).
178. Mathias, 347 F.3d at 673-74.
179. Id. at 674.
180. Id. at 678.
181. See id. at 675 (noting that Campbell did not "lay down a... single-digit-ratio rule"). In Campbell, the Supreme Court suggested that "few awards exceeding a single-digit ratio
I would argue that the $186,000 in punitive damages awarded to each plaintiff is not only an attempt to punish the hotel for its misconduct, or to deter it from future failure to exterminate properly, but also—or perhaps instead—an attempt, albeit an imperfect one, to effect societal compensation.\(^{182}\)

**C. Link to Insurability Debate**

It should come as no surprise that the contours of the debate over insurability of punitive damages might likewise change, especially so when the nonpunitive rationales for punitive damages gain force. What is perhaps surprising is that the correspondence between the changing and evolving underlying purposes of punitive damages and the policy rationales governing insurability is not stronger. Examples of that disconnect can be found in states on both sides of the insurability divide.

The clearest case for insurability would seem to be in those states that recognize an exclusively compensatory purpose of punitive damages. In other words, when punitive damages are viewed as compensatory in nature, the public policy-based objections to insurance would seem to disappear.\(^{183}\) In addition, if punitive damages are compensatory, policy considerations will support the insurability of those damages in order to secure compensation for victims.\(^{184}\) This appears to be the case in Connecticut, where "punitive damages serve primarily to compensate the plaintiff for his injuries and, thus, are properly lim-

---

182. For an example of a similar attempt to effect societal compensation by assessing punitive damages, see *Williams v. Philip Morris Inc.*, 92 P.3d 126 (Or. Ct. App. 2004), *pet. for review granted*, 104 P.3d 601 (Or. 2004). In *Williams*, the court upheld a $79.5 million punitive damages award—96 times the compensatory damages award—in a single-plaintiff case. The court cited "evidence concerning other Oregon victims of defendant's decades-long fraudulent scheme" and noted that "[plaintiff] was simply one of its many Oregon victims." *Id.* at 141-42. The court also concluded that "it would have been reasonable for the jury to infer that at least 100 members of the Oregon public had been misled by defendant's advertising scheme over a 40-year period in the same way that [plaintiff] had been misled." *Id.* at 145. The Oregon Supreme Court heard oral arguments in the appeal on May 10, 2005.

183. *Cf.* Am. Surety Co. v. Gold, 375 F.2d 523, 525 (10th Cir. 1966) (deciding the insurability question by distinguishing New Hampshire, which allows exemplary damages only for compensatory purposes, from Kansas, which holds that punitive damages are intended to punish and deter); Zurich Ins. Co. v. Shearson Lehman Hutton, Inc., 601 N.Y.S.2d 276, 278-79 (App. Div. 1993) (basing its decision not to allow coverage for punitive damages on the ground that the purpose of punitive damages awards under the laws of Georgia and Texas was to punish and deter, not to compensate).

184. See *supra* notes 120, 123.
ited to the plaintiff's litigation expenses less taxable costs. In Connecticut, insurability has turned upon the distinction between common-law punitive damages that cover litigation costs and statutory multiple damages (e.g., double or treble damages) that have been deemed punitive in purpose. The former are insurable; the latter are not. These "compensatory punitive damages" states (Connecticut, Michigan, and, on some accounts, New Hampshire and Louisiana), however, comprise a minority of the states that allow punitive damages to be insured.

Less predictable (and thus more interesting) are the many states that allow potential tortfeasors to purchase insurance policies to protect against punitive damages liability, even while holding fast to the dominant view that punitive damages exist solely to punish and deter wrongdoers. Georgia provides a particularly good illustration. A previous statutory damages provision had empowered juries in tort actions to "give additional damages to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff." At that time, the Georgia Supreme Court deemed punitive damages insurable. Subsequently, in 1987, the Georgia legislature amended the provision to provide that "punitive damages shall be awarded not as compensation to the plaintiff but solely to

185. Berry v. Loiseau, 614 A.2d 414, 435 (Conn. 1992); see also Conn. Gen. Stat. § 52-240b (1991) (limiting the amount of punitive damages in products liability cases to two times the amount of compensatory damages).


187. See Kewin v. Mass. Mut. Life Ins. Co., 295 N.W.2d 50, 55 (Mich. 1980) ("In Michigan, exemplary damages are recoverable as compensation to the plaintiff, not as punishment of the defendant."); Crowley v. Global Reality, Inc., 474 A.2d 1056, 1058 (N.H. 1984) ("[N]o damages are to be awarded as a punishment to the defendant or as a warning and example to deter him and others from committing like offenses in the future. In other words, no damages other than compensatory are to be awarded." (quoting Vratsenes v. N.H. Auto, Inc., 289 A.2d 66, 68 (N.H. 1972))); Fagot v. Ciravola, 445 F. Supp. 342, 345 (E.D. La. 1978) ("[T]o the extent that Louisiana permits damage awards that other states would term 'exemplary' or 'punitive,' Louisiana has relied on what may often be viewed as the compensatory nature of even punitive damages.").

188. Ga. Code Ann. § 51-12-5(a) (2000). This section was repealed in 1987. See id. § 51-12-5(b) ("This Code section shall apply only to causes of action for torts arising before July 1, 1987.").

punish, penalize, or deter a defendant."190 Notwithstanding this change in expressed legislative purpose, Georgia courts have reaffirmed the insurability of punitive damages.191

A similar phenomenon is at work in Texas—one of a handful of states where the insurability issue has yet to be decided conclusively.192 In a landmark 1994 decision, Transportation Insurance Co. v. Moriel,193 the Texas Supreme Court made clear that “[t]he legal justification for punitive damages is similar to that for criminal punishment”; namely, “punitive damages are levied for the public purpose of punishment and deterrence.”194 The court could not have been more emphatic in declaring that “[o]ur duty in civil cases, . . . like the duty of criminal courts, is to ensure that defendants who deserve to be punished in fact receive an appropriate level of punishment.”195 Following Moriel, the Texas legislature took the further step of clarifying this exclusive punitive purpose by defining exemplary damages as “any damages awarded as a penalty or by way of punishment.”196 Here, then, would seem to be the strongest case for a public policy prohibition of insurance for punitive damages.

Instead, in a 2004 decision, a Texas federal district court held that insurance for punitive damages does not violate public policy.197 The court rejected plaintiff’s contention, based upon Moriel, that insurance coverage would “thwart the policy behind punitive damages


The U.S. Court of Appeals for the Fifth Circuit recently certified the question to the Supreme Court of Texas. See Fairfield Ins. Co. v. Stephens Martin Paving, 381 F.3d 435 (5th Cir. 2004). The Texas Supreme Court accepted certification on August 27, 2004. The case was argued on November 9, 2004, and, at the time this Article went to press, was still pending.
193. 879 S.W.2d 10 (Tex. 1994).
194. Id. at 16-17. Some earlier cases had suggested that punitive damages might also serve a compensatory function. E.g., Hofer v. Lavender, 679 S.W.2d 470, 474-75 (Tex. 1984).
195. Moriel, 879 S.W.2d at 17.
196. Act of April 11, 1995, ch. 19, sec. 1, § 41.001(5), 1995 Tex. Gen. Laws 108, 109. Prior to this Act, “exemplary damages” were defined as “any damages awarded as an example to others, as a penalty, or by way of punishment.” Id. The Act deleted “an example to others” from this definition, such that “exemplary damages” are defined as “any damages awarded as a penalty or by way of punishment.” Id.
197. See Stebbins, 2004 WL 210636, at *4-6 (relying upon Ridgway v. Gulf Life Ins. Co., 578 F.2d 1026 (5th Cir. 1978)).
awards—punishment and deterrence.” To the contrary, the court reasoned that “punishment and deterrence may nonetheless be promoted where coverage of punitive damages is permitted.” Specifically, the court noted that “[w]here an insurer contracts to provide coverage for a punitive damages award, the insurer may punish and deter a potential insured’s conduct by raising its premiums or refusing coverage altogether.” With the subtle shift from the nature of punitive damages as punishment or deterrence to a focus upon how such goals are best achieved, courts and legislatures are given enormous discretion in terms of deciding insurability regardless of the underlying legal characterization of punitive damages.

That discretion, moreover, may exist equally on the other side of the insurability divide. Ohio, for example, purports to align itself squarely in the public policy prohibition camp. After reviewing the arguments for and against insurability, the Ohio Court of Appeals, in a 1987 decision, held that “both the legislature and the judiciary have articulated a clear policy against the insurability of punitive damages.” In a more recent decision, the court backpedaled a bit, holding that public policy prohibitions should not stand in the way when punitive damages are awarded “without any finding of malice, ill will, or other culpability.” The court reasoned that “[p]unitive damages

198. Id. at *4.
199. Id. at *5.
200. Id. The court relied on a Texas Court of Appeals decision, Westchester Fire Insurance Co. v. Admiral Insurance Co., which “[i]n the absence of any clear indication from either the legislature or the supreme court on this issue, . . . decline[d] to hold that insurance coverage for punitive damages . . . violates the public policy of the State of Texas.” Id. (quoting Westchester, No. 2-01-227-CV, 2003 WL 21475423, at *10 (Tex. App. June 26, 2003)). After en banc reconsideration, the Texas Court of Appeals withdrew its prior opinion, and substituted a much narrower holding. See Westchester Fire Ins. Co. v. Admiral Ins. Co., 152 S.W.3d 172, 190 (Tex. App. 2004) (en banc) (declining to address “whether insurance coverage for punitive damages currently violates this state’s public policy”). The en banc court pointed out that “[t]he legislative change to the definition of exemplary damages (as being solely for penalty or punishment) did not apply to causes of action [like the one before the court] accruing before September 1, 1995.” Id. at 189. And, according to the court, “[w]hether or not the party against whom punitive damages are imposed actually pays (or its insurance company pays) such an award is irrelevant when the purpose of the award is to make an example of the party.” Id. The en banc decision was rendered while the broader question of whether insurance coverage for punitive damages violates public policy in Texas was pending before the Texas Supreme Court. See supra note 192.

201. See, e.g., Casey v. Calhoun, 531 N.E.2d 1348, 1350-51 (Ohio Ct. App. 1987) (holding that the Ohio Legislature’s enactment of Ohio Rev. Code Ann. § 3937.182 evinced a legislative policy against punitive damages insurance broad enough to negate the policy provision at issue in the case); supra note 92.
203. Corinthian v. Hartford Fire Ins. Co., 758 N.E.2d 218, 223 (Ohio Ct. App. 2001). In Corinthian, statutory punitive damages were awarded against a nursing home “upon a show-
which are not based on a finding of actual malice or any other state of mind are not punishment in any traditional sense."\textsuperscript{204} Moreover, the court was convinced that "there is little deterrent effect from 'punitive damages' awarded without a finding of ill will or malice."\textsuperscript{205}

Much hinges, then, on whether conduct is characterized as intentional, willful and wanton, malicious, reckless, or negligent. But, as Judge Gewin recognized back in the 1960s in his \textit{McNulty} confluence, "[t]he borderline between willful and wanton injury and injury as the result of simple negligence, is often a hairline distinction."\textsuperscript{206} And that distinction has become increasingly imperceptible in modern cases. In such situations, courts and legislatures should be wary of any broad public policy exclusion for insurance of punitive damages.\textsuperscript{207}

\textbf{CONCLUSION: INSURABILITY DEBATE AS HARBINGER OF CHANGE}

Thirty-five years ago, Calabresi challenged the tort system's embrace of individualized justice:

\begin{quote}
The fault system may have arisen in a world where one injurer and one victim were the most that society could handle adequately . . . . But even assuming that such was the world in which the fault system grew, it is not today's world. Today accidents must be viewed not as incidental events linking one victim with injurer, but as a more general societal problem.\textsuperscript{208}
\end{quote}

For Calabresi, the prevalence of general liability insurance was strong evidence that we had moved decidedly away from the bipolar view of torts. Fast-speed forward. Now, at the beginning of the twenty-first

\begin{footnotes}
\item[204] \textit{Id.} at 223.
\item[205] \textit{Id.}
\item[206] Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432, 444 (5th Cir. 1962) (Gewin, J., concurring); \textit{see also} Lazenby v. Universal Underwriters Ins. Co., 383 S.W.2d 1, 7 (Tenn. 1964) (White, J., concurring) ("The line of demarcation between the allowance of punitive damages and compensatory only is too thin and exacting . . . . Verdicts of juries are unpredictable.").
\item[207] Moreover, "[w]hen combined with the possibility that different fact finders in similar fact situations may reach differing conclusions as to the availability of punitive damages, the argument for denial of coverage becomes difficult to sustain." First Bank (N.A.)-Billings v. Transamerica Ins. Co., 679 P.2d 1217, 1222 (Mont. 1984).
\item[208] \textit{The Costs of Accidents}, \textit{supra} note 1, at 307-08. Samuel Issacharoff and John Witt challenge further the assumption that the tort law system, as a historical matter, ever embraced individualized justice as its modus operandi. \textit{See} Issacharoff & Witt, \textit{supra} note 26, at 1573-74.
\end{footnotes}
century, the changing and expanding roles assumed by punitive damages might provide further ammunition that juries and courts attempt to remediate and punish harms on a societal scale. It seems particularly fitting, then, at this juncture, to examine the interplay between insurance and punitive damages.

Several insights emerge from our review of the insurability question. First, insurance markets appear to draw boundaries different from those drawn within traditional tort doctrine. While various tort doctrines and public policy-based objections to punitive damages insurance continue to stress the particular nature or classification of damages, the insurance market segments claims along an accidental-intentional line that cuts across the categories of compensatory and punitive damages. Historically, punitive damages and intentional acts may have been a tight fit, but that alignment is strained in modern torts.

Second, every reason exists to believe that the traditional compensatory-punitive divide is eroding in the judicial system itself. As Tennessee Supreme Court Justice White presciently recognized in his concurring opinion in *Lazenby*, "[t]he line of demarcation between the allowance of punitive damages and compensatory only is too thin and exacting in my opinion to apply coverage in one case and deny coverage in the other."\(^{209}\) I leave for another day a general exploration of the blurring of the compensatory-punitive divide in torts. Strategic lawyers and jurors, of course, play a key role in this blurring. But so do courts, which can enable jurors to act or else attempt to emulate their understandings. Thus, for example, the Maryland Court of Appeals, in finding punitive damages insurable, deferred to its intuition that jurors would expect such coverage: "[W]e strongly suspect that the common sense of the community as a whole would expect a judgment including exemplary damages to be satisfied through . . . insurance policies . . . . It would be outraged and have substantial difficulty in comprehending reasons for a holding to the contrary."\(^{210}\)

\(^{209}\) *Lazenby*, 383 S.W.2d at 7 (White, J., concurring). Justice White based his view on the fact that "[v]erdicts of juries are unpredictable." *Id.* Justice White pointed to *McNulty* as an example:

In the *McNulty* case insurance protection was disallowed in order that the insured might be punished for his wrongdoing and to deter him and others from similar conduct. Yet, on identical facts, another jury might have returned an award limited to compensatory damages only in which case the wrongdoer would be fully protected under provisions of a policy such as here.

*Id.*

The bottom line is that blanket public policy prohibitions against insurance for punitive damages no longer make sense. Pure "intentional" wrongdoing, of the sort that inevitably involves moral hazard, will continue to be excluded from coverage by the insurance industry. It is true that courts, on the whole, have been "reluctant to find an intentional act unless it is blatantly clear that the actor intended to cause the harm as distinguished from intending to perform the act." But if the insurance industry wishes to restrict its policies further, it can explicitly exclude punitive damages. The trend towards ever-increasing insurability of punitive damages signals something important about the shifting nature of the roles assumed by such damages: an evolutionary process that is stifled by ad hoc judicial or legislative public policy-based objections.

It must, of course, be recognized that a switch of focus from the nature or classification of damages to the intentional (i.e., expected or intended) nature of the underlying conduct is fraught with its own set of difficulties. Here I return to Calabresi's example of drunken driving, a clear case in his mind for "noninsurable penalties." Calabresi may have unwittingly chosen the most contentious example possible. Perhaps he was influenced by the approach taken in his home state. In a leading 1941 case, Tedesco v. Maryland Casualty Co., the Connecticut Supreme Court ruled that the statutorily authorized double or treble damages allowable in motor vehicle accidents were penalties "imposed upon an offending driver as punishment for a violation of the statute which has the aspects of a wrong to the public rather than to the individual." For this reason—like Calabresi's noninsurable tort fines and penalties—the court held that these damages were not insurable. In the court's words, "A policy which permit-

211. 1 Kircher & Wiseman, supra note 15, § 7:04, at 7-19. Courts may read the intentional act exclusion especially narrowly in cases where a plaintiff would otherwise be left entirely without compensation. See supra notes 120, 123. In other words, where the compensatory (as opposed to punitive) rationale dominates for the award of damages, any sharp line premised upon intentionality may inevitably waver.

212. On this account, the statutory approaches of Hawaii and Montana may have it exactly backwards. Recall that these states would exclude coverage for punitive damages unless it is specifically included in an insurance contract. See supra note 93. The better approach might be to presume coverage unless expressly excluded. In this way, it would operate like an information-forcing penalty default rule. See Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 YALE L.J. 87, 97 (1989) (describing penalty defaults as a method to encourage parties to a contract to produce information).

213. The Costs of Accidents, supra note 1, at 269.

214. Indeed, the "procoverage and anti-public policy trend appears to be the strongest as to automobile insurance." 1 Kircher & Wiseman, supra note 15, § 7:14, at 7-76.

215. 18 A.2d 357, 359 (Conn. 1941).
ted an insured to recover from the insurer fines imposed for a violation of a criminal law would certainly be against public policy. By characterizing these statutory damages as "fines" and "penalties," the court assured the conclusion that they were not insurable.

By contrast, other courts consider drunken driving a paradigm of "gross, reckless or wanton negligence," which, unlike a "purposeful or intentional tort," does not "carry the degree of culpability that should foreclose the right to insurance coverage. Recall that Lazenby too involved a drunken driver, and the Tennessee Supreme Court was not persuaded that prohibiting insurance coverage "would necessarily accomplish the result of deterring [drunken drivers] in their wrongful conduct."

As these cases make clear, the insurability debate resurfaces in a different guise—i.e., whether the conduct is "intentional" in the moral hazard sense that it was expected or intended by the insured.

The debate also highlights a new dividing line: that between fines or penalties and punitive damages. In The Costs of Accidents, Professor Calabresi made no distinction between the two; indeed, at the time, punitive damages may have had more in common with penalties than with damages. But punitive damages today encompass a much broader territory. They may best be characterized as a curious amalgam of penalties and damages, satisfying both remedial and punitive purposes. The insurability debate must wrestle with these questions, in old and new realms.

216. Id.  
217. For similar reasoning, see Reimer v. Delisio, 442 A.2d 731, 736 (Pa. Super. Ct. 1982) (rejecting the view that the phrase "tort fine" in a state no-fault automobile liability statute encompassed common-law punitive damages).  
219. 383 S.W.2d 1, 5 (Tenn. 1964). It may well be, for example, that, even in the face of knowledge that driving drunk risks serious harm or death, many people continue to drive drunk because they nonetheless do not believe these risks will materialize for them.  
220. This debate, moreover, carries over as well to the interpretation of "criminal act" language that some insurers have added to their standard intentional act exclusions. See TOM BAKER, INSURANCE LAW AND POLICY: CASES, MATERIALS, AND PROBLEMS 496-505 (2003) (noting that courts have recently disagreed over whether the criminal act exclusion focuses only on the criminality of the act regardless of actual intent, or instead, requires that the harm "reasonably be expected" from the act—very likely a manifestation of the moral hazard concern).  
221. According to two leading punitive damages commentators, "[t]he terms fine and penalty are not identical in meaning, but are often confused. The term penalty includes all punishment of whatever kind . . . [whereas] a fine is a 'sum of money exacted of a person guilty of a crime . . . .'" 1 KIRCHER & WISEMAN, supra note 15, § 7:23, at 7-118 to 7-119.
A key issue for the future concerns the scope of insurance for statutory multiple damages.\textsuperscript{222} Already, several courts have distinguished such statutory damages from common-law punitive damages in order to hold them insurable, while upholding public policy-based objections to insuring punitive damages.\textsuperscript{223} Courts have attempted to classify statutory damages as either remedial (and thus insurable) or else punitive (and thus not insurable).\textsuperscript{224} But will such a distinction hold up? In fact, like common-law punitive damages, statutory multiple damages may inhabit both spheres. Nevertheless, a court's characterization as one or the other affects the insurability determination.\textsuperscript{225}

One thing remains certain, however: the insurability debate—as it continues to play out in the realm of punitive damages and as it confronts the realm of statutory damages—has decades later now moved beyond Calabresi's conception of noninsurable tort fines and penalties in \textit{The Costs of Accidents}. The multifaceted remedial and penal roles assumed by common-law and statutory damages inevitably

\textsuperscript{222} See \textit{id.} § 7:27, at 7-128 ("An increased frequency of such cases is to be anticipated, since legislatures are multiplying legislative prohibitions against individual conduct as well as providing a civil remedy in the form of statutorily imposed damages.").

\textsuperscript{223} E.g., Cieslewicz v. Mut. Servs. Cas. Ins. Co., 267 N.W.2d 595, 601 (Wis. 1978) (rejecting the application of the state's public policy prohibition against insuring punitive damages in a case involving treble damages for violation of a dog-bite statute); see also Wojcik v. N. Package Corp., 310 N.W.2d 675, 680 (Minn. 1981) (finding punitive damages for wrongful discharge under the state workers' compensation statute insurable, notwithstanding the general public policy prohibition against insuring punitive damages, on the ground that, "although styling the multiple damages authorized therein as 'punitive damages,' [they are awarded] . . . not only to punish employers guilty of retaliatory discharges and to deter such conduct by others, but also to afford redress to employees who lose their employment as the consequence of retaliatory dismissal").

\textsuperscript{224} Compare, e.g., Genty v. Resolution Trust Corp., 937 F.2d 899, 910 (3d Cir. 1991) (suggesting that RICO's treble damages are "punitive" in nature), with, e.g., Convent of the Visitation Sch. v. Cont'l Cas. Co., 707 F. Supp. 412, 416 (D. Minn. 1989) (stating that treble damages under the Minnesota Human Rights Act are "compensatory" in nature).

\textsuperscript{225} Its characterization may likewise affect whether or not the entire apparatus of the Supreme Court's punitive damages excessiveness jurisprudence applies. \textit{Compare} Parker v. Time Warner Entm't Co., 331 F.3d 13, 22 (2d Cir. 2003) (suggesting that the Supreme Court's due process review might apply where the combination of statutory damages with the class action mechanism "may expand the potential statutory damages so far beyond the actual damages suffered that the statutory damages come to resemble punitive damages"), with Lowry's Reports, Inc. v. Legg Mason, Inc., 302 F. Supp. 2d 455, 460 (D. Md. 2004) ("The \textit{Gore} guideposts do not limit the statutory damages here because of the difficulties in assessing compensatory damages in this case. Statutory damages exist in part because of the difficulties in proving—and in providing compensation for—actual harm in copyright infringement actions." (citation omitted)), appeal docketed, No. 04-1433 (4th Cir. Apr. 12, 2004) (oral argument heard Mar. 16, 2005); see also J. Cam Barker, Note, \textit{Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement}, 83 Tex. L. Rev. 525, 536 (2004) (arguing that substantive due process "restricts the aggregation of minimum statutory damages for copyright infringement in the file-sharing context").
change the terms of the debate. But all this change too may, nonetheless, be embraced by Calabresi’s parting words in *The Costs of Accidents*: “change is virtually inevitable, whether it is made consciously or not.”226

### APPENDIX: INSURABILITY OF PUNITIVE DAMAGES: 50 STATE SURVEY

<table>
<thead>
<tr>
<th>State</th>
<th>Statutory or Common-Law Case Authority</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hawaii</td>
<td>HAW. REV. STAT. § 431:10-240 (2001) (effective 1987) (coverage must be specifically included)</td>
</tr>
</tbody>
</table>
IA: Safeco Ins. Co. v. Liss, 16 P.3d 399 (Mont. 2000) |
IA: (same statute) |
| Virginia  | VA. CODE ANN. § 38.2-227 (Michie 2002) (effective 1986)  
IA: (same statute) |

#### B. Highest State Court

<table>
<thead>
<tr>
<th>State</th>
<th>Case Authority</th>
</tr>
</thead>
</table>
| Alabama       | Am. Fid. & Cas. Co. v. Werfel, 164 So. 383 (Ala. 1935)  
IA: Fid.-Phenix Fire Ins. Co. v. Murphy, 146 So. 387 (Ala. 1933) |
| Arkansas      | S. Farm Bureau Cas. Ins. Co. v. Daniel, 440 S.W.2d 582 (Ark. 1969)  
IA: (same case) |
IA: (same case) |
<table>
<thead>
<tr>
<th>State</th>
<th>Case Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Iowa</td>
<td>Skyline Harvestore Sys., Inc. v. Centennial Ins. Co., 331 N.W.2d 106 (Iowa 1983)</td>
</tr>
<tr>
<td>Kentucky</td>
<td>Cont’l Ins. Cos. v. Hancock, 507 S.W.2d 146 (Ky. 1973)</td>
</tr>
<tr>
<td></td>
<td>IA: (same case)</td>
</tr>
<tr>
<td>Maryland</td>
<td>First Nat’l Bank v. Fid. &amp; Deposit Co., 389 A.2d 359 (Md. 1978)</td>
</tr>
<tr>
<td>Mississippi</td>
<td>Anthony v. Frith, 394 So. 2d 867 (Miss. 1981)</td>
</tr>
<tr>
<td></td>
<td>IA: (same case)</td>
</tr>
<tr>
<td>South Carolina</td>
<td>Carroway v. Johnson, 139 S.E.2d 908 (S.C. 1965)</td>
</tr>
<tr>
<td>Tennessee</td>
<td>Lazenby v. Universal Underwriters Ins. Co., 383 S.W.2d 1 (Tenn. 1964)</td>
</tr>
<tr>
<td></td>
<td>IA: (same case)</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Brown v. Maxey, 369 N.W.2d 677 (Wis. 1985)</td>
</tr>
<tr>
<td>Wyoming</td>
<td>Sinclair Oil Corp. v. Columbia Cas. Co., 682 P.2d 975 (Wyo. 1984)</td>
</tr>
</tbody>
</table>

C. Lower State & Federal Court

<table>
<thead>
<tr>
<th>State</th>
<th>Case Description</th>
</tr>
</thead>
</table>
**Not Insurable**  
*(VL= Vicarious Liability Exception)*

### A. Statute

<table>
<thead>
<tr>
<th>State</th>
<th>Reference</th>
</tr>
</thead>
</table>

### B. Highest State Court

<table>
<thead>
<tr>
<th>State</th>
<th>Reference</th>
</tr>
</thead>
</table>
| California | PPG Indus., Inc. v. Transamerica Ins. Co., 975 P.2d 652 (Cal. 1999)  
IA: CAL. INS. CODE § 533 (West 1993) (effective 1935)  
| Florida | United States Concrete Pipe Co. v. Bould, 437 So. 2d 1061 (Fla. 1983)  
VL: (same case) |
| Minnesota | Wojciak v. N. Package Corp., 310 N.W.2d 675 (Minn. 1981)  
VL: (same case) |

### C. Lower State & Federal Court

<table>
<thead>
<tr>
<th>State</th>
<th>Reference</th>
</tr>
</thead>
</table>
**Indiana**
V/L: (same case)

**Missouri**

**New Jersey**
No V/L: (same case)

**Pennsylvania**

**Undecided or Decided Only in Limited Contexts**

**Maine**
Tuttle v. Raymond, 494 A.2d 1353 (Me. 1985);

**North Dakota**
Continental Cas. Co. v. Kinsey, 499 N.W.2d 574 (N.D. 1993) (under factual circumstances presented, under express terms of policy, insurer had to pay for punitive damages, but insurer had right of indemnification against insured pursuant to statutory intentional act exclusion, since loss resulted from a willful act)

**Rhode Island**
Allen v. Simmons, 553 A.2d 541 (R.I. 1987) (not insurable in automobile context)

**South Dakota**
Dairyland Ins. Co. v. Wyant, 474 N.W.2d 514 (S.D. 1991)

**District of Columbia**

**No Common-Law Punitive Damages**

**Louisiana**
Maryland Law Review

Civil rights statutes:

<table>
<thead>
<tr>
<th>State</th>
<th>Case</th>
<th>Note</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nebraska</td>
<td>Distinctive Printing &amp; Packaging Co. v. Cox, 443 N.W.2d 566 (Neb. 1989) (punitive damages prohibited by state constitution)</td>
<td></td>
</tr>
</tbody>
</table>