Recognition and Enforcement of U.S. Punitive Damages Awards in Continental Europe: The Italian Supreme Court's Veto

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I. Introduction

In an unpublished product liability case, a federal district court in Alabama entered a one million dollars judgment against an Italian manufacturer accused of producing a defective item that allegedly contributed to the death of the plaintiff’s son. The court did not specify the apportionment of contributory and punitive damages against the Italian corporation. The Italian court of first impression (the Venice Court of Appeals) refused to recognize and enforce the Alabama judgment, concluding that the award was punitive in nature and, therefore, contrary to domestic public policy. An appeal ensued but the Suprema Corte di Cassazione found no fault in the lower court’s ruling and upheld it on the ground that the Italian system of civil liability was strictly compensatory, not punitive.

Some authors have argued that punitive damages in the United States tend to fully compensate the injured party for otherwise non-compensable losses (i.e., legal fees, non-economic damages). If this were the case, it would follow that the decision of the Italian Supreme

* 2008 LL.M. Candidate, University of California Hastings College of the Law. Research Scholar, Università del Salento, Faculty of Law, Lecce, Italy. I wish to thank Professors Raffaele Di Raimo and Ugo Mattei for their precious suggestions and Professor Stefano Polidori for his brotherly prop. I am also grateful to the Dipartimento di Studi Giuridici, Università del Salento, with special thanks to Professor Gabriella De Giorgi and Mrs. Rita Malorgio, for supporting the research for this article. Finally, thanks to Alex Kingsley and the Hastings International & Comparative Law Review Staff for their peerless enthusiasm and patience. All errors remain my own.
Court discussed in this article is incorrect and ought to be revised.

However, the history of the punitive damages doctrine in the United States, though still subject to controversy, shows that it has nothing to do with making the plaintiff whole. The U.S. Supreme Court has on several occasions emphasized that the purpose of punitive damages is not compensation of the plaintiff for any detriment suffered, but rather punishment of the wrongdoer. The U.S. Congress, too, has ascertained that punitive damages are intended to punish the wrongdoer and not to compensate the victim for lost wages or pain and suffering.

Consequently, in framing the function of punitive damages as essentially retaliatory, the Corte di Cassazione in *Fimez* appears consistent with Italian law and the majority of American legal scholarship on the issue. Nevertheless, punitive damages embody an anomalous doctrine bridging private law and criminal law. Although the U.S. Supreme Court has determined that punitive damages serve the same purposes as criminal penalties, this legal mechanism of recovery continues to be used within the civil process, where the heightened protections of a criminal trial are not observed and standards of proof are lower.

The clash between legal systems is thus at a political level. In Italy, judges may not create new remedies in the absence of statutory authority, especially if criminal penalties imposed within civil proceedings are what is at stake. In this context, surprisingly, the Corte di Cassazione in *Fimez* did not mention the system of checks and balances set forth by Article 25 of the Italian Republic Constitution, which is the stiffest hurdle to the transplant (or, for the purposes of this article, the judicial recognition) of the punitive damages doctrine.

Total rejection of U.S. punitive damages awards, however, is not the only possible answer. This article intends to demonstrate that, in order to avoid a perverse denial of justice, it is preferable that the enforcing judge analyze the nature of the foreign judgment in depth and try to distinguish between the different categories of damages, thus enforcing only those compatible with Italian law (that is, at least enforcing the compensatory part of the award, if any). If, as in the instant case, a U.S. judgment does not elaborate on the apportionment of compensatory and punitive damages, foreign courts should apply the guidelines generally employed within their own jurisdictions to resolve similar cases, including, at a minimum, attorneys’ fees.
When dealing with U.S. awards of punitive damages, judges operating in those countries in which punitive damages are deemed contrary to public policy should try to decipher the amount of compensatory damages and limit their enforcement to that portion of damages that are not punitive. Absent such a differentiation, it should be the enforcing judge’s job to read between the lines and, in the interest of justice, extrapolate a number that would compensate, even if imprecisely, the plaintiff for the losses suffered. A transnational lawyer seeking recognition of punitive damages awards is thus called to play a creative role before the foreign enforcing judge, coming forward with clear evidence of her client’s compensable losses that — because of the peculiarity of the legal system — had they not been incorporated under the punitive damages label would remain uncompensated.

Finally, there is a mounting risk of the improper use of pain and suffering awards in the United States aimed at fully replacing punitive damages and purporting punitive aims. This recent trend may represent a misleading pathway to the recognition and enforcement of U.S. punitive damages awards in civil law systems, where pain and suffering awards are totally legitimate and do not raise any public policy questions. This article suggests that the enforcing judge should go beyond structural appearances and question the authentic function of such unreliable “pain and suffering” awards.

II. The 2007 Decision of the Italian Supreme Court. The Reasons for a Rejection

In 1985, a young motorcyclist lost his life in a motorcycle accident in Alabama due to an alleged defect in the design and manufacture of the buckle of his helmet. As a result of an impact with a car, the buckle broke and the motorcyclist lost his helmet. The motorcyclist’s only heir brought suit against all subjects directly or indirectly involved in the accident, seeking joint and several liability with an award of three million dollars. The Italian manufacturer of that buckle did not take part in a settlement agreement reached by all of the other involved parties. As a result, the Italian corporation was

left as the only defendant at trial. Eventually, the district court in Jefferson County, Alabama found for the plaintiff and ordered the defendant to pay one million dollars in damages, without specifying the apportionment of compensatory and punitive damages. The prevailing party at trial filed a petition in the Court of Appeals of Venice for the recognition and enforcement of the Alabama judgment in Italy.

The Italian court of first instance refused to enforce the U.S. judgment because it entailed an award of punitive damages—an institution specific to common law systems and alien to civil law countries like Italy. In particular, although the Alabama decision did not contain any explicit reference to punitive damages, the Venice Court of Appeals laid out a list of factors that led it to believe that the Alabama award was punitive in nature: (1) its lack of rationale, which made it impossible to identify what kind of losses the American court intended to compensate; (2) the large amount of damages awarded, along with the fact that such award could not be compared to the sums already obtained by the plaintiff in the settlement agreement with the other defendants; and (3) the particular professional quality of the wrongdoer (a manufacturer).

2. The court stated that the lack of rationale itself in a foreign judgment does not conflict with a domestic public order. See Ostoni, supra note 1, at 258.

3. The Italian Code of Civil Procedure article 796 (Codice di procedura civile) vested the Intermediate Appellate Courts with the authority to decide whether a foreign decision can be recognized and enforced in Italy as a case of first impression. Here, the request for the recognition and enforcement of the Alabama decision in Italy was first brought before the Court of Appeals of Venice [hereinafter “Court of Appeals”]. In the instant case, the actual appellate court is the Italian Supreme Court, Suprema Corte di Cassazione, in Rome [hereinafter “Supreme Court”].

4. Punitive damages “are in contrast with public order,” since in civil damages actions (as well as in contract cases) “the civil law principles of our legal system assume that compensation to the injured party shall be due based on the damages that the party actually suffered.” Corte app. Venezia, Parrot v. Fimez, 24 J.L. & COM. at 261.

5. Id. at 258.

6. Id. at 261.

7. “Due to the absence of a rationale, it is not possible to understand on which grounds the amount was awarded, the nature of the damages recovered, and the criteria to understand on which basis it was possible to recover damages.” Id. at 259. Moreover, the Venetian court found that it was unable to determine the rules and the principles applied in determining the amount that the defendant was ordered to pay. Id. at 259-60.

8. Id. at 262.

9. Id. at 262. “[A]ll these elements suggest that the judgment against Fimez is a
The decision of the Venetian court was then appealed, and the case reached the Supreme Court (Suprema Corte di Cassazione).\textsuperscript{10} The appellant sought reversal, arguing that the reasoning expressed by the lower court — that the American court's judgment lacked rationale for the punitive nature of damages — revealed an evident logical contradiction: How can one extrapolate with certainty the exact meaning of a statement if the statement itself is not clear? Moreover, the appellant claimed the Court of Appeals erred in holding that an award of punitive damages would be contrary to domestic public policy. The appellant's argument was that the Italian legal system does consist of different legal institutions, such as penalty clauses and non-economic damages, that tended to punish the wrongdoer through a payment of a sum of money to the victim.

With respect to the alleged inconsistency in the lower court's reasoning, the Supreme Court held that the determination reached by the Venetian court regarding the punitive nature of the Alabama judgment was an issue of fact, and thus not subject to review by the Supreme Court. As a matter of law, the Supreme Court is only entitled to reinterpret the definition of domestic ordre public rendered by the lower court and in the instant case such definition revealed no fault. Hence, the Supreme Court upheld the Court of Appeals' decision on the ground that it correctly ascertained that the concept of punishment is alien to the award of civil damages in Italy and that to this extent the wrongdoer's conduct is considered irrelevant.

The Supreme Court further reasoned that the purpose of civil damages is only to compensate the injured party for the losses suffered, without exception. Consequently, the Supreme Court struck down, one by one, each of the appellant's attempts to show that there exist some legal institutions within the Italian system of civil liability that pursue a punitive aim, that is to say, penalty clauses and non-economic damages.

Citing some of its own earlier decisions,\textsuperscript{11} the Court emphasized that the purpose of penalty clauses is not punishment. It stated that a

\textsuperscript{10} For a translation of the Italian Supreme Court's decision, Cass., 19 jan. 2007, n.1183, see infra Appendix A. The decision can be read, in Italian, in Corr. giur., 2007, 4, 497 (with note by Pasquale Fava, Punitive damages e ordine pubblico: la Cassazione blocca lo sbarco).

penalty clause serves to strengthen a contractual relationship and to quantify damages beforehand. The Court found its main evidence against the punitive nature of penalty in article 1382 of the Civil Code, which empowers a judge to downsize a manifestly excessive penalty.

Moreover, with respect to non-economic damages, the Supreme Court reasoned that "no overlap exists between an award of moral damages and the punitive damages doctrine." In the Italian legal

12. See infra Appendix A, Translation.

13. See in the United States, Charles Calleros, Punitive Damages, Liquidated Damages, and Clauses Penales in Contract Actions: A Comparative Analysis of the American Common Law and the French Civil Code, 32 BROOK. J. INT’L L. 67, 115 (2006) (arguing that economic efficiency can be accomplished even if punitive damages could be assessed for intentional breach of contract); William S. Dodge, The Case for Punitive Damages in Contracts, 48 DUKE L.J. 629, 666 (1999) (analyzing the different impact of “property rules” and “liability rules” on the protection of a legal entitlement; proposing an efficiency-based reasoning according to which punitive damages should be extended to any willful breach of contract); Ugo Mattei, The Comparative Law and Economics of Penalty Clauses in Contracts, 43 AM. J. COMP. L. 427, 443 (1995) (discussing the origins and developments of different models of penalty clauses, and identifying as ideological the reasons why legal systems in general, and common law system in particular, are “so suspicious of penalties”).

In Italy, the debate around public-policy limits on “private fines” is undoubtedly open. See Pietro Perlingieri, Equilibrio Normativo e Principio di Proporzionalità nei Contratti, in Rassegna di Diritto Civile, 2001, II, 334. Professor Perlingieri argues that freedom of contract is neither a dogma nor a preconception nor a value in itself; it is instead molded in accordance with the legal system as a whole, based on its principles and rules. The so-called freedom of contract places itself “between freedom and justice.” Id. at 335. On such premises, analyzing a landmark decision of the EU Court of First Instance (April 30, 1998, n. 16/98, in Réc., 1998, II, p. 757), Professor Perlingieri concludes that the principle of proportionality is fully in force in the Italian system and it directly applies to contracts. Id. at 340. See also ANDREA ZOPPINI, LA PENA CONTRATTUALE 218 (1991) (maintaining that the subject-matter of penalty clauses should not be limited to pecuniary performances, so long as such different performance is susceptible of economic appraisal and rejecting the idea according to which penalty clauses may be freely reduced by the court, absent the parties’ pleadings).

14. See infra Appendix A, Translation. The expression danni morali in Italian (freely translated here as moral damages) can be read, for the purposes of this article, as a synonym with pain and suffering awards. The history of the availability of such awards in Italy, however, has not been steadfast. A quick overview may help. Art. 2059 of the Italian Civil Code states that non-economic damages can be awarded only in those cases expressly provided by the law. Further, art. 2043 c.c., which can be seen as the basic rule of civil liability within the Italian system, provides that “any deed, intentional or negligent, that causes others unjust harm compels he [or her] who did the deed to pay damages.” Conspicuous is the literature developed around the scope of the two rules and their alleged relationship of “mutual exclusion.” See Emanuela Navarretta, Danni Non Patrimoniali: il Dogma Infranto e il Nuovo Diritto
system pain and suffering awards are intimately linked to a loss actually suffered by the person damaged, and their assessment is closely anchored to that loss.¹⁵

According to the Supreme Court, the amount of punitive damages is calculated independently of the loss suffered by the plaintiff. By contrast, the court continued, in Italy damages for pain and suffering may only be awarded once the plaintiff has come forward with evidence of a loss determined by the offense, resorting to concrete, factual circumstances.

Therefore, over twenty years after the occurrence of the facts that gave rise to the Fimez case in Alabama, the Italian Supreme Court confirmed the Venetian Court's decision, and, by doing so, ultimately fended punitive damages off the Italian system.

¹⁵ There is a deep split in the Italian civil law scholarship with regard to the nature of non-economic damages. In favor of their punitive function, and for complete references to the state of the art in the literature, see M. GRAZIA BARATELLA, LE PENE PRIVATE 88 (2006) (analyzing the development of the non-economic-damage doctrine, especially under an historical perspective, and maintaining, dissenting from the majority view endorsed by the Italian Supreme Court, that moral damages bear a punitive function, analogous to the poenae ex maleficio typical of classic Roman law. Id. at 187.). Cf. FRANCESCO D. BUSNELLI AND SALVATORE PATTI, Danno e Responsabilità Civile 246 (2003) (analyzing the difference between crime and tort liability within common law systems, and concluding that it is not legally possible to identify the function of non-economic damages and that of punitive damages because the former tends to entirely compensate the loss suffered by the injured party).
III. The Italian System of Civil Liability Does Not Seek Punishment; Does the U. S. System? The Need for An Overview of the Punitive Damages Doctrine

In the *Fimez* case, the Corte di Cassazione thus expelled the legal institution of punitive damages from the Italian legal system. In doing so, the court specified that the domestic system of civil liability does not seek punishment for the wrongdoer’s misconduct but only compensates the injured party for the losses suffered. The court limited its analysis to the parties’ pleadings, thereby avoiding having to provide its judgment in a systematic framework.

In the United States, the distinction between the law of torts and criminal law lies on the postulation that the former “does not condemn, but only shifts the economic burdens of loss.”

The literature on punitive damages in the United States is

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16. Confront, however, the opinion delivered by the Italian *Corte Costituzionale* in different occasions: for instance, see Corte cost., 14 jul. 1986, n.184, Foro It. I 1986, 2053 (with note by Giulio Ponzanelli); and Corte cost., 30 dec. 1987, n. 641, Foro It. I 1988, 1057 (with note by Giulio Ponzanelli) (both maintaining that the system of civil liability can as well take up tasks of retribution and prevention).


18. JOHN L. DIAMOND ET AL., *UNDERSTANDING TORTS* 6 (2007). See also, PAGE KEETON ET AL., *PROSSER AND KEETON ON TORTS* 26 (1984) (recognizing that, although punishment and retaliation may be an important aim of the law in assessing damages, “it is not often mentioned in the award of compensatory damages, which usually are treated by the courts as a mere adjustment of the loss which has occurred in accordance with responsibility. To the extent that punitive damages are given, however, both prevention and retaliation become accepted objects of the administration of the law of torts.”). For a review of literature claiming tort damages’ main goal is deterrence, and not compensation, see Richard Craswell, *Instrumental Theories of Compensation: A Survey*, 40 SAN DIEGO L. REV. 1135, 1177 (2003) (arguing “that the idea of compensation plays a very different role in economic theories than in theories of corrective justice. Specifically, while compensation is foundational to the very idea of corrective justice, compensation is only incidentally connected (if it is even connected at all) with economic welfare”).
extensive. Nevertheless, even in 2007, there are still those who feel
the need to call attention to the widespread lack of systematic insight
towards the punitive damages doctrine.19

In order to make a reasoned prediction on whether the feasibility
of recognition of punitive damages awards in Italy is really as remote
as the Corte di Cassazione made it appear in the Fimez case,20 it is
important to observe the development of the punitive damages
document.21 A historical analysis is useful to determine the way in
which American scholars have tackled this controversial issue at the
border between civil and criminal liability.22

IV. Purpose of Punitive Damages in the United States: Full
Compensation of Plaintiff or Punishment of Defendant?

Punitive damages received their first statutory recognition in
England in 127523 and their first actual award in common law history

19. “[A]lthough there is no crisis in punitive-damages litigation, there was, and
still is, a crisis in punitive-damages theory.” Anthony J. Sebok, Punitive Damages:
From Myth to Theory, 92 IOWA L. REV. 957, 960 (2007). Conclusively, Professor
Sebok argues that, “[i]f we recognize that [punitive damages] fit within a scheme of
civil recourse and provide a unique form of redress where citizens have suffered the
indignity of a willful violation of their private rights, then we will have a theory of
punitive damages that reflects the reality of the tort system we actually have.” Id. at
1036.

20. See infra Appendix A, Translation.

21. For a historical survey on punitive damages, see Dorsey D. Ellis, Jr., Fairness
(tracing English history of punitive damages awards); Stephen Daniels & Joanne
Martin, Myth and Reality in Punitive Damages, 75 MINN. L. REV. 1, 6 (1990)
discussing early punitive damage awards in England and United States); David G.
Owen, Punitive Damages in Products Liability Litigation, 74 MICH. L. REV. 1257,
1262 (1976) (tracing deep roots of punitive damages in ancient law); Michael Rustad
& Thomas Koenig, The Historical Continuity of Punitive Damages Awards:
Reforming the Tort Reformers, 42 AM. U. L. REV. 1269, 1284 (1993) (tracing origins
and development of the punitive damages doctrine).
The following functions have been attributed to punitive damages in the eighteenth
and nineteenth centuries: (1) compensation for insult (distinct from emotional
distress); (2) personal vindication; (3) vindication of the state; (4) exemplary
punishment; and (5) general deterrence. Anthony J. Sebok, What Did Punitive
Damages Do? Why Misunderstanding the History of Punitive Damages Matters

22. David J. Seipp, The Distinction Between Crime and Tort in the Early
Common Law, 76 B.U. L. REV. 59 (1996); David Friedman, Beyond the Tort/Crime

23. The first English provision for multiple damages was enacted by Parliament
in 1275: “Trespassers against religious persons shall yield double damages.” Synopsis
In early English cases, their purpose was aimed to punish and deter abuses of official authority.

Among the common law countries that have traditionally utilized punitive damages in civil lawsuits, the most widespread use is in the United States. Even though both scholarship and case law have almost unanimously deemed punishment and deterrence, together, as the main goals of punitive damages, the debate around the factors to be used by the courts in determining their amount, as well as their nature and purpose, has been exceptionally lively since the doctrine


26. For a virtual synthesis of the two positions, see RESTATEMENT (SECOND) OF TORTS § 908(1) (1977): “Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.” For a limited focus on California, see Cal. Civ. Code §3294(a) (2007) which provides that, “[i]n an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.” (Emphasis added). The most recent developments in the case law clearly show that compensation is not the justification for punitive-damages awards. See, Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001). See also infra note 39 and section 4.

27. See Judge Posner, delivering the Court’s opinion in Mathias v. Accor Economy Lodging, Inc., 347 F.3d 672 (7th Cir. 2003): punitive damages chiefly pursue purposes of deterrence, by “limiting the defendant’s ability to profit from its fraud by escaping detection and (private) prosecution. If a tortfeasor is ‘caught’ only half the time . . . , then when he is caught he should be punished twice as heavily in order to make up for the times he gets away.” Id. at 677. See also, Kemezy v. Peters, 79 F.3d 33, 34-35 (7th Cir. 1996) (the underdeterrence provided by compensatory damages is a reason for punitive damages). Further, see A. Mitchell Polinsky & Steven Shavell, Punitive Damages: an Economic Analysis, 111 HARV. L. REV. 869, 954 (1998), who propose “a simple formula for calculating punitive damages, according to which harm is multiplied by a factor reflecting the likelihood of escaping liability. If punitive damages are calculated according to this multiplier formula, precautions will tend to be optimal . . . as will product prices and the incentive to participate in risky activities.” But cf. E. Donald Elliott, Why Punitive Damages Don’t Deter Corporate
first appeared in the United States. At least six objectives have been identified for imposing punitive damages: (1) punishing the wrongdoer; (2) deterring the wrongdoer and others from committing similar offenses; (3) preserving the peace; (4) inducing private law enforcement; (5) compensating victims for an otherwise non-compensable loss; and (6) paying the plaintiff's attorneys' fees.

In the United States, a line of scholarship considers the most important aspect of punitive damages to be to compensate plaintiffs. If this were true, it would follow that the view expressed by the Italian Supreme Court in *Fimez* is incorrect and ought to be revised.

It has been argued that "[s]ince at least one-third of the plaintiff's recovery ordinarily is spent for legal fees, a verdict that does not include a sum for these expenses almost always leaves the plaintiff substantially worse off financially than he was before the accident." Furthermore, it has been argued that a substantial part of a plaintiff's losses, especially that involving intangible harm, cannot be compensated under the ordinary rules of compensatory damage liability. Accordingly, punitive damages may be seen as a mere adjustment necessary to fully compensate victims in response to the assumption that compensatory damages as defined by the courts are insufficient to make the plaintiff completely whole. Also, some scholars, citing case law, have argued "the legal revenge provided by punitive damages helps restore the plaintiff's emotional equilibrium Misconduct Effectively, 40 ALA. L. REV. 1053, 1056-57 (1989) (arguing that "punitive damages awards against corporations may actually have the perverse effects of decreasing economic incentives for safety, undermining individual responsibility, and encouraging business-as-usual by corporations").


29. Ellis, Jr., *supra* note 21, at 3.

30. Owen, *supra* note 21, at 1297. The author reasoned that "awards of punitive damages tend to alleviate, however imprecisely, the rigors of the American rule," which "unequivocally prohibits awards of attorneys' fees in the absence of statutory authorization." It should be noted, however, that in Italy it is generally accepted that the party losing at trial has to pay for its counterpart's legal fees.

31. Owen, *supra* note 23, at 378 (concluding that "[i]t seems self-evident that a defendant who has intentionally or wantonly injured another may fairly be required to make the plaintiff truly whole again").
and in this way compensates him for the psychological harm caused by the defendant’s malicious act.\textsuperscript{32}

This paper is not intended to establish whether the doctrine of punitive damages in the United States is right or wrong,\textsuperscript{33} efficient or detrimental;\textsuperscript{34} rather, it is aimed to research the overall logic, if any,\textsuperscript{35} of such a doctrine within its own legal environment. Nevertheless, it should be noted that in the above-mentioned situations (plaintiffs recovering, through an award of punitive damages, for their otherwise non-compensable economic and non-economic losses) something is

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33. See Ellen Wertheimer, \textit{Punitive Damages and Strict Products Liability: An Essay in Oxymoron}, 39 VILL. L. REV. 505, 507 (1994) (suggesting that the primary focus of tort damages “should lie with their compensatory function. Because the ability of subsequent plaintiffs to recover compensatory damages may depend on the manufacturer remaining solvent, punitive damages are a luxury that courts should avoid awarding in order to protect the broader-based right of all claimants to compensatory payment.”).


35. See, e.g., Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 42 (1991) (O’Connor, J., dissenting): “Punitive damages are a powerful weapon. Imposed wisely and with restraint, they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm. Regrettably, common-law procedures for awarding punitive damages fall into the latter category.” See also, the radical position expressed in Martin H. Redish & Andrew L. Mathews, \textit{Why Punitive Damages are Unconstitutional}, 53 EMORY L.J. 1, 52 (2004) (arguing that “the very existence of punitive damages, as the concept currently exists, should be held unconstitutional.” Indeed, “by vesting coercive public power in self-interested private actors, the concept of punitive damages upsets the delicate balance between public and private authority that grows out of the essential precepts of liberal democratic theory.”). See also, Kimberly A. Pace, \textit{Recalibrating the Scales of Justice through National Punitive Damage Reform}, 46 AM. U.L. REV. 1573, 1637 (1997) (calling for a federal tort reform legislation on the grounds that the increase in the magnitude and frequency of punitive damages warrants “closer scrutiny of the doctrine and the introduction of safeguards to protect American industry from abusive penalties. When punitive damage sanctions are awarded in excessive amounts or are imposed erratically against undeserving defendants, the tort system as a whole is undermined”). See also Dan Quayle, \textit{Civil Justice Reform}, 41 AM. U.L. REV. 559, 564 (1992) (highlighting that punitive damages “generate disproportionately high awards in a random and capricious manner”) and Jane Mallor & Barry S. Roberts, \textit{Punitive Damages: On the Path to A Principled Approach?}, 31 HASTINGS L.J. 639, 648 (1980) (maintaining that, “[b]etter still would be to remove the jury from the assessment of the punitive award”).
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strikingly absent. Such inconsistency may be found either in U.S. tort law or, in all likelihood, in the very heart of those theories placing compensation amongst the purposes of punitive damages awards.

In American tort law there exist several effective responses to plaintiffs’ claims as far as recovery for intangible losses is concerned.\(^{36}\) It has also been argued that “compensating some plaintiffs for otherwise uncompensable losses or attorneys’ fees may be viewed, not as justification for, but as a byproduct of punitive damages.”\(^{37}\)

It is generally accepted that punitive damages have nothing to do with making the plaintiff whole.\(^{38}\) The U.S. Supreme Court has on

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36. Even though jurisdictional splits are still present, witnessing the existence of different approaches in assessing non-economic damages, it has been noted that, “[t]he more a society develops (in economic terms), the greater the amount of resources it spends in recognition of ‘new’ interests and the greater the demand for legal recognition will be.” Giovanni Comandè, Towards a Global Model for Adjudicating Personal Injury Damages: Bridging Europe and the United States, 19 TEMP. INT’L & COMP. L.J. 241, 250-51 (2005). Stephen D. Sugarman, A Century of Change in Personal Injury Law, 88 CAL. L. REV. 2403, 2409 (2000) (“In 1900, misfortune was a more accepted part of life. Today, people are more willing to blame others for their injuries and go to court to obtain redress.”).

37. Ellis, Jr., supra note 21, at 11, who concludes that the justifications offered for punitive damages “can be reduced to two: (1) that wrongdoers deserve punishment, beyond that provided by reparative damages; and (2) that imposing a detriment on defendants promotes efficiency by deterring loss-creating conduct.” \emph{Id.}

38. \emph{See} Redish & Mathews, supra note 35, at 2 (holding that “punitive damages in no way purport to compensate private victims for any loss they have suffered, either measurable or immeasurable”); Elizabeth J. Cabraser, Unfinished Business: Reaching the Due Process Limits of Punitive Damages in Tobacco Litigation Through Unitary Classwide Adjudication, 36 WAKE FOREST L. REV. 979, 981 (2001) (“Punitive damages are not an entitlement of the victims, but of society: a punitive damages award is a civil punishment visited upon defendants to vindicate the public interest in deterrence, and to penalize conduct that violates the social contract and injures society.”); Theodore B. Olson & Theodore J. Boutrous, Jr., Constitutional Restraints on the Doctrine of Punitive Damages, 17 PEPP. L. REV. 907, 918 (1990) (“Punitive damages are imposed for purposes of retribution and deterrence by a system which simultaneously compensates the victim for his injury, and punishes the defendant for the wrong done to society by his conduct.”); Keeton et al., supra note 18, at 9 (affirming that punitive damages are given to the plaintiff “over and above full compensation for the injuries, for the purpose of punishing the defendant, of teaching the defendant not to do it again, and of deterring others from following the defendant’s example.”); Mallor & Roberts, supra note 35, bottom (arguing that punishment and deterrence cannot be separated as purposes for punitive damages and that punishment for past acts affects future conduct). Among early U.S. common law, confront the opinion delivered by Justice Foster of the New Hampshire S.C., in \emph{Fay v. Parker}, 53 N.H. 342, 343 (1873) (“Damage . . . is derived from \emph{demo}, to take away; and therefore it is not derived from \emph{punio}, to punish.”) Punitive damages are “a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law.” \emph{Id.} at 382).
several occasions stated that the purpose of punitive damages is not to compensate the plaintiff for injury but to punish the defendant.\textsuperscript{39} That is also demonstrated by the fact that the U.S. Congress has ascertained that, "[p]unitive damages are intended to punish the wrongdoer and do not compensate the claimant for lost wages or pain and suffering."\textsuperscript{40} It can be argued that by using punitive damages to increase compensation in cases where punitive damages are not required, courts would be awarding compensatory damages twice; in those cases, it would seem desirable to expand the scope of compensatory damages.\textsuperscript{41} On the other hand, one further question

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\item Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (punitive damages "are not compensation for injury" but "are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence"), quoted in Int'l Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 48 (1979); Newport v. Fact Concerts, Inc., 453 U.S. 247, 266-67 (1981) ("Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct"); Smith v. Wade, 461 U.S. 30, 54 (1983) (The "focus" of punitive damages "is on the character of the tortfeasor's conduct-whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards."); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991) ("Punitive damages are imposed for purposes of retribution and deterrence"); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003) ("It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence"); Philip Morris USA v. Williams, 127 S. Ct. 1057, 1062 (2007) ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition.") Nonetheless, "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties." \textit{Id.} at 1063). The latter opinion is also significant for what it \textit{did not} hold: the Court declined to consider the question of whether the $79.5 million award. \textit{...} was unconstitutionally excessive under \textit{State Farm}. Therefore, the issue of whether a jury may award punitive damages in excess of a 9-1 ratio when there is particularly culpable conduct remains unsettled." Kendyl T. Hanks, \textit{Philip Morris further limits punitive damages}, 16 BUS. L. TODAY 10 (2007).

\item H.R. REP. No. 104-586, at 143 (1996): "Punitive damages received on account of personal injury or sickness whether or not related to a physical injury or physical sickness" are considered a windfall for plaintiffs and, thus, taxable gross income. \textit{See} 26 U.S.C.A. § 104(a)(1)(West 2002), which does not apply to punitive damages awarded in a civil wrongful death action. 26 U.S.C.A. § 104(c)(1) (West 2002). For an analysis of the impact of this reform on trial strategies, \textit{see infra} sections 6 and 7.

\item \textit{See} Polinsky & Shavell, \textit{supra} note 27, at 939: "Although we recognize that awarding punitive damages as a substitute for a missing component of harm has a potential rationale in terms of assuring proper deterrence, we suggest \textit{...} that remedies for missing components of harm would be best pursued through revision of the rules to calculate compensatory damages."
\end{enumerate}
\end{footnotesize}
which leaves the debate about the compensatory nature of punitive damages somewhat open is why plaintiffs continue to be the sole beneficiaries of the whole punitive damages award\(^2\) while, in any other segment of the legal system in case of punishment, fines generally go to the community \textit{latu sensu}.\(^3\) What is it that makes punitive damages different from criminal sanctions? On the assumption that punitive damages do not compensate plaintiffs — even in a minimal part — and that their major purpose is deterrence, some authors have then proposed to "give only the compensatory part to the plaintiff" and the remainder to other public institutions.\(^4\)

V. Punitive Damages at the Border Between Criminal Law and Private Law

With this in mind, the boundaries between punitive damages and criminal sanctions need to be clarified.\(^5\)

\(^{42}\) "Exemplary or punitive damages go to the plaintiff, not as a fine or penalty for a public wrong, but in vindication of a private right which has been willfully invaded; and, indeed, it may be said that such damages in a measure compensate or satisfy for the willfulness with which the private right was invaded, but, in addition thereto, operating as a deterring punishment to the wrongdoer, and as a warning to others." Watts v. South Bound R. Co., 38 S.E. 240, 242 (S.C. 1901). See also, Daniel M. Weddle, \textit{A Practitioner's Guide to Litigating Punitive Damages After BMW of North America, Inc. v. Gore}, 47 DRAKE L. REV. 661, 662 (1999) ("[P]unitive damages are meant to provide a public remedy for a public wrong rather than an individual remedy."). Moreover, punitive damages "motivate reluctant victims to press their claims and enforce the rules of law." Owen, \textit{supra} note 23, at 380.

\(^{43}\) "The idea of punishment, or of discouraging other offenses, usually does not enter into tort law. . . . Something more than the mere commission of a tort is always required for punitive damages." Keeton et al., \textit{supra} note 18. According to Professor Friedman, \textit{supra} note 22, at 110 (fn. 32), "[i]n a system in which the state received any excess damages instead of the victim, it would be in the joint interest of plaintiff and defendant to settle, thus eliminating the payment to the state. Preventing such agreements would require substantial changes in civil procedure designed to reduce the plaintiff's control over the case." The favorability of a system based on private prosecution, through the so-called bounty system, rather than prosecution by the state has been found in the circumstance that "advocacy by government attorneys must be tempered by the "neutrality" that comes with their recognition of their special obligation to the public interest, above and beyond their role as advocates." Redish & Mathews, \textit{supra} note 35, at 45 (citing the \textit{Restatement (Third) of the Law Governing Lawyers} § 97 cmt. b (2000)).


\(^{45}\) See Richard A. Posner, \textit{Economic Analysis of Law}, 163-64 (2d ed. 1977) (arguing that, from an economic point of view, the purpose of criminal law is to impose additional costs on unlawful behavior where the conventional remedies would be inadequate to limit that behavior to the optimal level). See also Kenneth
Justice O'Connor, dissenting from the majority in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, stated that punitive damages imposed on defendants constitute "a fine subject to the limitations of the Eighth Amendment." In spite of her vehement attempt to extend the Excessive Fine clause to punitive damages awards, the majority in *Browning-Ferris* established that the Eighth Amendment was inapplicable to money damage awards in civil suits.

In *TXO Production Corp. v. Alliance Resources Corp.*, the U.S. Supreme Court recognized that a grossly excessive punitive damages award might violate substantive due process constraints but declined to set forth a ratio between compensatory and punitive damages. Consequently, the Court upheld a punitive damages award that exceeded the plaintiff's actual damages by over five hundred times.

*BMW of North America, Inc. v. Gore* represented a turning point in the history of punitive damages. For the first time, the U.S. Supreme Court overturned a punitive damages award by reason of its excessiveness (500 times the amount of the actual harm). Although it refused, once again, to put forward a clear formula, the Court set

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47. *Id.* at 297 (1989). In *Browning-Ferris* the majority held that no due process claims — either procedural or substantive — were properly presented and that, due to peculiarities of the case before the court, the award of punitive damages should not be overturned as a matter of federal common law. Moreover, at the time it was drafted and ratified, "the primary focus of the Eighth Amendment was the potential for governmental abuse of its "prosecutorial" power, not concern with the extent or purposes of civil damages." *Id.* at 266. However, because private actors are permitted "to determine and foster their own interests, untied to some broader notion of the public interest," it is "wholly inappropriate and unwise to place purely public coercive power in their hands." Redish & Mathews, *supra* note 35, at 52 (challenging the constitutionality of the whole concept of punitive damages).


51. *Id.* at 451.

52. Higher punitive damages "may ... be justified in cases in which the injury is hard to detect," or where "a particularly egregious act has resulted in only a small amount of economic damages." *Gore*, 517 U.S. at 582.
forth three guideposts to determine the constitutionality of a punitive damages award. The Court's reasoning in *Gore* established the foundation for all subsequent punitive damages awards.

The U.S. Supreme Court, when called on to elaborate on the nature and purpose of punitive damages, has had difficulties fitting the practice of punitive damages into the concept of civil fines or penalties. In 2001, the Supreme Court seemed to arrive at an epochal turning point, when it acknowledged that punitive damages are like criminal punishments set by legislatures because they "reflect moral judgments." This could have meant that all constitutional guarantees provided for the accused in criminal proceedings should automatically be extended to civil litigants facing punitive damages. Two years later, in *State Farm Mut. Auto. Ins. Co. v. Campbell*, the Court maintained that punitive damages "serve the same purposes as criminal penalties" and, at the same time, stated that great care must be taken to avoid use of the civil process to assess criminal penalties, which should be imposed only after the heightened protections of a criminal trial have been observed — including its higher standards of proof.

In an attempt to put forth a clearer distinction between the concept of punishment in civil and criminal actions, some authors have proposed describing punitive damages as private punishment.
while others have argued that a plaintiff in a private lawsuit "does not punish wrongdoing in a way that resembles punishment by the state." Moreover, some studies have shown that, even "if egregious and morally shocking civil wrongs were criminalized, such cases would seldom be prosecuted" due to the exceptionally burdensome investigatory process peculiar to the criminal system. The punitive damages system, by contrast, proves more efficient than prosecution by the state because it "provides injured parties and their lawyers with financial incentives to do all of the investigation themselves." At this point, it seems clear (and case law confirms) that punitive damages pursue a retaliatory function, which, for the purposes of this article, is sufficient to place them outside the picture drawn by the Italian Supreme Court in the Fmez case.

VI. The Law and Economics Multiplier: the Optimal Level of Damages Tends to Equal the Harm Done

Consider a passage of a renowned law and economics article: "punitive damages . . . should be set at a level such that the expected damages of defendants equal the harm they have caused, for then their damage payment will, in an average sense, equal the harm." That is, punitive damages should be determined according to the following formula: let $P$ be the probability of being found liable and the probability to escape liability equal $(1 - P)$. The multiplier then equals $(1 - P)/P$. In other words, if the probability of escaping liability

61. Sebok, supra note 19, at 1006.
63. Id. at 1440 (underlying that "punitive damages are the only practical method of exercising social control over economically formidable offenders, especially organizational offenders." And that "[a] crucial function of punitive damages is to provide financial incentives for private parties to enforce the law — the bounty system." Id. at 1451).
64. Id. at 1441.
65. Punitive damages "are not awarded to compensate for injury, but rather to further the aims of the criminal law." Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 87 (1988) (O'Connor, J., concurring in part with the judgment). See also Redish & Mathews, supra note 35, at 33 ("Punitive damages, freed from their historical moorings in the compensatory form of exemplary damages, do not compensate the private plaintiff for actual harm suffered.").
66. Polinsky & Shavell, supra note 27, at 954 (emphasis added).
67. Id. at 962, n.274.
is 50 percent, then a jury is expected to assess punitive damages by multiplying compensatory damages by one; if the probability is 80 percent, then the multiplier would be four; if 90 percent, the multiplier would be nine; and so forth.68

The reality, however, has proven to be rather different from the one suggested by the aforementioned economic analysis of punitive damages. So far, no court has based its reasoning on this formula (see, in particular, the exceptional amount of punitive damages at stake in the Exxon Valdez case69). Nevertheless, assuming that this was the official trend in the United States in assessing punitive damages, and supposing also that a verdict of that kind was brought before an Italian court for recognition and enforcement, would such a judgment have a better chance than that in the Fimez case?

Even though an award thus obtained would, "in an average sense,"70 equal the harm done, the Italian system of civil liability is not yet prepared to grant it recognition. To this end, courts will continue to focus on the sphere of the injured party, notwithstanding the defendant's (mis)conduct or wealth.71 On the contrary, in the United States, it is well established that the determining factor in assessing punitive damages is the overall position of the wrongdoer.72

68. For a different approach to a multiplier formula, depending upon the existence of statutory caps to punitive damages (thus reducing the enforcement probability), see Galanter & Luban, supra note 62, at 1451.
69. In re Exxon Valdez, 490 F.3d 1066 (9th Cir. 2007).
70. Polinsky & Shavell, supra note 27.
71. Infra Appendix A, Translation, penultimate paragraph.
72. See Punitive damages: relationship to defendant's wealth as factor in determining propriety of award, 87 A.L.R. 4th 141 (Originally published in 1991). To illustrate, the California Supreme Court has established that, "[p]unitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff 'whole,' punitive damages are a 'windfall' form of recovery." College Hospital, Inc. v. Superior Court, 8 Cal. 4th 704, 712 (1994). Cf. Kelly v. Haag, 145 Cal. App. 4th 910 (2006) (reversing a punitive-damages award for lack of evidence of the defendant's financial condition). However, it has been argued that, in order to establish optimal levels of deterrence, punitive damages should be linked to the wealth of defendant only when the wrongdoers are "individuals whose benefit from causing harm is socially illicit," that is, for conducts "whose goal is to cause harm." Polinsky & Shavell, supra note 27, at 914 (emphasis added).
VII. Recent Trends in the United States Courts: Shifting From Punitive Damages to Pain and Suffering Awards

Having observed that punitive damages do not pursue compensatory goals, it is now interesting to examine the surprising escalation in the United States of multi-million-dollar pain and suffering awards. These awards, ostensibly, seem to have established a convenient alternative to punitive damages.

Since Congress, in 1989, provided that, unlike compensatory damages, punitive damages are taxable gross income, plaintiffs’ attorneys have “poured new wine of punishment evidence, once used to obtain punitive damages, into old bottles of pain and suffering awards.”

For example, consider that in 2001 a Los Angeles jury set forth a verdict of over $55 million in a tire separation case, of which $41 million of the damages awarded were for non-economic damages. Surprisingly, no punitive damages were awarded. Also in 2001, a plaintiff in a medical malpractice action was awarded $115 million; $100 million of which was for pain and suffering. The same year in Mississippi, in two separate cases, juries awarded multi-million-dollar verdicts for plaintiffs based almost exclusively on pain and suffering, whereas out-of-pocket damages amounted to a sum significantly below the overall award.

73. See supra note 40. See also, Margaret L. Thum, Note, Confusion in the courts: Failure to Tax Punitive Damages Uniformly in Personal Injury Cases, 23 HASTINGS CONST. L.Q. 591, 614 (1996) (underscoring the judiciary's failure to uniformly apply tax laws due to inconsistent interpretations of tax statutes).


75. Id. at 64 n.90 (referring to Lampe v. Cont'l Gen. Tire, Inc., No. BC 173567, slip op. at 6 (L.A. Super. Ct. Apr. 20, 2001), which eventually settled for an undisclosed sum.).

76. Id. at 65 n. 99 (referring to Evans v. St. Mary's Hosp. of Brooklyn, No. 4038/91, slip op. at 1 (N.Y. Co. Super. Ct. (Nov. 9, 2001))).

77. In the first case, the award amounted to $100 million in compensatory damages to ten plaintiffs in a lawsuit against the makers of a heartburn drug. See Nation’s First Rezulin Trial Ends in Settlement, 6-22 MEALEY’S EMERGING DRUGS AND DEVICES 15, 19 (2001) (discussing Rankin v. Janssen Pharmaceutica, Inc., No. 2000-20 (Miss. Cir. Ct., Jefferson County, Sept. 29, 2001)). In the second case, the jury awarded $150 million in compensatory damages to six plaintiffs who claimed they were purely exposed to asbestos, while no actual injuries had occurred. See Miss. Jury Returns $150M Verdict Against AC&S, Dresser Industries, 3M Corp., 16-19 MEALEY’S LITIG. REP.: ASBESTOS, 1, 4 (2001). Both cases are studied in Schwartz
Because punitive damages were not awarded in any of those cases, the risk of the improper use of pain and suffering aimed to fully replace punitive damages is patently high. Consequently, it should be noted that pain and suffering damages "are intended to compensate the plaintiff for past and future pain and suffering and anguish. They should not be twisted into a covert punitive damages substitute and provide the next oil well for 'jackpot justice.'"

VIII. Punitive Damages Disguised as Pain and Suffering: A Misleading Pathway Towards the Recognition of U.S. Punitive Damages Awards

A central passage of a 2007 Italian Supreme Court decision describes the mainstream trend in the Italian courts in dealing with non-economic damages: "[i]n the case of [non-pecuniary] damages . . . the stress falls on the plaintiff, not on the wrongdoer: the primary purpose of this category of damages is to compensate the plaintiff."

What opinion would an Italian court deliver if called upon to recognize and enforce a multi-million-dollar "pain and suffering" award similar to those mentioned in the last section? As seen in the Fimez case, the Court of Appeals of Venice rejected the Alabama award even though it did not contain any explicit reference to punitive damages. The Court of Appeals of Venice gathered from both the personal characteristics of defendant and the vagueness of the Alabama judgment's rationale, that the award was punitive in nature.

In dealing with cases such as the aforementioned, where damages were awarded under the label of "pain and suffering," the enforcing judge could be led into error. Since pain and suffering awards in the United States are traditionally meant to compensate the injured party for non-economic losses, and because in Italy, especially
after 2003, damages for pain and suffering enjoy full judicial recognition, Italian courts will be prone to enforce foreign judgments of this kind.

Following the analysis proposed by Professors Schwartz and Lorber, it should be emphasized that such "pain and suffering" awards unmistakably play a punitive role, in spite of the nomenclature used. Hence, a foreign court should use a rather skeptical approach when evaluating whether to recognize and enforce such judgments.

Judging which of the legal systems is better or produces more efficient outcome is not the purpose of this paper. This is not the job of a comparative study, which should instead focus on the specificities of the different legal systems one intends to examine. The purpose of mentioning this recent trend in the U.S. legal system, by underscoring its ambiguity with regard to punitive damages, is to suggest that an enforcing court should go beyond the structural appearances of foreign judgments and question their authentic function.

83. The gist of the two decisions (supra note 16) is that, in the Italian legal system, based on the Constitution and, especially, on Article Two (which recognizes and protects all inviolable human rights), non-economic damages must be seen as a broad category, comprehensive of any circumstance in which a value linked to the human being has been damaged, and must go beyond the category of "moral damages" (that is, non-economic losses arising from criminal offenses).

84. For an efficiency-based analysis of punitive damages in the United States, see David Rosenberg, Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases, 115 HARV. L. REV. 831, 853 (2002), which noted that efficient deterrence "is achieved by threatening . . . defendant with damages equal to the aggregate tortious loss." See also Polinsky & Shavell, supra note 27, at 954 ("Punitive damages should be imposed when deterrence otherwise would be inadequate because of the possibility that injurers would escape liability.") and Calabresi, supra note 32, at 135 ("[T]he system would allocate the costs to those acts or activities that an arbitrary initial bearer of accident costs would (in absence of transaction and information costs) find it more worthwhile to 'bribe' in order to obtain that modification of behavior which would lessen accident costs most.").

85. See RODOLFO SACCO, LA COMPARAISON JURIDIQUE AU SERVICE DE LA CONNAISSANCE DU DROIT 8 (1991) ("La comparaison suppose évidemment l'observation de plusieurs modèles juridiques, mais elle dépasse cette simple observation . . . consiste à mesurer les différences existant entre plusieurs modèles juridiques."); see also UGO MATTEI, COMPARATIVE LAW AND ECONOMICS 69 (6th ed. 2004) (underlying the importance of a comparative study in order to shed light, both in the United States and in Europe, on the contingency and relativity of the respective national legal models).

86. A solution to an indiscriminate use of pain suffering in the United States is that jurors be instructed "they are not to consider any alleged 'guilt' or 'misconduct'
IX. Conclusion: Why Enforcing Courts Should Avoid Unfair Total Rejections of U. S. Punitive Damages Awards

On top of the controversial nature of the punitive damages doctrine itself, the fact that the United States is not a party to any international agreement governing the recognition and enforcement of foreign judgments further complicates the picture. For its part, the Italian Supreme Court's rationale in *Fimez* is not without its flaws.

First, in upholding the Venice Court of Appeals' decision in the


88. Insofar as civil law countries other than Italy are concerned, the trend is in the same direction: courts do not show much sympathy for punitive damages. See John Y. Gotanda, *Charting Developments Concerning Punitive Damages: Is the Tide Changing?*, 45 COLUM. J. TRANSNAT’L L. 507 (2007) (discussing a number of developments outside of the United States concerning punitive damages, such as the proposed revisions to the civil code in France, which would allow the awarding of punitive damages in civil actions, and court decisions in Australia, Canada and Spain enforcing American awards of punitive damages) and Volker Behr, *Enforcement of United States Money Judgments in Germany*, 13 J.L. & COM. 211, 231 (1994) (analyzing the position of the German Supreme Court: “Although punitive and exemplary damages are an aspect of private law, and not criminal law, an award of punitive and exemplary damages is fundamentally contrary to German public policy even in enforcement cases.”). For a practical approach to the subject, see ROBERT E. LUTZ, *A LAWYER’S HANDBOOK FOR ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND ABROAD* 427 (2007) (focusing on the civil law *Exequatur*).

89. See also supra notes 15 and 16 (and accompanying text).
Fimez case, the Italian Supreme Court confirmed the rejection of the Alabama judgment despite the absence, in its rationale, of a plain reference to punitive damages. Under the domestic rules of both civil procedure and private international law, such a choice is wholly legitimate and, as the Italian Supreme Court maintained, it is a matter of fact, which should be tackled on a case-by-case basis.

Consequently, the Court held that punitive damages conflict with domestic ordre public, thus rejecting the entire Alabama judgment and the whole doctrine it allegedly set forth. Astonishingly, however, it did not consider that part of the Alabama award might also provide for compensatory damages. The issue at stake here is whether a court has the power to reject a foreign money judgment, which undoubtedly contains a compensatory fraction, simply because (the determination of) part of it is deemed contrary to domestic public policy. Total denial is not the only available answer — in truth, it is the least appropriate one. Given that the defendant has no assets within the reach of the foreign court, as a result of the rejection of the entire judgment the plaintiff will recover nothing from the manufacturer of the item that contributed to her son’s death. If, on the one hand, it is credible for the court to state that punitive damages are contrary to a generic notion of domestic public policy, on the other hand total rejection of the Alabama judgment could be seen as a denial of justice.

Second, the Corte di Cassazione in Fimez failed to analyze in depth the nature of the Alabama award. Its lack of rationale aside, the Court should have been solicited by one of the parties (the one with the greatest interest in the recognition of the Alabama judgment perhaps) that punitive damages cannot be awarded by a United States

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90. See supra notes 6-9 (and accompanying text).

91. It should be kept in mind that in the Fimez case the Alabama court did not distinguish between the apportionment of compensatory and punitive damages. It is known that punitive damages, alone, cannot be awarded. “Punitive damages do not constitute a separate cause of action, but instead form a remedy available for some tortious or otherwise unlawful acts; a demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action such as fraud. Thus, a claim for punitive damages must relate to some separate cause of action which permits the recovery of such damages.” 25 C.J.S. Damages § 195 (2007).

92. This must have been the impression of the plaintiff in Fimez, interviewed for the New York Times by Adam Liptak (American Exception: Foreign Courts Wary of U.S. Punitive Damages, New York Times, March 26, 2008).
court absent an independent cause of action\textsuperscript{93} and that the award could therefore not be considered entirely punitive. There is always an \textit{underlying} compensatory portion (either economic or non-economic) in any punitive damages award. If only the Alabama court had elaborated on the different categories of damages, then the enforcing judge would have had a chance to select, by following the principles of their own legal system, which of the categories to enforce. The apportionment of the different categories of damages is regularly and clearly set forth by American courts. Unfortunately, this was not the case here.

Third, when dealing with U.S. awards of punitive damages, judges operating in continental Europe should try to identify the amount of compensatory damages and limit their enforcement to the portion of damages that are not punitive. Absent such a differentiation, it should be the enforcing judge’s responsibility to read between the lines and, in the interest of justice, extrapolate a number that would compensate, even if imprecisely, the plaintiff for the losses incurred. Such determination should, at a minimum, take into account the prevailing party’s legal fees,\textsuperscript{94} whose award, in the absence of statutory authorization, is prohibited in the United States.\textsuperscript{95} To do so, the enforcing judge should apply the guidelines generally employed within her own jurisdiction to resolve similar issues (e.g., through the “disability schedule and value table” judicial scheduling),\textsuperscript{96} with regard to the specificities of the case brought before it.

Fourth, no Italian judge may create new remedies in absence of statutory authority, especially if, functionally, criminal penalties imposed within civil proceedings is what is at stake. In this context, surprisingly, the Corte di Cassazione did not mention the system of checks and balances set forth by Article 25 of the Italian Republic Constitution, which is the greatest obstacle facing the judicial

\textsuperscript{93} See id.

\textsuperscript{94} By reference to article 11 of the Hague Convention on Choice of Court Agreement. \textit{Supra} note 88.

\textsuperscript{95} See \textit{supra} notes 28-30 (and accompanying text). Of course, it is the job of the party seeking recognition — or better, its transnational counsel — to solicit the enforcing court with concrete evidence of his or her economic and non-economic losses, bearing in mind the indissoluble public policy hurdles existing between punitive damages and civil law systems.

\textsuperscript{96} See Giovanni Comandé, \textit{supra} note 36, at 290-98 (analyzing the “Franco-Italian” approach to awarding non-economic damages).
recognition of the punitive damages doctrine.

Moreover, and surprisingly, the Court did not even mention the limit imposed on the judiciary by Article 25 of the Italian Republic’s Constitution: “[n]o person shall be punished but for a law entered into effect before the commission of the offense.” In other words, no deprivation of liberty or property is permitted absent express statutory authorization. Having established that punitive damages in the United States serve in a civil process “the same purposes as criminal penalties,” it is highly improbable that punitive damages will successfully pass this constitutional check in Italy. The same holds true regardless of the origins of the punitive damages doctrine, considered to be rooted in equity. The enforcing court is required to identify the basic principles of the law of the foreign jurisdiction and thus determine whether those principles are irreconcilable with the corresponding principles of its own country. From this point of view, it is clear that the established “substantially criminal” function of punitive damages does not belong in the Italian legal system.

As simplistic as it seems, this is the core of the question. Judges operating in civil law systems throughout continental Europe, unlike their colleagues across the Atlantic, cannot create law or frame new remedies without statutory authority.

97. State Farm, 538 U.S. at 417.
98. Black’s Law Dictionary defines equity as “the system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law (together called ‘law’ in the narrower sense) when the two conflicts.” Black’s Law Dictionary (8th ed. 2004). See also George T. Bispham, The Principles of Equity 1-2 (Joseph D. McCoy ed., 11th ed. 1931) (arguing that, “[i]n order to begin to understand what equity is, it is necessary to understand what the English High Court of Chancery was, and how it came to exercise what is known as its extraordinary jurisdiction. Every true definition of equity must, be, to a greater or less extent, a history.”). Most importantly, equity may not and does not create new substantive rights, Meyer v. City of Eufala, Okla., et. al., 132 F.2d 648 (10th Cir. 1942), or impose obligations not otherwise arising; in other words, “Equity does not sit to confer a windfall.” 30A Corpus Juris Secundum Equity § 2 (emphasis added); see also generally Branham v. First Nat’l Bank, 78 F.2d 443 (4th Cir. 1935). The latter reconstruction of the role of equity in common law systems, given by the Corpus Juris Secundum, undermines the very foundations of some ideas according to which the main reason to explain why civil law systems do not traditionally accept punitive damages is that “[p]unitive damages awards developed in equity . . . .” Ostoni, supra note 1, at 245.
99. In this regard, it is important to underline that “the idea of a common law decision making as opposed to a centralized command and control ‘regulatory’ model is simply unknown in Europe.” Mattei, supra note 86, at 75.
Particularly today, after *Philip Morris*,¹⁰⁰ which simply did not take into account the guideposts timidly set forth in *State Farm*¹⁰¹ in evaluating the excessiveness of an award under the Excessive Fine Clause, the state of affairs of the punitive damages doctrine in the United States continues to be uncertain.

As previously mentioned, a transnational lawyer seeking recognition of punitive damages awards is thus called to play a creative role before the European enforcing judge, coming forward with clear evidence of her client’s compensable losses that — because of the peculiarity of the United States legal system — had they not been incorporated under the punitive damages label would remain uncompensated.

¹⁰⁰. *See supra* note 40.

¹⁰¹. In *State Farm*, the Court established that, for purposes of determining whether an award of punitive damages is disproportionate under the Excessive Fine Clause, an award that exceeds a single-digit ratio between punitive and compensatory damages may comport with due process where “a particularly egregious act has resulted in only a small amount of economic damages.” 538 U.S. at 425. “The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” *Id.*
Appendix A
(Author's Translation of Cass., 19 Jan. 2007, n. 1183)

Procedural Posture and Overview

P.J. filed petition in the Court of Appeals of Venice for the recognition and enforcement of the judgment issued by the District Court of Jefferson County (Alabama, United States). The court ordered Fimez S.p.A. to pay P.J. $1 million for the damages resulting from the death of her son P.V.K., who, according to that court's finding, had been thrown from the seat of his motorcycle as a consequence of a crash with an automobile, lost his helmet due to design and manufacturing defects of the safety buckle produced by Fimez, and, once on the floor, suffered severe injuries to his head, which caused his death.

The Court of Appeals rejected such request, holding that the Alabama judgment entailed an award of punitive damages, conflicting with public policy.

P.J. appealed that judgment before this Court for review.

Rationale

In her pleading (insufficient and contradictory rationale), appellant argues that: (1) the judgment appealed bears an evident contradiction where it states that the lack of rationale in a foreign judgment does not bar a court from giving it legal effect in Italy, and, at the same time, holds that it is possible to infer, from a lack of evidentiary justifications in the assessment of damages by the Alabama court, the punitive nature of the award . . . and (2) the court erred both in considering the award excessive and in attributing it, apodictically, punitive nature simply on the grounds of such erroneous evaluation.

Such complaint is groundless and unacceptable.

No contradiction exists in stating that the lack of rationale in the foreign judgment does not prevent a court from granting it exequatur and making, from that same lack of rationale, an argument for the punitive nature of the damages awarded by that judge.

Moreover, the lower court's reasoning cannot be considered

102. See Corte app., supra note 1.
apodictic, as appellant asserts, on the ground that [the foreign court] has provided no explanation of neither the criteria used in determining the amount of damages nor the nature and kind of the harm done. Excessiveness or disproportion of the award should be instead viewed in accordance with the criteria generally used by the Italian courts, considering also the sums already paid to the appellant [in the settlement agreement] by the driver of the car implicated in the accident, the firm manufacturer of the helmet, and other defendants.

Moreover, the finding for the excessiveness of the damages awarded by the foreign court and the definition of such award in terms of punitive damages... hinge upon the facts of the individual situation and, therefore, should be left for the Court of Appeals, whose finding cannot be reversed by this Court, especially if, as in the instant case, it is appropriately and logically justified. Indeed, the Supreme Court is entitled to reverse the judgment of a lower court, on the ground of a different definition of domestic public order, and check the appropriateness of the rationale adopted therein, but it cannot interfere with the evaluation of the deed of which appellant seeks recognition and enforcement, being a matter of fact... [citations omitted].

With the second of her claims (violation of art. 797, n. 7, code of civil procedure),

appellant argues that the decision issued by the American court is not contrary to public policy, on the assumption that our system of civil liability consists of various legal institutions pursuing punitive goals, such as penalty clauses and non-economic damages.

Such grievance is groundless, as well.

Penalty clauses are not punitive in nature and do not carry any retaliatory purpose. A penalty clause serves to strengthen a

103. As ultimately amended by Art. 10, d.l. October 10, 1996, n. 542, converted by Law, December 23, 1996, n. 649, the court of first instance cannot recognize and enforce a foreign judgment if its content is contrary to domestic public policy. Today, absent an international agreement, a lawyer seeking recognition and enforcement of a foreign money judgment in Italy should refer to the rules of the Reform of Private International Law Act. Article 64 provides that the foreign judgment is conclusive between the parties and automatically recognized in Italy unless one of the seven factors listed under that article occur. To illustrate, Article 64(1)(g) expressly stops the automatic recognition mechanism where the foreign judgment's provisions "produce effects contrary to public order." Law n. 218 of May 31, 1995, (in Gazz. Uff., 3 June 1995, n.128, S.O.).
contractual relationship and quantify damages in advance, so that if its provision entails, according to the judge's discreitional appraisal, an abuse in the parties' freedom of contract contrary the principle of proportionality, it can be downsized by the judge. Hence, although the sum agreed upon as a penalty is due by the breaching party notwithstanding the proof of the harm suffered and a rigid correlation with the extent of the latter, we conclude that penalty clauses cannot be compared to the legal institution of punitive damages, peculiar to Anglo-Saxon law, an institution that not only links itself to the wrongdoer's conduct and not to the kind of harm done, but it is also characterized by an unjustifiable disproportion between the damages awarded and the harm actually suffered by the plaintiff.

Likewise, we hold that no overlap exists between an award of moral damages and the punitive damages doctrine. Moral damages reflect a loss suffered by the injured party, and recovery is anchored to such loss. In the case of moral damages, indeed, the stress falls on the plaintiff, not on the wrongdoer: the primary purpose of such category of damages is to compensate the plaintiff, whereas in the case of punitive damages, as we have seen, there is no correspondence between the damages awarded to the plaintiff and the harm actually suffered.

In the current legal system, the idea of punishment is alien to any award of civil damages. The wrongdoer's conduct is also considered irrelevant. The task of civil damages is to make the injured party whole by means of an award of a sum of money, which tends to eliminate the consequences of the harm done. The same holds true for any category of damages, moral and non-economic damages included, whose award not only is unresponsive to both the injured parties' conditions and defendants' wealth, but it also requires that plaintiffs prove the existence of a loss stemming from the offense, resorting to concrete, factual evidence, on the assumption that such evidence cannot be considered in re ipsa... [citations omitted].

The appeal is therefore rejected...