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## Punitive Damages, Chinese Tort Law, and the American Experience

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### Recommended Citation

Vincent R. Johnson, Punitive Damages, Chinese Tort Law, and the American Experience, 9 *Frontiers of Law in China* 321 (2014).

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FOCUS: PUNITIVE DAMAGES IN CHINA

PUNITIVE DAMAGES, CHINESE TORT LAW, AND THE AMERICAN EXPERIENCE

Vincent R. Johnson \*

In a country such as China, with abundant consumer products and the inevitability of product defects, claims for punitive damages are sure to arise under Article 47 of the new Chinese Tort Law. Article 47 provides that “(w)hereany producer or seller knowingly produces or sells defective products, causing death or serious damage to the health of others, the injured party may request appropriate punitive damages.” As Chinese jurists and scholars interpret Article 47, they may wish to consider whether lessons can be drawn from the American experience. During the past two decades, few areas of American law have changed more radically than the law on punitive damages. While there were once few restraints on the ability of a judge or jury to impose punitive damages in a case involving egregious conduct, today there are a host of limitations embodied in American state and federal law. In many American states, statutes or judicial decisions restrict the ability of a court to award punitive damages by narrowly defining the types of conduct that will justify a punitive award, raising the standard of proof, capping the amount of punitive damages, requiring a portion of a punitive award to be forfeited to the state, or limiting vicarious liability for punitive damages. In addition, under federal constitutional law, the principle of due process limits the imposition of punitive damages by scrutinizing the ratio between compensatory and punitive damages and prohibiting an award to be based on harm to persons other than the plaintiff. An examination of these developments from a comparative law perspective may prove useful to the implementation of Article 47.

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## INTRODUCTION

The Chinese Tort Law,<sup>1</sup> which became effective in 2010,<sup>2</sup> allows for punitive damages to be awarded in a narrow range of cases. Specifically, Article 47 provides that “(w) here any producer or seller knowingly produces or sells defective products, causing death or serious damage to the health of others, the injured party may request appropriate punitive damages.”<sup>3</sup> This law is the first legislation in China “specifically to use the term ‘punitive damages.’”<sup>4</sup>

<sup>1</sup> See Zhonghua Renmin Gongheguo Qinquan Zerenfa (Tort Law of the People’s Republic of China) (promulgated by the Standing Comm. National People’s Congress, Dec. 26, 2009, effective Jul. 1, 2010) (Lawinfochina), available at 2009 China Law LEXIS 668.

<sup>2</sup> Vincent R. Johnson, *The Rule of Law and Enforcement of Chinese Tort Law*, 34 THOMAS JEFFERSON L. REV. 43, 80–1 (2011) (“In 2009, after many years of study and deliberation, China adopted a new comprehensive tort law..., which became effective July 1, 2010”).

<sup>3</sup> See Chinese Tort Law, fn.1, Article 47.

<sup>4</sup> Jordan Brandt et. al., *China*, 45 INT’L LAW. 487, 490 (2011).

### A. China's Alignment with Common Law Countries

In recognizing that the imposition of punitive damages is sometimes appropriate in tort litigation, China has joined the relatively small number of countries that have embraced a similar position. That group notably includes the United States<sup>5</sup> and other common law countries such as England,<sup>6</sup> Wales,<sup>7</sup> Ireland,<sup>8</sup> Northern Ireland,<sup>9</sup> Australia,<sup>10</sup> New Zealand,<sup>11</sup> and Canada,<sup>12</sup> as well as Zimbabwe.<sup>13</sup> However, among the countries allowing punitive damages, there is “little consensus on the factors used to determine the amount of punitive damages that should be awarded.”<sup>14</sup>

In many parts of the world, recovery of punitive damages is not permitted in a tort action and foreign judgments awarding punitive damages are not enforced.<sup>15</sup> According to some scholars, “virtually all civil law countries disallow punitive damages in tort cases.”<sup>16</sup> European civil law countries, in particular, “remain impervious to this Americanization ... (and) the concept of punitive damages is still nonexistent.”<sup>17</sup> Thus,

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<sup>5</sup> *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 410 (2009) (discussing the history of punitive damages in the United States).

<sup>6</sup> Sir Henry Brooke, *A Brief Introduction: The Origin of Punitive Damages*, in *PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES* 1, 1 (Helmut Koziol & Vanessa Wilcox eds., 2009) (“exemplary damages first made their appearance...in England in the 1760s...and over the next 200 years...were awarded from time to time not only in cases of assault, false imprisonment, defamation, seduction and malicious prosecution, but also in cases of trespass to land, and eventually trespass to goods”); see also Vanessa Wilcox, *id.* at 7, 53 (predicting that “‘exemplary’ damages will remain a part of English law for a while to come”).

<sup>7</sup> See Brooke, *fn.6* at 1 (discussing Wales); Thomas Rouhette, *The Availability of Punitive Damages in Europe: Growing Trend or Nonexistent Concept?*, 74 *DEFENSE COUNSEL J.* 320, 327 (2007) (indicating that punitive damages are “strictly limited in England and Wales”).

<sup>8</sup> See Brooke, *fn.6* at 2 (discussing Ireland).

<sup>9</sup> See *Id.* at 2 (discussing Northern Ireland).

<sup>10</sup> See *Id.* (discussing Australia).

<sup>11</sup> See *Id.* (discussing New Zealand).

<sup>12</sup> See *Id.* (discussing Canada).

<sup>13</sup> Geoffrey Feltoe, *Zimbabwe*, in R. Blanpain, ed. *INTERNATIONAL ENCYCLOPEDIA OF LAWS* at 115 (2002) (“Punitive damages are used sparingly in Zimbabwe”).

<sup>14</sup> John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 *COLUM. J. TRANSNAT'L L.* 391, 394–5 (2004) (finding that punitive damages are “widely available” in England, Australia, New Zealand, the United States, and Canada).

<sup>15</sup> John Y. Gotanda, *Charting Developments Concerning Punitive Damages: Is the Tide Changing?*, 45 *COLUM. J. TRANSNAT'L L.* 507, 528 (2007) (“American parties should not anticipate smooth sailing when seeking to have a domestic punitive damages award recognized and enforced in other countries....(T)here still are significant hurdles that may bar enforcement”).

<sup>16</sup> Julia A. Davies & Paul T. Hayden, *GLOBAL ISSUES IN TORT LAW* 12 (2008).

<sup>17</sup> See Rouhette, *fn.7* at 342.

punitive damages are generally not available in Austria,<sup>18</sup> France,<sup>19</sup> Germany,<sup>20</sup> Italy,<sup>21</sup> Hungary,<sup>22</sup> Scandinavia,<sup>23</sup> or Scotland<sup>24</sup> (the latter of which has a mixed legal system derived from civil law and common law influences), nor in Mexico,<sup>25</sup> Brazil,<sup>26</sup> or Japan.<sup>27</sup>

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<sup>18</sup> Willibald Posch, *Austria*, in INTERNATIONAL ENCYCLOPEDIA OF LAWS 138 (R. Blanpain, ed. 2002).

<sup>19</sup> See Jean-Sebastien Borghetti, *Punitive Damages in France*, in PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES, fn.6 at 55, 56 (“Although punitive damages do not officially exist as such under French law, some mechanisms do exist which bear some resemblance to them”); See also Matthew Parker, *Changing Tides: The Introduction of Punitive Damages into the French Legal System*, 41 GA. J. INT’L & COMP. L. 389, 390 (2013) (discussing a 2010 case in which the French Court of Cassation refused to enforce California court’s judgment which included a punitive damages award, but stated that “an award of punitive damages is not per se contrary to public policy”).

<sup>20</sup> See Nils Jansen and Lukas Rademacher, *Punitive Damages in Germany*, in PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES, fn.6, at 75, 76 (“the widely prevailing opinion sees no place for punitive damages under German law”); Id. at 86 (“apart from the exception of damages for discrimination, there are no punitive damages in German law”); ANDREW J. MCCLURG, ADEM KOYUNCU, & LUIS EDUARDO SPROVIERI, *Practical Global Tort Litigation: United States, Germany and Argentina*, Carolina Academic Press (Durham), at 207 (2007) (“In Germany, punitive damages are viewed as a quirky phenomenon of U.S. tort law”).

<sup>21</sup> Alessandro P. Scarso, *Punitive Damages in Italy*, in PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES, at 103, 113 (“As a general rule, Italian (tort) law does not award punitive damages”).

<sup>22</sup> Attila Menyhard, *Punitive Damages in Hungary*, in PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES, at 87 (“Punitive damages as such are not recognized in Hungarian tort law: neither on a regulatory level nor in court practice”).

<sup>23</sup> Bjarte Askeland, *Punitive Damages in Scandinavia*, in PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES, at 115, 115 (“punitive damages’...simply have no tradition under Scandinavian law”).

<sup>24</sup> See Brooke, fn.6 at 2 (indicating that exemplary damages have “never formed part of the law of Scotland”).

<sup>25</sup> See INTERNATIONAL PERSONAL INJURY COMPENSATION 438 (Dennis Campbell, ed., 1996) (“Mexican law does not contemplate or regulate...punitive damages. An exception to this is moral damage which, in a limited scope incorporates concepts of...punitive damages”); but see Jorge A. Vargas, *Moral Damages Under the Civil Law of Mexico: Are These Damages Equivalent to U.S. Punitive Damages?*, 35 U. MIAMI INTER-AM. L. REV. 183, 267 (2004) (indicating that some “American judges...have made determinations that Mexico’s ‘moral damages’ are equivalent to punitive damages, exemplary damages, or loss of consortium”).

<sup>26</sup> See HARVARD LAW SCHOOL PROGRAM ON THE LEGAL PROFESSION, THE BRAZILIAN LEGAL PROFESSION 4 (2011) (“Technically, punitive damages are not allowed....Legal scholars...cannot agree on whether moral damages are the equivalent of U.S. punitive damages”).

<sup>27</sup> See Norman T. Braslow, *The Recognition and Enforcement of Common Law Punitive Damages in a Civil Law System: Some Reflections on the Japanese Experience*, 16 ARIZ. J. INT’L & COMP. L. 285, 358 (1999) (“Germany and Japan have judicially determined that the punitive damage portions of American judgments will not be recognized, and given the intense scrutiny of these cases by both academics and the courts, it is highly unlikely these decisions will be reconsidered”).

Discussing Europe, Sir Henry Brooke observed that “an important part of the continental temperament is to distrust punitive damages.”<sup>28</sup> Focusing on the European Union in particular, Professor Bernhard A. Koch indicates that “(d)espite constant rumors to the contrary, punitive damages do not seem to be of any significance in EU law yet.”<sup>29</sup>

China’s recognition of punitive damages was momentous. As described by one author:

*(Article 1 of the Chinese Tort Law) states, “In order to protect the legitimate rights and interests of parties in civil relationships, clarify the tort liability, prevent and punish tortious conduct, and promote the social harmony and stability, this Law is formulated.” Although China has followed the continental European civil law approach in the development of its laws, the “punish” language in the (Chinese Tort Law) is a grand departure from one of the core principles of continental European civil tort law, where the purpose of tort law is to compensate a victim for his loss and to prevent future harm, but not to punish the violation.*<sup>30</sup>

#### B. Article 47’s Uncertain Future

Scholars have speculated that the inclusion in the Chinese Tort Law of a punitive damages rule linked to products liability is “a response to recent scandals that have caused an abundance of worldwide recalls of Chinese products.”<sup>31</sup> On this theory, presumably it was necessary to enhance the wide range of other penalties under Chinese

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<sup>28</sup> See Brooke, fn.6, at 3; see also Michael L. Wells, *A Common Lawyer’s Perspective on the European Perspective on Punitive Damages*, 70 LA. L. REV. 557, 557 (2010) (“While punitive damages are well-entrenched in the common law legal systems of the United States and Great Britain, they have a far smaller role in the civil law tradition of Continental Europe”).

<sup>29</sup> See Bernhard A. Koch, *Punitive Damages in European Law*, in PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES, fn.6 at 197, 208; but see Helmut Koziol, *Punitive Damages — A European Perspective*, 68 LA. L. REV. 741, 749 (2008) (“An inclination towards punitive damages exists in some [EU] directives; for example, on consumer credit and in the area of anti-discrimination in the workplace”).

<sup>30</sup> See Jason E. Kelley, *Seeking Justice for Pollution Victims in China: Why China Should Amend the Tort Liability Law to Allow Punitive Damages in Environmental Tort Cases*, 35 SEATTLE U. L. REV. 527, 529 (2012), citing Helmut Koziol & ZHU Yan, *Background and Key Contents of the New Chinese Tort Liability Law*, 1 J. EUR. TORT L. 328, 336 (2010).

<sup>31</sup> Tina M. Castellana, *Unconventional Remedies: The Feasibility of a Private Recall Remedy in the People’s Republic of China*, 37 BROOK. J. INT’L L. 233, 242 (2011); see generally LIU Chenglin *The Obstacles of Outsourcing Imported Food Safety to China*, 43 CORNELL INT’L L.J. 249, 251 (2010) (discussing the recall of melamine tainted pet foods imported from China and related legal issues); LIU Chenglin, *Profits Above the Law: China’s Melamine Tainted Milk Incident*, 79 MISS. L.J. 371, 373 (2009) (hereinafter “*Tainted Milk Incident*”) (discussing a food safety scandal that “prompted a number of Asian countries and the European Union to ban food products from China”).

law that already discourage the marketing of dangerous products.<sup>32</sup>

Thus far, despite the authorization of Article 47, punitive damages have never been awarded by a Chinese court.<sup>33</sup> Consequently, there is no well-established right to punitive damages in China.<sup>34</sup> And, except as noted below, punitive damages are not available in a Chinese tort action.<sup>35</sup>

In a country such as China with abundant consumer products and the inevitability of product defects, claims for punitive damages are sure to arise under Article 47. Scholars have also argued that China should allow recovery of punitive damages in other contexts, such as harm arising from environmental torts.<sup>36</sup> As Chinese jurists and scholars interpret

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<sup>32</sup> As Professor Chenglin Liu explains:

The criminal law of China imposes severe sanctions on those who produce counterfeit or substandard products that cause serious bodily injury or death.

Product safety in China is regulated by China's Product Quality Law, which requires sellers to inspect and verify the quality of products and prohibits the production or sale of products that fail to meet that standard. The consequences for producing adulterated products range from halt of production to confiscation to fines equaling up to 300% of the total sale. Under the most serious circumstances, the penalty may include revocation of the producer's business license and even criminal investigation. If . . . fake drugs cause serious harm or death, the responsible parties will face penalties ranging from three years to life imprisonment. If the circumstances are particularly serious, the death penalty may be imposed. In either case, responsible parties will face a fine of 50% to 200% of the sale amount or a confiscation of the total amount of the illegal proceeds.

In terms of compensation, the producer of a defective product may be liable for medical expenses as well as any lost earnings as a result of the injury. Compensation may also cover the living expenses of a party's dependants if the defective product left the victim disabled. In cases that result in the victim's death, the law entitles the decedent's surviving dependants to funeral and living expenses.

LIU Chenglin, *Leaving the FDA Behind: Pharmaceutical Outsourcing and Drug Safety*, 48 TEX. INT'L L.J. 1, 20–1 (2012).

<sup>33</sup> See Vincent R. Johnson, *The Rule of Law and Enforcement of Chinese Tort Law*, 34 THOMAS JEFFERSON L. REV. 43, 87 (2011) ("Americans might argue that a tort system like the one in China — where contingent fees are (strictly speaking) prohibited, where there are no provisions for aggregate litigation (e.g. class actions), where punitive damages have never been awarded, and where there is no independent judiciary — provides little hope of affording the victims of accidents access to legal remedies for the injuries they suffer").

<sup>34</sup> Cf. Andrea Conzatti, *The Recognition of U.S. "Opt-Out" Class Actions in China*, 44 GEO. J. INT'L L. 641, 668 (2013) ["certain awards approved by U.S. courts (more specifically, a 'punitive damages award') would unlikely be granted preclusive effects in China, given the absence — within the PRC's legal system — of an equivalent legal concept"].

<sup>35</sup> Brian J. Safran, *A Critical Look at Western Perceptions of China's Intellectual Property System*, 3 U. PUERTO RICO BUS. L.J. 135, 175 (2012) (discussing the products liability exception).

<sup>36</sup> Michael I. Jeffery QC & ZHAO Xiaobo, *Developing A National Contaminated Land Liability Scheme in China: The Comprehensive Environmental Response, Compensation, and Liability Act Revisited*, 30 J. ENERGY & NAT. RESOURCES L. 423, 465 n.171 (2012) ("The establishment of a punitive remedy has been discussed by scholars for years"); See Kelley, fn.30 at 532 ("Punitive damages will not only provide a remedy for victims of environmental pollution torts but will also punish and deter polluters, thus having a net positive benefit on public health and the environment"); See also REN Xiang, *Judicial Cases in China in 2012*, 1 CHINESE J. COMP. L. 408, 419 (2013) (discussing the Xinyi Zijin case which arose from the collapse of a dam at a tin mine and ultimately resulted in 243 million RMB settlement with the principal defendant).

the punitive damages provision of the Chinese Tort Law and consider whether punitive damages should be recognized in other fields, they may wish to consider whether lessons can be drawn from the American experience. As Professor Ellen Bublick has written, “(w)hether China’s tort law actually embodies the broad protections that appear on the face of the Tort Liability Law depends in large part on its implementation through legal institutions and procedures.”<sup>37</sup>

## I. OVERVIEW OF REFORM IN THE UNITED STATES

### A. Recent Restrictions on Punitive Damages

During the past two decades, few areas of American law have changed more radically than the law on punitive damages. While there were once few restraints on the ability of a judge or jury to impose punitive damages in a case involving egregious conduct,<sup>38</sup> today there are a host of limitations embodied in American state and federal law, such as procedural rules which separate inquiries into the appropriateness of a punitive award from the basic issue of whether the defendant should be liable for compensatory damages.<sup>39</sup> As a result, it is considerably more difficult than it once was for American litigants to win at the trial level, and uphold on appeal, awards of punitive damages.<sup>40</sup>

The reformulation of the American law on punitive damages was motivated by the fact that the once-vague principles governing such awards posed a risk that punitive

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<sup>37</sup> Ellen M. Bublick, *China’s New Tort Law: The Promise of Reasonable Care*, 13 ASIAN-PAC. L. & POL’Y J. 36, 42 (2011); See also Vincent R. Johnson, *Train Wreck Serves as a Test for Chinese Law*, HOUS. CHRON., Aug. 7, 2011, <http://www.chron.com/opinion/outlook/article/Train-wreck-serves-as-a-test-for-Chinese-law-2081496.php> (discussing the limitations of a Chinese legal system in the context of a mass tort accident).

<sup>38</sup> See *e.g.* *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 6 n.1 (1991) (upholding against a constitutional challenge an award of punitive damages that was levied after the jury was told little more than that “you must take into account the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong”).

<sup>39</sup> A two-step litigation process which deals first with compensatory damages liability and second with punitive damages liability is called a “bifurcated trial.” See *e.g.* CAL. CIV. CODE § 3295(d) (Westlaw 2013) (“The court shall, on application of any defendant, preclude the admission of evidence of that defendant’s profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages”); N.J. STAT. ANN. § 2A:15-5.13(b) (Westlaw 2013) (“In the first stage of a bifurcated trial, the trier of fact shall determine liability for compensatory damages and the amount of compensatory damages or nominal damages. Evidence relevant only to the issues of punitive damages shall not be admissible in this stage”). The goal is to prevent issues related to the reprehensible nature of the defendant’s conduct or the defendant’s wealth from contaminating the threshold inquiry into whether a tort has been committed. Sometimes applicable law requires a “trifurcated” process where the second stage is whether punitive damages should be imposed and the third stage is the amount of punitive damages.

<sup>40</sup> See *e.g.* Patricia F. Miller, Comment, *2003 Texas House Bill 4: Unanimous Exemplary Damage Awards and Texas Civil Jury Instructions*, 37 ST. MARY’S L.J. 515, 518–9 (2006) (discussing comprehensive tort reform legislation which was likely to create great obstacles for plaintiffs seeking punitive damages).



damages would be levied against some defendants unpredictably and excessively.<sup>41</sup> It seems possible that the spare terminology of Article 47 of the Chinese Tort Law could pose similar risks if Chinese courts begin to apply its provisions to the cases that come before them.

### *B. Punishment and Deterrence*

Under American tort law, punitive damages are intended, first and foremost, to punish the defendant for reprehensible acts or omissions.<sup>42</sup> This principle favoring punishment of wrongdoers guides the applicable punitive damages rules in predictable ways, but also informs the analysis of many less obvious questions.

Most American states do not permit recovery of the punitive damages if the tortfeasor is dead.<sup>43</sup> This is because, in such cases, it is impossible to punish the wrongdoer.

Similar concerns about punishment explain why some<sup>44</sup> (but not all<sup>45</sup>) American states hold that liability insurance cannot protect an insured from an award of punitive damages. Those jurisdictions tend to reason that allowing a person to buy insurance

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<sup>41</sup> In what was then the largest verdict rendered by a U.S. court, the jury in a tortious interference action awarded \$3 billion in punitive damages in addition to a \$7.53 billion compensatory damages award. *See Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 784 (Tex. App. 1987).

<sup>42</sup> *See* RESTATEMENT (SECOND) OF TORTS § 908 (1979) (indicating that punitive damages are “awarded against a person to punish him for his outrageous conduct”).

<sup>43</sup> In *Crabtree ex rel. Kemp v. Estate of Crabtree*, 837 N.E.2d 135 (Ind. 2005), the court wrote:

A minority of jurisdictions permit recovery of punitive damages after the tortfeasor’s death. Although the decedent can be neither punished nor deterred, these courts have found punitive damages sufficiently justified by deterrence of others from engaging in similar conduct....Some also note that punitive damages provide additional compensation to victims for remote losses, inconvenience, and attorney’s fees....

We believe the majority view is persuasive and hold that Indiana law does not permit recovery of punitive damages from the estate of a deceased tortfeasor. The central purpose of punitive damages is to punish the wrongdoer and to deter him from future misconduct, not to reward the plaintiff and not to compensate the plaintiff....

*Id.* at 138–9. *See also In re Vajgrt*, 801 N.W.2d 570, 575 (Iowa 2011) (denying recovery of punitive damages in an action against an estate arising from the decedent’s unconsented removal of forty trees from a neighbor’s property).

<sup>44</sup> *See, e.g. Peterson v. Superior Court of Ventura County*, 642 P.2d 1305, 1310 (Cal. 1982) (noting that insurance policies do not include coverage for punitive damages); *Hartford Accident & Indem. Co. v. Hempstead*, 397 N.E.2d 737, 744 (N.Y. 1979) (proscribing insurance coverage for punitive damages in certain civil rights cases); *See generally Ina Ebert, Punitive Damages and Liability Insurance, in PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES*, fn.6 at 213, 213 (“About half of all U.S.-states prohibit the insurance of punitive damages for various reasons”).

<sup>45</sup> *See Chubb Custom Ins. Co. v. Prudential Ins. Co. of America*, 948 A.2d 1285, 1293 n.3 (N.J. 2008) [“(T)here has never been a declaration by this Court or the Legislature that punitive damages are uninsurable.... Moreover, the Legislature has at least implicitly recognized that insurance of punitive damages does not violate the public policy of this State”].

against liability for punitive damages would enable a blameworthy actor to escape liability by shifting such losses to other innocent insureds. Other purchasers of insurance, even though they never engaged in reprehensible conduct, would eventually would pay higher premiums if their insurance companies had to indemnify malefactors for judgments imposing punitive damages.<sup>46</sup>

For related reasons, American courts carefully scrutinize punitive awards against public entities, because the costs will usually be shouldered not by the actual tortfeasor, but by the citizenry. For example, in *Payne v. Jones*,<sup>47</sup> a case arising from abusive police conduct, the U.S. Court of Appeals for the Second Circuit held that a punitive damages award of \$300,000 was excessive, and that the case would be remanded for a new trial on punitive damages unless the plaintiff agreed to accept only \$100,000 in punitive damages. In reducing the award, the court was mindful of the fact that, in such cases, it is often not the wrongdoer but “the taxpaying public that bears the brunt of an excessive award.”<sup>48</sup>

Likewise, plaintiffs in legal malpractice actions normally are not permitted to recover “lost” punitive damages — reimbursement for punitive damages awards that might have been recovered in litigation but for the defendant lawyer’s negligence.<sup>49</sup> As the Supreme Court of California explained in *Ferguson v. Lieff, Cabraser, Heimann & Bernstein*,<sup>50</sup> “[m]aking a negligent attorney liable for lost punitive damages would not serve a societal interest, because the attorney did not commit and had no control over the intentional misconduct justifying the punitive damages award.”<sup>51</sup>

Punishment is not the only public policy that animates the law of punitive damages; deterrence also plays a role. Sometimes called “exemplary damages,” punitive damages are often intended to make an example of the defendant. Thus, from a public policy standpoint, this type of award is intended to advance the interests of both specific deterrence<sup>52</sup> (of the tortfeasor whose reprehensible conduct is at issue) and general deterrence<sup>53</sup> (of other

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<sup>46</sup> See *Peterson v. Superior Court*, 642 P.2d 1305, 1310 & n.4 (Cal. 1982) [discussing the rationale in *Northwestern Nat. Cas. Co. v. McNulty*, 307 F.2d 432, 440–1 (5th Cir. 1962)].

<sup>47</sup> 711 F.3d 85 (2d Cir. 2013).

<sup>48</sup> 711 F.3d at 95.

<sup>49</sup> See VINCENT R. JOHNSON, *LEGAL MALPRACTICE LAW IN A NUTSHELL* 259–60 (2011) (discussing damages).

<sup>50</sup> 135 Cal. Rptr. 2d 46 (Cal. 2003).

<sup>51</sup> 135 Cal. Rptr. at 53.

<sup>52</sup> “In contrast with general deterrence, specific deterrence means to deter the individual who committed the act from repeating it.” Dwayne C. Turner, *Safer Laws?: Problematic Civil/Criminal Liability and Curbing New York’s HIV/AIDS Epidemic*, 6 QUINNIPIAC HEALTH L.J. 173, 189 (2003).

<sup>53</sup> James Grimmelman, *Future Conduct and the Limits of Class-Action Settlements*, 91 N.C. L. REV. 387, 422 (2013) (indicating that “general deterrence...aims to ensure that other potential defendants in similar situations will take adequate precautions”).

persons who might act in similarly egregious ways).<sup>54</sup>

### C. An Important Tort Doctrine

Liability for punitive damages is an important part of American tort law, even if such awards are not as common or as large as media reports might suggest.<sup>55</sup> The relevant legal principles are studied in American law schools<sup>56</sup> and asserted by scholars and litigators. The applicable substantive and procedural rules of punitive damages are regarded as important. For example, it has been argued that “[a]ny diminution in the exposure of legal services providers to punitive damages liability would undercut the deterrent effect of the law in terms of discouraging abusive practices by other providers.”<sup>57</sup> However, even though punitive damages has been a viable concept in American law since at least 1784,<sup>58</sup> lawyers and judges now think much more carefully and methodically about the appropriateness of punitive damages awards than once was the case.

In the United States, punitive damages are available only under tort principles, not in contract-based actions.<sup>59</sup> In this respect, America seems to differ from China. In 2003, “the Supreme People’s Court announced its interpretation on contract disputes involving the sale of houses...and permitted buyers to potentially recover punitive damages from a

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<sup>54</sup> See *In re Vajgrt*, 801 N.W.2d 570, 575 (Iowa 2011) [“punitive or exemplary damages serve three purposes: (1) punishment, (2) specific deterrence, and (3) general deterrence”]; see also GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970) (discussing broadly the roles of specific and general deterrence in accident law); Vincent R. Johnson & Claire G. Hargrove, *The Tort Duty of Parents to Protect Minor Children*, 51 VILLANOVA L. REV. 311, 325 (2006) (discussing the policy of preventing future harm and the difference between specific deterrence and general deterrence).

<sup>55</sup> See Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFFALO L. REV. 103, 161–65 (2002) (“Empirical studies of punitive damages in actual cases have found that juries award punitive damages relatively infrequently. Studies conducted by researchers at the RAND Corporation found that punitive damages are only awarded in 1%–8% of civil cases. Other studies have found...similar rates”).

<sup>56</sup> Cf. Vincent R. Johnson, *On Race, Gender, and Radical Tort Reform*, 17 WM. & MARY J. WOMEN & LAW 591, 593 n.20 (2011) [asserting that “intentional tort liability plays a prominent role in (American)classroom coverage of many doctrines not specifically focused on intentional tort causes of action, such as punitive damages”].

<sup>57</sup> Vincent R. Johnson, *Legal Malpractice in a Changing Profession: The Role of Contract Principles*, 61 CLEVE. ST. L. REV. 489, 525 (2013).

<sup>58</sup> See *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 410 (2009) [citing a South Carolina case decided in 1784, which involved “spiking wine,” and stating that “(b)y the middle of the 19th century, ‘punitive damages were undoubtedly an established part of the American common law of torts’”].

<sup>59</sup> See *Grams v. Milk Prods., Inc.*, 699 N.W.2d 167, 171 n.4 (Wis. 2005) (“punitive damages ... are sometimes available in tort actions, but generally cannot be had in breach of contract claims”).

seller who breached the principle of good faith or maliciously damaged the buyer's interests."<sup>60</sup> If an American court imposed punitive damages on similar facts, it would do so not because a breach of contractual obligations warranted such a penalty, but because the facts that established the breach of contract also proved that the defendant had committed a tort that is a proper basis for punitive damages.<sup>61</sup>

Article 113 of the Contract Law of the People's Republic of China provides that:

*A business operator who acts fraudulently in supplying commodities or services is liable to pay compensation in accordance with the Protection of Consumer Rights and Interests Law of the People's Republic of China.*<sup>62</sup>

As explained below in the text, the referenced law on Protection of Consumer Rights and Interests allows for awards of multiple damages, which can be viewed as a form of punishment (rather than compensation).

#### *D. Legitimate Reform Versus Power Politics*

The standards that now constrain punitive damages awards in the United States reflect both legitimate debate about principles of public policy and the raw power of interest-group politics. On the one hand, the constraints are rooted in appropriate concerns about effective deterrence of anti-social conduct,<sup>63</sup> fair notice of penalties,<sup>64</sup> proportionality,<sup>65</sup> due

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<sup>60</sup> XU Junke, *Who Will Protect Chinese Consumers? The Past, Present and Future of Consumer Protection Legislation in China*, 24 Loy. Consumer L. Rev. 22, 33 (2011); see also LUI, *Tainted Milk Incident*, fn.31 at 411 n. 183 [translating "The Interpretation of the Supreme People's Court on the Relevant Issues Concerning the Application of Law for Trying Cases on Dispute over Contract for the Sale of Commodity Houses Article 8 (2003)"].

<sup>61</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981) ("Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable").

<sup>62</sup> XINQIANG SUN, M.P. ELLINGHAUS, & E.W. WRIGHT, *CONTRACT LAW OF THE PEOPLE'S REPUBLIC OF CHINA WITH JUDICIAL INTERPRETATIONS OF THE SUPREME PEOPLE'S COURT* 43 (2012).

<sup>63</sup> Jill Wieber Lens, *Justice Holmes's Bad Man and the Depleted Purposes of Punitive Damages*, 101 KY. L.J. 789, 790 (2013) (arguing that recent U.S. Supreme Court decisions have "depleted both the punishment and deterrence rationales" of punitive damages).

<sup>64</sup> See *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1598 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose"); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 525 (2008) (Breyer, J., concurring in part and dissenting in part) (explaining that "there is a need, grounded in the rule of law itself, to assure that punitive damages are awarded according to meaningful standards that will provide notice of how harshly certain acts will be punished").

<sup>65</sup> See Part III-B of this article (discussing the single digit ratio principle derived from constitutional jurisprudence).

process,<sup>66</sup> and, in some cases, free speech.<sup>67</sup> On the other hand, certain punitive damages limitations are nothing more than the product of effective lobbying by potential defendants to protect themselves from civil liability to the greatest extent possible.<sup>68</sup>

Taken as a whole, recent legislative and judicial reforms to American punitive damages law have been a response to real or potential problems related to the imposition of punitive awards in tort litigation. Many of those same concerns are likely to be encountered by Chinese lawyers and judges involved in implementing the punitive damages provisions of the Chinese Tort Law. Thus, Chinese jurists and scholars may want to consider whether jurisprudential insights can be gleaned from the American experience.

### *E. The Complexity of American Tort Law*

Tort law in the United States is exceedingly complex<sup>69</sup> because it is a mixture of state and federal law drawn from statutes, court decisions, and constitutional provisions. Although all jurisdictions are bound by the Due Process Clause of the federal constitution and certain federal legislative enactments that pre-empt state tort law,<sup>70</sup> tort law is usually

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<sup>66</sup> See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 24 (1991) (recognizing that the size of punitive damages awards is subject to due process limitations).

<sup>67</sup> See *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (reversing an award of compensatory and punitive damages in a tort action arising from picketing at a military funeral to protest homosexuality in society and in the military because “(g)iven that... (the picketers’) speech was at a public place on a matter of public concern, that speech is entitled to ‘special protection’ under the First Amendment”); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) (holding that in cases involving matters of “public concern,” states may not allow “recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth”); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) [stating in a libel action that “(i)n light of the reduced constitutional value of speech involving no matters of public concern, the state interest (in redressing defamatory harm) adequately supports awards of presumed and punitive damages — even absent a showing of ‘actual malice’ (meaning knowledge of falsity or reckless disregard for the truth)”].

<sup>68</sup> See generally Vincent R. Johnson, *Regulating Lobbyists: Law, Ethics, and Public Policy*, 16 CORNELL J. L. & PUB. POL’Y 1, 12–13 (2006) (discussing the “dark side” of lobbying in the American legal system).

<sup>69</sup> Indeed, the common law principles of American tort law alone are so complex that the current effort to “restate” them in clear and succinct form has been underway for two decades. See generally Vincent R. Johnson, *The Vast Domain of the Restatement (Third) of Torts*, 1 WAKE FOREST LAW REVIEW ONLINE 29–35 (2011), <http://wakeforestlawreview.com/the-vast-domain-of-the-restatement-third-of-torts> (last visited Nov. 18, 2013) (“Everyday scores of courts in dozens of jurisdictions, hand down tort decisions on a nearly endless range of issues”).

<sup>70</sup> See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992):

Article VI of the (federal) Constitution provides that the laws of the United States “shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.” . . . Thus, since our decision in *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427, 4 L. Ed. 579 (1819), it has been settled that state law that conflicts with federal law is “without effect.” Consideration of issues arising under the Supremacy Clause “start(s) with the assumption

formulated at the state level. Therefore, there is considerable variation in the relevant legal principles. The law on punitive damages differs in important respects among the fifty states and the District of Columbia, not to mention the U.S. territories, such as Puerto Rico,<sup>71</sup> American Samoa,<sup>72</sup> Guam,<sup>73</sup> and the Virgin Islands.<sup>74</sup> Consequently, there are many sources from which potential jurisprudential guidance might arise about issues related to punitive damages.

While punitive damages are broadly available in some jurisdictions, they are entirely, or usually, unavailable in other states.<sup>75</sup> Professor Anthony J. Sebok has explained that five American states extensively limit punitive damages:

*Louisiana is a Civil Code jurisdiction that refused to recognize punitive damages, except as statutorily authorized. Nebraska and New Hampshire are common law jurisdictions that refused to adopt the remedy of punitive damages entirely. Massachusetts and Washington are common law jurisdictions that do not recognize punitive damages except as may be covered under specific statutory authorization.*<sup>76</sup>

In the many jurisdictions where punitive damages are recognized under American law, their availability is constrained by substantive and procedural limitations. It is useful to focus on two categories of limitations. The first group consists of the state-law constraints which are typically embodied in statutes. The second group encompasses the federal-law limitations that arise from the Due Process Clause of the Fourteenth Amendment to the

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that the historic police powers of the States (are) not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.” Accordingly, “(t)he purpose of Congress is the ultimate touchstone” of pre-emption analysis.

Congress’ intent may be “explicitly stated in the statute’s language or implicitly contained in its structure and purpose.” In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field “as to make reasonable the inference that Congress left no room for the States to supplement it.”

Id. at 516; See also *Wyeth v. Levine*, 129 S. Ct. 1187 (2009) (holding that a state law tort claim relating to a manufacturer’s alleged failure to warn of certain risks in administering a drug was not pre-empted even though the drug’s label had been deemed sufficient by the federal Food and Drug Administration when it initially approved the manufacturer’s new drug application and later approved changes in the drug’s labeling).

<sup>71</sup> See 1 LINDA L. SCHLUETER, *PUNITIVE DAMAGES* § 20.2 (2010) [indicating that “(t)he doctrine of punitive damages is not recognized in Puerto Rico,” but that “moral damages” may be recoverable].

<sup>72</sup> See Id. § 20.3(A) (indicating that punitive damages are allowed in American Samoa under limited circumstances).

<sup>73</sup> See Id. § 20.3(B) (discussing the “few cases” in Guam on punitive damages and relevant statutes).

<sup>74</sup> See Id. § 20.3(C) (stating that while “there are very few reported cases from the Virgin Islands...it is clear that punitive damages are recoverable”).

<sup>75</sup> See *Summary of Punitive Damages Law by State in the U.S.*, in *PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES*, fn.6 at 311–22.

<sup>76</sup> See Anthony J. Sebok, *Punitive Damages in the United States*, in *PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES*, fn.6 at 155.

United States Constitution.<sup>77</sup>

## II. AMERICAN STATE-LAW LIMITATIONS ON PUNITIVE AWARDS

In many American states, there are statutes or judicial decisions which restrict the ability of a court to award punitive damages by narrowly defining the types of conduct that will justify a punitive award, raising the standard of proof, capping the amount of a punitive award, requiring a portion of a punitive award to be forfeited to the state, or limiting vicarious liability for punitive damages. These subjects are discussed below.

### A. *The Egregious-Conduct Requirement*

In the United States, it is commonly said that there are four categories of tort liability: intent,<sup>78</sup> recklessness,<sup>79</sup> negligence,<sup>80</sup> and strict liability.<sup>81</sup> In the first three of these categories, liability is based on the fault of the defendant. In the fourth category, the liability is strict because it is imposed even in the absence of fault.<sup>82</sup>

Under American law, punitive damages can never be recovered in a case involving mere negligence.<sup>83</sup> Only highly blameworthy conduct justifies a punitive award.<sup>84</sup> For example, the Texas Supreme Court, in *Bennett v. Reynolds*, found that a punitive award

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<sup>77</sup> See U.S. CONST. AMEND. XIV (providing in part that “No State shall...deprive any person of life, liberty, or property, without due process of law”).

<sup>78</sup> See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 1 (2010) (discussing intent).

<sup>79</sup> See *Id.* § 2 (discussing recklessness).

<sup>80</sup> See *Id.* § 3 (discussing negligence).

<sup>81</sup> See *Id.* §§ 20–25 (discussing strict liability).

<sup>82</sup> Under American law, there are different varieties of strict liability, and some are more strict than others. See VINCENT R. JOHNSON, *STUDIES IN AMERICAN TORT LAW* 649 (5<sup>th</sup> ed. 2013) [“The ‘strictness’ of strict liability lies in the fact that one or more of the usual prerequisites for liability based on fault — typically, proof of unreasonable (or worse) conduct and foreseeability of harm — are dispensed with or modified. As the requirements for recovery become less numerous or less formidable, the liability becomes more strict”].

<sup>83</sup> See *e.g.* 1 STEIN ON PERSONAL INJURY DAMAGES § 4:11 (3d ed. 1997) (“What is manifestly evident...is that mere or ordinary negligence will not support an award of punitive damages”); See also *Safeshred, Inc. v. Martinez*, 365 S.W.3d 655, 662 (Tex. 2012) (“In a typical negligence case like medical malpractice, to recover exemplary damages a plaintiff must simply prove that the defendant was not merely negligent, but was grossly negligent or acted intentionally in causing the serious harm that is the subject of the cause of action”).

<sup>84</sup> See *generally* *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) [stating that the defendant’s reprehensibility is “(t)he most important indicium of the reasonableness of a punitive damages award”]; See also Vincent R. Johnson, *Transferred Intent in American Tort Law*, 87 MARQ. L. REV. 903–38 (2004) (“Recovery of money to punish or make an example of the defendant depends not so much upon whether the action is based on intent or lack of care, but upon whether the case involves highly blameworthy conduct. Some intentional tort cases satisfy that criterion — others do not. The same is true of suits based on lack of care”).

was appropriate where a rancher proved that his neighbor had stolen his cattle.<sup>85</sup> As the court explained, “(t)he jury could have reasonably formed a firm belief...from the theft itself and from the ongoing hostilities between the parties, that there was nothing accidental about Bennett’s conduct and that he specifically intended to injure Reynolds by taking his property.”<sup>86</sup>

In contrast, in *Boring v. Google Inc.*,<sup>87</sup> the plaintiffs, who lived on a private road, “discovered that Google had taken ‘colored imagery of their residence, including the swimming pool, from a vehicle in their residence driveway...without obtaining any privacy waiver or authorization.’”<sup>88</sup> The plaintiffs alleged that their road was clearly marked “private” and sued on a variety of theories. The U.S. Court of Appeals for the Third Circuit held that the plaintiffs stated a cause of action for trespass to land, but denied punitive damages because they failed to allege conduct that was outrageous or malicious.

Punitive damages are sometimes recoverable in cases involving intentional injury<sup>89</sup> or recklessness,<sup>90</sup> or in cases litigated under a strict liability theory where there is evidence that the defendant acted in a highly blameworthy fashion.<sup>91</sup> However, while these types of generalities are useful in forming a general understanding of the American tort system, the applicable provisions of state law are often much more specific.

For example, Wisconsin requires proof that “the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.”<sup>92</sup> South Carolina frames the standard somewhat more broadly, requiring “wilful, wanton, or reckless conduct.”<sup>93</sup>

In Texas, an award of punitive damages requires proof of “(1) fraud; (2) malice; or (3)

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<sup>85</sup> 315 S.W.3d 867 (Tex. 2010).

<sup>86</sup> 315 S.W.3d at 872.

<sup>87</sup> 362 Fed. Appx. 273 (3d Cir. 2010).

<sup>88</sup> 362 Fed. Appx. at 276.

<sup>89</sup> See *e.g.* *Covenant Care, Inc. v. Sup. Ct.*, 11 Cal. Rptr. 3d 222 (Cal. 2004) (affirming punitive damages based on multiple torts, including intentional false imprisonment, inflicted by a nursing facility); *Haryanto v. Saeed*, 860 S.W.2d 913 (Tex. App. 1993) (affirming an award of \$2 million in punitive damages, on top of \$1 million in compensatory damages, where an aide to a Saudi prince took a hotel employee hostage and threatened to kill him).

<sup>90</sup> See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 2 cmt. b (2010) (“While a showing of negligence generally suffices for compensatory damages, the standard for awarding punitive damages commonly refers to the defendant’s reckless conduct — or reckless indifference to risk, or reckless disregard for risk”).

<sup>91</sup> See *e.g.* *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 732 (Minn. 1980) [stating, in a case involving injuries to a child resulting from the defendant’s failure to produce pajamas from flame-proof fabric, that “(t)here is ample authority from many jurisdictions approving this remedy (punitive damages) in strict liability cases”].

<sup>92</sup> WIS. STAT. ANN. § 895.043(3) (Westlaw 2013).

<sup>93</sup> S.C. CODE 1976 § 15-32-520 (2013).



gross negligence.”<sup>94</sup> The availability of punitive damages in actions for fraud is particularly important. There is no shortage of misrepresentation in human affairs, and, in the United States, lawsuits alleging fraud are numerous.<sup>95</sup> “Malice” is a term that has various meanings in American law. For purposes of the Texas punitive damages statute, “malice” means “a specific intent by the defendant to cause substantial injury or harm to the claimant.”<sup>96</sup> In Texas, “gross negligence” is roughly equivalent to the level of wrongdoing which other jurisdictions refer to as recklessness.<sup>97</sup> Thus, “[g]ross negligence” means an act or omission: (A) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and (B) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.”<sup>98</sup> This can be a difficult standard to meet. In *Diamond Shamrock Refining Co., L.P. v. Hall*,<sup>99</sup> the Texas Supreme Court held that the plaintiff failed to prove gross negligence because the evidence did not show that the defendant knew of the risk of a gas compressor explosion and yet did not exercise care.

Other states have distinguished between recklessness and gross negligence, and do not treat those levels of culpability as synonymous. For example, Virginia holds that “wilful recklessness,” and not merely “gross negligence,” is required for punitive damages. Applying that standard, the Virginia Supreme Court, in *Doe v. Issacs*,<sup>100</sup> held that a motorist’s behavior in rear-ending a vehicle and leaving the scene of the accident was not so willful or wanton as to show a conscious disregard for the rights of others, and therefore punitive damages could not be awarded.

Articulating a punitive damages standard that focuses on the state of mind of the defendant can have unexpected consequences. For example, in *Komornik v. Sparks*,<sup>101</sup> a

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<sup>94</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (West 2013).

<sup>95</sup> See *e.g.* *Baker v. Dorfman*, 239 F.3d 415, 418 (2d Cir. 2000) (awarding punitive damages under New York law against an attorney who committed resume fraud); See also Vincent R. Johnson & Shawn M. Lovorn, *Misrepresentation by Lawyers about Credentials or Experience*, 57 OKLA. L. REV. 529, 534 (2004) (“Misrepresentation...may support a claim for intentional fraud, and will thus carry with it...the possibility of punitive damages”); Vincent R. Johnson, *Standardized Tests, Erroneous Scores, and Tort Liability*, 38 RUTGERS L.J. 655, 692 (2007) (discussing the tort duty to correct false statements).

<sup>96</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(7) (Westlaw 2013).

<sup>97</sup> A Massachusetts wrongful-death statute treats recklessness and gross negligence the same for purposes of punitive damages. See MASS. GEN. LAWS ANN. ch. 229, § 2 (Westlaw 2013) (allowing recovery of “punitive damages in an amount of not less than five thousand dollars in such case as the decedent’s death was caused by the malicious, willful, wanton or reckless conduct of the defendant or by the gross negligence of the defendant”).

<sup>98</sup> TEX. CIV. PRAC. & REM. CODE §41.001(11) (Westlaw 2013).

<sup>99</sup> 168 S.W.3d 164 (Tex. 2005).

<sup>100</sup> 579 S.E.2d 174 (Va. 2003).

<sup>101</sup> 629 A.2d 721 (Md. 1993).

driver whose blood alcohol level was almost twice the amount required for legal intoxication caused an accident by depressing the clutch, rather than the brake, as he approached cars stopped at a traffic light. The Maryland Court of Appeals (the highest court in that state) held that the defendant's three prior instances of drunk driving did not warrant an award of punitive damages because what was needed was evidence of "evil motive, intent to injure, ill will, or fraud." The defendant's state of mind, the court found, was to the contrary of what was required, because his "intent was to avoid injury to those stopped ahead of him."<sup>102</sup>

*1. Specific U.S. Statutes.* — Regardless of the general rules of state law governing punitive damages, special American statutes often address the availability of punitive damages in particular contexts. Indeed, in recent years, there has been "a dramatic increase in the number of statutes pertaining to punitive damages."<sup>103</sup>

Many of these legislative enactments are not unlike Article 47 of the Chinese Tort Law, which, as explained above, indicates that punitive damages are available in certain cases of harm caused by defective products. Such laws often do little to change the legal principles that otherwise govern the imposition of punitive damages. They merely reaffirm that punitive damages are available in particular kinds of cases, such as suits involving unlawful disclosure of confidential information relating to victims of sexual assault,<sup>104</sup> injuries caused by perjury,<sup>105</sup> or harm to elderly persons resulting from deceptive trade practices.<sup>106</sup>

However, in some instances, special legislation imposes procedural obstacles which make it difficult to secure a punitive damages award. In California, a person seeking punitive damages from certain types of health care providers cannot assert a punitive damages claim without special permission from the court, which is contingent upon pre-trial showing of a probability of success and subject to various time limitations.<sup>107</sup> In

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<sup>102</sup> 629 A.2d at 723–24.

<sup>103</sup> 1 LINDA L. SCHLUETER, PUNITIVE DAMAGES § 20.0 (2010); *see also id.* § 20.1 (setting forth extracts from relevant statutes in the American states and territories).

<sup>104</sup> *See* NEV. REV. STAT. ANN. § 41.1398 (Westlaw 2013).

<sup>105</sup> *See* *Id.* § 41.365.

<sup>106</sup> *See* *Id.* § 598.0977.

<sup>107</sup> *See* CAL. CODE CIV. PROC. § 425.13 (Westlaw 2013), which provides in relevant part that:

In any action for damages arising out of the professional negligence of a health care provider, no claim for punitive damages shall be included in a complaint...unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed. The court may allow the filing of an amended pleading claiming punitive damages...(if) the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim pursuant to Section 3294 of the Civil Code (the general rule governing punitive damages). The court shall not grant a motion allowing the filing of an amended pleading that includes a claim for punitive damages if the motion for such an order is not filed within two years after the complaint or initial pleading is filed or not less than nine months before the date the matter is first set for trial, whichever is earlier.

Georgia, punitive damages are unavailable to a defamation plaintiff unless the plaintiff requested, and was refused, a retraction of the libelous or slanderous statement.<sup>108</sup>

Some statutes specifically immunize certain defendants from liability for punitive damages. For example, under the Federal Tort Claims Act, the United States government cannot be sued for punitive damages.<sup>109</sup> Under the National Vaccine Injury Compensation Program,<sup>110</sup> the manufacturers of vaccines are “immunized from liability for punitive damages absent failure to comply with regulatory requirements, ‘fraud,’ ‘intentional and wrongful withholding of information,’ or other ‘criminal or illegal activity.’”<sup>111</sup> A number of states have enacted legislation barring punitive damages in certain suits against manufacturers of drugs or devices, if the product complied with federal or state regulations.<sup>112</sup>

2. *Specific Chinese Statutes.* — The Chinese Tort Law is not the only legislation in China that allows for recovery of what might be called punitive damages. Multiple damages, which are punitive in effect, are available under the Food Safety Law of the P.R.C. and the Consumer Rights and Interests Protection Law (sometimes called the Consumer Protection Law<sup>113</sup>):

*Article 96 of the Food Safety Law regulates punitive damages....(F)irst, the food producer or seller may incur punitive damages ranging from two times up to ten times the cost of the food; second, the food producer or seller is subject to punitive damages, notwithstanding a lack of fraudulent conduct on their behalf. Additionally, Article 96 of the Food Safety Law provides that if the product does not meet health standards, the consumer can request ten times compensation, whereas Article 49 of the CRIL (Consumer Rights and Interests Protection Law) provides that producers and sellers are subject to punitive damages based upon fraudulent conduct.*<sup>114</sup>

A recent survey found that punitive damages have never been awarded under the Chinese Food Safety Law.<sup>115</sup> In contrast, awards of punitive damages under the

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<sup>108</sup> See GA. CODE ANN. § 51-5-11(c) (Westlaw 2013); see also *Mathis v. Cannon*, 573 S.E.2d 376 (Ga. 2002) (interpreting state statutes as providing that, because the plaintiff did not request the defendant who posted a defamatory Internet message to issue a retraction, punitive damages were not recoverable).

<sup>109</sup> See 28 U.S.C. §§ 1346(b), 2671, 2674 (Westlaw 2013).

<sup>110</sup> 42 U.S.C.A. § 300aa-10 *et seq.* (Westlaw 2013).

<sup>111</sup> *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1074 (2011).

<sup>112</sup> See *e.g.* TENN. CODE ANN. § 29-28-104 (Westlaw 2013).

<sup>113</sup> WANG Weiguo, *Fraudulent Conduct and Punitive Damages in The Consumer Protection Law of China*, 4 CANBERRA L. REV. 111, 111 (1997/98) (point stated).

<sup>114</sup> See XU, *fn.60*; See also Benjamin Van Rooij, *The People's Regulation: Citizens and Implementation of Law in China*, 25 COLUM. J. ASIAN L. 116, 155 (2012) (describing provisions in the Food Safety Law and Labor Contract Law as allowing for “quasi-punitive damages”).

<sup>115</sup> John Balzano, *China's Food Safety Law: Administrative Innovation and Institutional Design in Comparative Perspective*, 13 ASIAN-PAC. L. & POL'Y J. 23, 45 (2012) (“In none of the cases surveyed has there been an award of punitive damages”).

Consumer Protection Law, “the first illustration of the adoption of punitive damages in China’s legislation,”<sup>116</sup> can be traced back more than 15 years.<sup>117</sup> However, even those awards are very different from the American concept of punitive damages, as Professor Chenglin Liu explained in an article about China’s “tainted milk incident”:

*Article 49 differs significantly from the concept of punitive damages in the United States legal system. Article 49 bases the double payment on what the plaintiff paid for goods or services, not on the compensatory damages caused by the defendant. In the milk scandal, even if the affected families were allowed to recover double damages under Article 49, they could only be paid twice the amount they paid for milk powder, not twice the amount of their actual injuries. Thus, the so-called double damages provision does very little to punish wrongful conduct. . . .*<sup>118</sup>

3. *Culpability Under Article 47.* — There is a great need for guidance on matters of culpability related to the Article 47 of the Chinese Tort Law, the provision which permits recovery of punitive damages in certain types of products liability cases. Article 47 states that “(w)here any producer or seller knowingly produces or sells defective products, causing death or serious damage to the health of others, the injured party may request appropriate punitive damages.”<sup>119</sup>

First, as a whole, “(t)he Tort Law fails to define key terms including negligence, gross negligence, and intentional act.”<sup>120</sup> Second, and more specifically, Article 47 fails to illuminate the key term “knowingly” or even “clarify the type of ‘defect’ that triggers product liability.”<sup>121</sup> Thus, as one writer has commented, “Article 47 provides punitive damages as a remedy without providing guidance as to the judiciary’s implementation of such punitive damages awards.”<sup>122</sup>

“Knowing” that a product is defective is different from “knowing” that it might cause death or serious bodily injury, whether to the plaintiff in particular or to some unspecified person in general. It is not clear from the text of Article 47 what the defendant must “know” in order to be liable for punitive damages under that provision. Of course, this is

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<sup>116</sup> See WANG, fn.113 at 116; but see Lawrence S. Liu, *In the Name of Fair Trade: A Commentary on the New Competition Law and Policy of Taiwan, The Republic of China*, 27 INT’L LAWYER 145, 164 (1993) [indicating that under Taiwan’s fair trade law, which became effective in 1992, “actual damages may be trebled,” and noting that “(a)s a form of punitive damages it deviates from the traditional civilian compensatory (rather than deterrent) rationale for the recovery of damages for civil wrongs”].

<sup>117</sup> See WANG, fn.113 at 113 (discussing a case decided in 1996)

<sup>118</sup> See LIU, *Tainted Milk Incident*, fn.31 at 412.

<sup>119</sup> See Chinese Tort Law, fn.1 Article 47.

<sup>120</sup> See Brandt et al., fn.4 at 490.

<sup>121</sup> Id.

<sup>122</sup> See Castellana, fn.31 at 242.

the type of issue that is often pivotal in litigating or deciding a tort case.<sup>123</sup>

Based on the English translation of Article 47 of the Chinese Tort Law quoted above, the text of the rule may be read to support the view that all that must be known by the defendant is that the product was defective, not that the defendant knew that the defective produce was likely to cause death or serious bodily injury, whether to an unknown person or to the plaintiff in particular. However, even if that reading of the provision is (as it appears to be) rooted in the text of Article 47, it is nevertheless a surprising construction. This is true because such a reading of Article 47 is a more “extreme” view than saying that punitive damages are appropriate only when the defendant knows both that a product is defective and that it poses a risk of death or serious bodily injury. An interpretation of Article 47 that makes a producer or seller liable for punitive damages based only on knowledge of a product defect would make the Chinese Tort Law’s adoption of punitive damages an all the more startling departure from the European civil law tradition.

Under American law, “knowledge” is a form of “intent” which means “substantial certainty,”<sup>124</sup> which is to say certainty for all practical purposes that a forbidden result will occur. Any state of mind which falls short of that exacting standard is not “knowledge.” An actor who knows that there is a risk, or even a great risk of harm, does not knowingly (*i.e.* intentionally) cause harm unless the forbidden result is substantially certain to follow.<sup>125</sup>

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<sup>123</sup> *Cf.* *Richetta v. Stanley Fastening Sys., L.P.*, 661 F. Supp. 2d 500 (E.D. Pa. 2009). *Richetta* was a products liability case that arose from the accidental misfiring of a nail gun. In overturning an award of punitive damages, the U.S. District Court for the Eastern District of Pennsylvania wrote;

Here, the only basis for Plaintiffs’ punitive damages claim is that Defendant had notice of injuries resulting from its nail guns’ contact trip trigger design, yet Defendant did not redesign its nail guns to include a safety switch. . . . (A)ssuming that the prior incidents of nail gun misfirings are similar to the incident in this case, notice of these incidents coupled with Defendant’s decision not to modify the nail gun’s design are, by themselves, insufficient to show that Defendant had knowledge of facts that created a high degree of risk of physical harm to another, yet deliberately proceeded to act in conscious disregard of that risk.

*Id.* at 514.

<sup>124</sup> See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 1 (2010) (“A person acts with the intent to produce a consequence if: (a) the person acts with the purpose of producing that consequence; or (b) the person acts knowing that the consequence is substantially certain to result”).

<sup>125</sup> To some extent, the difference between knowledge, recklessness, and negligence is a matter of degree. According to the second Restatement:

If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. As the probability that the consequences will follow decreases, and becomes less than substantial certainty, the actor’s conduct loses the character of intent, and becomes mere recklessness. . . . As the probability decreases further, and amounts only to a risk that the result will follow, it becomes ordinary negligence. . . .

RESTATEMENT, SECOND, OF TORTS § 8A cmt. b (1965).

As written, Article 47 raises many unanswered questions: what does “knowingly” mean?; what is it that must be known?; what is a “product” (as opposed to, for example, a service)?; what constitutes a product “defect”?; who is a “producer”?; who is a “seller”?; how are “appropriate” punitive damages measured? These are the types of important questions that can be answered by thoughtful judicial interpretation.<sup>126</sup> Although the precise legal status of interpretations issued by the Supreme Court of the People’s Republic of China is in dispute, the issuance of such interpretations is a mechanism through which Chinese legislation has often be clarified.<sup>127</sup>

American precedent is relevant to interpretation of Article 47 of the Chinese Tort Law not because it provides answers to legal questions in China. Rather, it is relevant, first, because it demonstrates just how important clear answers are to these kinds of questions and, second, because it provides examples of the ways in which other lawmakers have struggled to address similar issues.

Scholars have noted the importance of culpability requirements in other areas of Chinese law. A recent draft of an amendment to the Chinese copyright law provided for the availability of punitive damages. Not surprisingly, one scholar, noting American precedent, argued that an award of such damages should be limited to cases involving “conscious and repeated acts” on the ground that that would provide “breathing space for persons who . . . (commit) infringement only once or in good faith.”<sup>128</sup>

### *B. A Higher Standard of Proof*

In American law, there are three well known, but conceptually different, standards of proof: “preponderance of the evidence,” “beyond a reasonable doubt,” and “clear and convincing evidence.” The “preponderance of the evidence” standard is broadly applied to proof of factual issues in civil litigation. It requires the party bearing the burden of proof (normally the plaintiff, but usually the defendant with respect to affirmative defenses) to prove that the evidence more likely than not supports that party’s legal position.<sup>129</sup> Thus, in terms of the common visual metaphor, in order for a party to prevail, it is only necessary for the evidence to tilt the scales of justice slightly in that party’s

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<sup>126</sup> See Castellana, fn.31, at 242 (“Some commentators predict that standards will be clarified through judicial interpretation, while others feel that China’s courts may be hesitant to impose punitive damages without guidelines from the government”).

<sup>127</sup> XIAO Yongping & LIANG Wenwen, *Property Rights in Intermediated Securities Under Chinese Law*, 7 FRONTIERS OF LAW IN CHINA 553, 558 (2012) [“Though the formal legal status of judicial interpretation of the Supreme Court is in dispute, and strictly speaking, the rulings are only intended to serve as guidance for courts and judges without being strictly binding, (more) often than not, they are read as case law and are used to resolve issues...”].

<sup>128</sup> LIU Wenqi, *Reform of China’s Copyright Legislation*, 59 J. COPYRIGHT SOC’Y U.S.A. 843, 862 (2012).

<sup>129</sup> See BLACK’S LAW DICTIONARY (9<sup>th</sup> ed. 2009) (defining “preponderance of the evidence” as “the greater weight of the evidence...the stronger evidence, however slight the edge may be”).

favor.

The standard applied by American courts in criminal matters is the “beyond a reasonable doubt standard.”<sup>130</sup> Because the life or liberty of the defendant is often at stake, all doubts must be resolved against conviction. Only when there is no reasonable doubt as to the defendant’s guilt will criminal responsibility be imposed. In terms of the visual metaphor, tilting the scales only slightly against the defendant comes nowhere close to what the law requires. Rather, the scales must shift so extremely against the defendant that there is no reasonable doubt as to the defendant’s guilt.

Between these two very different standards of proof — the “preponderance of the evidence” standard and the “beyond a reasonable doubt” standard — there is an intermediate view, “clear and convincing evidence.” This third standard of proof requires more than a probability, but less than the elimination of all reasonable doubts.<sup>131</sup> Thus, it has been said that “the clear and convincing evidence standard does not refer to the quantity or kind of evidence presented, but to the apparent probability that the assertion is true: the party with the burden of proof must convince the trier of fact that it is highly probable that the facts he alleges are correct.”<sup>132</sup> In terms of the visual metaphor, the evidence must tilt the scales of justice clearly and convincingly in favor of the party who bears the burden of proof.

1. “Clear and Convincing” Evidence. — In the punitive damages realm, thirty-five American states plus the District of Columbia<sup>133</sup> now require a tort plaintiff to prove entitlement to a punitive award by “clear and convincing evidence.”<sup>134</sup> This change in the usual civil standard of proof — preponderance of the evidence — sometimes determines the outcome of cases. For example, in *Dillard Department Stores, Inc. v. Silva*,<sup>135</sup> a case arising from the false imprisonment of a suspected shoplifter, the Texas Supreme Court reversed an award of punitive damages because there was no clear and convincing

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<sup>130</sup> *Id.* (defining “reasonable doubt” by stating “the belief that there is a real possibility that a defendant is not guilty... ‘Beyond a reasonable doubt’ is the standard used by a jury to determine whether a criminal defendant is guilty”).

<sup>131</sup> *Id.* [defining “evidence” and stating that “clear and convincing evidence... is (e)vidence indicating that the thing to be proved is highly probable or reasonably certain” ].

<sup>132</sup> Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453, 462 (2002).

<sup>133</sup> See WILSONELSER, PUNITIVE DAMAGES REVIEW 2 (2011) (setting forth a state-by-state table). The table also indicates that eight states apply a “preponderance of the evidence” standard to proof of punitive damages, and that one state requires “proof beyond a reasonable doubt.” The remaining states either do not permit punitive damages or there is no clear standard.

<sup>134</sup> See e.g. TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(b) (Westlaw 2013) (“The claimant must prove by clear and convincing evidence the elements of exemplary damages as provided by this section. This burden of proof may not be shifted to the defendant or satisfied by evidence of ordinary negligence, bad faith, or a deceptive trade practice”).

<sup>135</sup> 148 S.W.3d 370 (Tex. 2004).

evidence of the type of malice required by that state's punitive damages statute. Thus, the award of \$50,000 in exemplary damages was overturned even though a \$13,000 award of compensatory damages was permitted to stand. (Under the usual principles of American tort law, entitlement to compensatory damages only needed to be proved by a "preponderance of the evidence," which the plaintiff in *Silva* had produced.)

In many respects, it makes sense to set the standard of proof for punitive damages at "clear and convincing evidence." A tort action is a civil suit, so it would be inappropriate to require the type of proof "beyond a reasonable doubt" that is called for in criminal litigation. However, because a punitive award is intended to punish the defendant, rather than compensate the plaintiff, something more is required than the lenient "preponderance of the evidence" standard that applies when the question is whether the plaintiff is entitled to a purely civil sanction, such as compensatory damages.

2. *The Standard of Proof Under Article 47.* — Chinese law does not presently recognize clearly defined standards of proof equivalent to the American standards of "preponderance of the evidence," "clear and convincing evidence," and "proof beyond a reasonable doubt."<sup>136</sup> However, there is no reason why such standards would be

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<sup>136</sup> WU Xiaofeng, *An Analysis of Wrongful Convictions in China*, 36 OKLA. CITY U. L. REV. 451, 465 (2011). Discussing criminal law in China, Wu explains:

The Chinese burden of proof is "the facts are clear, the evidence is reliable and sufficient." This standard follows the rules of logical induction but not the rules of reasonable doubt. In other words, as long as the prosecution presents enough evidence of guilt, the fact-finder can conclude that the defendant is guilty. This standard may sound reasonable and justified; however, because it is a flexible and nonscientific standard, it may be a dangerous tool for the judge determining a suspect's guilt.

One question to consider is how the court construes the words enough, reliable, and sufficient. Chinese law provides no standard of proof or definition for these words. This flexible or nonexistent meaning erases the opportunity for the defense attorneys to prove their client's innocence when certain evidence may not provide a reasonable doubt of guilt. This standard leaves too much room for wrongful convictions.

Id. at 465; See also Margaret K. Lewis, *Presuming Innocence, or Corruption, in China*, 50 COLUM. J. TRANSNAT'L L. 287, 321 (2012) (indicating that the 2012 Criminal Procedure Law "contains revisions that are a start at clarifying the burden of proof in criminal cases"). But see GUO Li & Allan V.Y. Ong, *The Fledgling Securities Fraud Litigation in China*, 39 HONG KONG L. J. 697 (2009). As GUO & Ong explain:

The criteria to obtain a finding of liability in criminal cases, civil cases and administrative cases vary. As of the standards of proof for different litigations, they are the same in principle, namely, "the facts of a case are clear and the evidence is reliable and sufficient." This principle has been interpreted to mean that (a) the evidence has been confirmed to be true, (b) the findings of fact are supported by sufficient evidence, (c) inconsistencies between different pieces of evidence and inconsistencies between the evidence and the findings of fact are reasonably eliminated, and (d) there is only one conclusion and the other possibilities are eliminated. However, the actual standard employed for criminal cases is "beyond reasonable doubt," while the standard for civil cases is "preponderance," to wit, that the ruling should be in favour of the party that has produced evidence that is "more forceful."

Id. at 708.



incompatible with the proper operation of the Chinese legal system, and some scholars have urged their application.<sup>137</sup> Indeed, the clear articulation of such standards would seem to be consistent with the continuing development of the Rule of Law in China. “To comport with the rule of law, legal decision making must be structured in a way that tends to ensure that results are reliable and that legal principles are applied consistently.”<sup>138</sup> Standards of proof must be neither too lenient nor too strict.<sup>139</sup>

The absence of cases awarding punitive damages under Article 47 may reflect concerns about the “appropriateness” of levying punitive awards, as that term is used in the Chinese Tort Law. One way to reduce such concerns, and to realize the utility of Article 47 as that provision must have been envisioned by the drafters, is to increase confidence in decisions holding that punitive damages are appropriate. One way to do that is by insisting that a plaintiff prove entitlement to a punitive award by “clear and convincing evidence” or some other legal standard that compellingly establishes that punishment is warranted.

### C. Caps on Punitive Damages

In the United States, tort litigation is highly adversarial and decisions about critical matters — such as whether and in what amount punitive damages should be awarded — are often made by lay jurors with no special expertise. One serious risk of this arrangement is that jurors may be enflamed by the effective advocacy of the plaintiff’s attorney to award an amount of punitive damages that is excessive.<sup>140</sup>

A few states have responded to this risk by providing that the amount of punitive damages is to be determined by judges, not juries, either in all cases<sup>141</sup> or at least in some suits.<sup>142</sup> Taking a different tack, many states have addressed the risk of excessively large awards — albeit in crude fashion — by adopting caps on damages. Such caps take many

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<sup>137</sup> See GUO & Ong, fn.136 at 708–9 (stating that scholars tend to suggest a general standard of clear and convincing evidence should be applied to administrative liability litigation).

<sup>138</sup> Vincent R. Johnson & Stephen C. Loomis, *The Rule of Law in China and the Prosecution of Li Zhuang*, 1 CHINESE J. COMP. L. 66, 77 (2013).

<sup>139</sup> Cf. Jonathan Wike, Note: *The Marlboro Man in Asia: U.S. Tobacco and Human Rights*, 29 VAND. J. TRANSNAT’L L. 329, 340 (1996) (criticizing the standard of proof for causation in products liability cases in China as being too strict because “plaintiffs must prove causation to a certainty”).

<sup>140</sup> Cf. George W. Conk, *Punctuated Equilibrium: Why Section 402a Flourished and the Third Restatement Languished*, 26 REV. LITIG. 799, 851–52 & n.127 (2007) (noting that “where jurors have been persuaded that Merck willfully failed to disclose important information on its anti-arthritis drug Vioxx, huge verdicts, including punitive damages, have resulted in Texas and in New Jersey” and citing a case where “jurors gave a \$229 million punitive damages verdict”).

<sup>141</sup> See KAN. STAT. ANN § 60-3702 (Westlaw 2013).

<sup>142</sup> See CONN. GEN. STAT. ANN. § 52-240b (Westlaw 2013) [in products liability actions, “(i)f the trier of fact determines that punitive damages should be awarded, the court shall determine the amount of such damages”].

forms. For example the permissible amount of a punitive award may be limited by reference to the amount of compensatory damages, the wealth of the defendant, the financial gain resulting from the tort, or even a fixed dollar figure. For example, in products liability actions, Connecticut law limits punitive damages to no greater than twice the amount of the compensatory award.<sup>143</sup> Under Colorado law, an award may not exceed actual damages or, if there are aggravating circumstances, three times actual damages.<sup>144</sup> Alaska has a more complex formula. Punitive damages are limited to the greater of three times compensatory damages or \$500,000, except when action was motivated by financial gain, in which case punitive damages are limited to the greater of four times compensatory damages, four times aggregate amount of financial gain, or \$7,000,000.<sup>145</sup> Kansas caps punitive damages at no more than \$5 million or the gross income of the defendant, whichever is less.<sup>146</sup> Alabama law generally provides that “no award of punitive damages shall exceed three times the compensatory damages of the party claiming punitive damages or five hundred thousand dollars (\$500,000), whichever is greater,”<sup>147</sup> but subject to other exceptions further provides that if “a defendant . . . is a small business, no award of punitive damages shall exceed fifty thousand dollars (\$50,000) or 10 percent of the business’ net worth, whichever is greater.”<sup>148</sup>

Texas has an unusually detailed capping law. “Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of: (1) (A) two times the amount of economic damages; plus (B) an amount equal to any noneconomic damages found by the jury, not to exceed \$750,000; or (2) \$200,000.”<sup>149</sup> However, with some exceptions, these caps do not apply to a cause of action against a defendant from whom a plaintiff seeks recovery of exemplary damages based on conduct described as a felony if the defendant knowingly or intentionally committed any of the following: murder or capital murder; aggravated kidnapping or aggravated assault; sexual assault or aggravated sexual assault; injury to a young, elderly, or disabled person; forgery or commercial bribery; misapplication of fiduciary property or the property of a financial institution; securing execution of document by deception; fraudulent destruction, removal, or concealment of writing; certain forms of theft; intoxication assault or intoxication manslaughter; or continuous sexual abuse of a young child.<sup>150</sup>

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<sup>143</sup> See *Id.* § 52-240b (“not to exceed an amount equal to twice the damages awarded to the plaintiff”).

<sup>144</sup> See COLO. REV. STAT. ANN. § 13-21-102 (Westlaw 2013).

<sup>145</sup> See ALASKA STAT. § 09.17.020(f)–(h) (Westlaw 2013) (different rules apply to actions involving employment practices).

<sup>146</sup> See KAN. STAT. ANN. § 60-3701(1) (e)–(f) (Westlaw 2013).

<sup>147</sup> ALA. CODE § 6-11-21(a) (Westlaw 2013).

<sup>148</sup> *Id.* § 6-11-21(b); *Tanner v. Ebbole*, 88 So. 3d 856, 880 (Ala. Civ. App. 2011) (holding that a tattooing and body piercing parlor was a small business and that therefore damages in a invasion of privacy action were capped).

<sup>149</sup> TEXAS CIV. PRAC. & REM. CODE § 41.008(b) (Westlaw 2013).

<sup>150</sup> *Id.* § 41.008(c).

In some states, awards of punitive damages are limited in other ways. For example, in Connecticut:

*Punitive damages may not exceed the amount of the expenses of litigation in the suit, less taxable costs. ... However, the expenses of litigation are not limited to attorneys fees. Litigation expenses may include not only reasonable attorneys fees, but also any other nontaxable disbursements reasonably necessary to prosecuting the action.*<sup>151</sup>

1. *Excessive Punitive Damages Under Article 47.* — The Chinese Tort Law contains no capping provisions to limit the amount of a punitive damages award. Moreover, there are no other provisions in the law that expressly address the problems posed by the risks posed by excessive awards of punitive damages. As one commentator has explained:

*The Act does not contain...detailed specifications. Neither the criteria for the establishment of the amount nor the designated limits, nor even the insurability of punitive damages are detailed.*<sup>152</sup>

It may be that in China, a country without a similar jury trial system,<sup>153</sup> the risk of excessively high awards is considerably less than in the United States.<sup>154</sup> However, if punitive damages awards become common in China, there will be a risk of inconsistent awards. China has a huge judiciary, and even professional judges can differ in their assessment of what amount of punitive damages is appropriate. For these and other reasons, it may be useful to consider the numerous factors reflected in the American punitive damages capping laws. Even if the American provisions that limit punitive damages to no more than a set dollar amount or a multiple of compensatory damages are too arbitrary to be useful in China, those laws also reflect some considerations which may be relevant in determining what amount of punitive damages is warranted under Chinese

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<sup>151</sup> Jackson v. Hartford Bd. of Educ., 2009 WL 7630238, \*2 (Conn. Super. Ct. 2009).

<sup>152</sup> Gert Bruggemeier, *European Civil Liability Law Outside Europe: The Example of the Big Three: China, Brazil, Russia*, 26 TUL. EUR. & CIV. L.F. 99, 105 (2011).

<sup>153</sup> ZENG Xun, *Enforcing Equal Employment Opportunities in China*, 9 U. PA. J. LAB. & EMP. L. 991, 1023 (2007) (“China has no jury trial system”); John J. Capowski, *China’s Evidentiary and Procedural Reforms, the Federal Rules of Evidence, and the Harmonization of Civil and Common Law*, 47 TEX. INT’L L.J. 455, 471 (2012) (“As with other civil law systems, China does not have jury trials, and this adds to the power of the judiciary in that judges do not share fact-finding power with jurors”); see also Stephan Landsman & ZHANG Jing, *A Tale of Two Juries: Lay Participation Comes to Japanese and Chinese Courts*, 25 UCLA PAC. BASIN L.J. 179, 180 (2008) [“China’s reformers have sought to...(re-energize) a system of lay assessors with origins in China’s revolutionary past and a continuing presence in at least some Chinese courts”].

<sup>154</sup> David Dai & Alex An, *New Tort Liability Law: Ramifications for Companies Doing Business in China*, MWE China Law Offices, <http://www.mwechinalaw.com/news/2010/chinalawalert0110a.htm> (last visited Nov. 29, 2013) (“the excessive punitive damages granted by juries in common law countries may not be repeated in China, because, like most European countries, trial by jury does not exist in the Chinese judicial system”); see also Castellena, fn.31 at 243 [“most observers do agree that if any punitive damages are awarded (under the Chinese Tort Law), they will not be excessive”].

law. As discussed above, those factors include the wealth or income of the defendant, the possible criminality of the defendant's conduct, the gain (if any) that the defendant derived from the tortious conduct, and whether the defendant's actions specifically targeted the plaintiff.

#### *D. Forfeiture to the State*

It has often been argued that an award of punitive damages can produce a windfall for a tort plaintiff who will already be fully compensated for resulting losses by an award of compensatory damages.<sup>155</sup> The merits of this argument can be questioned, at least in the United States. In America, successful plaintiffs are generally not reimbursed for attorney's fees incurred in litigating the tort action.<sup>156</sup> Attorneys representing plaintiffs in tort litigation often work on a contingent fee basis and are paid perhaps 35% or 40% of the amount recovered by the plaintiff as a result of a judgment or settlement.<sup>157</sup> Once this practice is taken into account, it is clear that compensatory damages rarely compensate the plaintiff fully because the amount received by the plaintiff is reduced by substantial attorney's fees and, in the usual case, the expenses of litigation (*e.g.* filing fees and discovery costs), which are typically contingently advanced by the plaintiff's attorney while the case is pending. Thus, an additional award of punitive damages often simply helps to ensure that a plaintiff obtains full compensation. Of course, if the punitive award is large or the attorney's fees owed by the plaintiff are small, the plaintiff might be overcompensated, if all relevant factors are taken into account.

In an effort to address concerns about windfall recoveries and increase state revenues, some American jurisdictions have enacted laws which require a portion of a punitive damages award to be forfeited to the state. In Illinois,<sup>158</sup> the amount of the forfeiture is left to the discretion of the court. In other states, the amount of the forfeiture is calculated as a percentage of the punitive award. For example, in Missouri, with certain limitations

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<sup>155</sup> See *e.g.* *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").

*State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1521 (2003)

<sup>156</sup> See James Maxeiner, *The American "Rule": Assuring the Lion His Share*, 11 IUS GENTIUM 287, 288 (2012) ("the practice in America is that each party pays his own lawyer her fee. Consequently losers do not make winners whole through paying their attorneys' fees").

<sup>157</sup> Jeffrey D. Swett, *Determining a Reasonable Percentage in Establishing a Contingency Fee: A New Tool to Remedy and Old Problem*, 77 TENN. L. REV. 653, 656 (2010) ["even when the (contingent fee) percentage varies, it is seldom less than the standard 33%"]; see also Vincent R. Johnson, *Tort Law in America at the Beginning of the 21st Century*, 1 RENMIN U. L. REV. 237, 254-7 (2000) (discussing the role of contingent fees in the American tort system).

<sup>158</sup> See 735 ILL. COMP. STAT. ANN. 5/2-1207 (Westlaw 2013).

and exceptions, the state is entitled to 50%,<sup>159</sup> and in Oregon the state gets 75%.<sup>160</sup> In Georgia, a law applicable to products liability actions requires forfeiture to the state of 75% of a punitive damages award (less a proportionate part of the costs of litigation).<sup>161</sup>

Some forfeiture laws are inapplicable if there are special facts. Thus, under Iowa law, the usual 75% forfeiture rule does not apply if the defendant's conduct was directed specifically at the plaintiff.<sup>162</sup>

The forfeited portion of a punitive damages award may simply become part of the general revenues of the state. However, in some jurisdictions, the forfeited amount is designated for use as part of a special state fund, such as a Criminal Injuries Compensation Account or State Court Facilities and Security Account.<sup>163</sup> In Pennsylvania, if punitive damages are awarded in a case involving violation of the Fine Arts Protection Act (which encompasses certain types of physical defacement, mutilation, alteration, or destruction of a work of fine art), "the court shall, in its discretion, select an organization or organizations engaged in charitable or educational activities involving the fine arts ... to receive such damages."<sup>164</sup>

Punitive damages forfeiture laws have produced less revenue that might be expected. This is due to two realities. First, large punitive damages awards are often reversed or reduced on appeal. Second, most tort cases are resolved by settlement, rather than by a court judgment. Some forfeiture laws expressly exempt settlements from their coverage.<sup>165</sup> In other instances, settlements are a private matter. Moreover, when a claim is settled, there is typically no clear delineation of compensatory and punitive amounts. Thus, there is often no practical way to apply forfeiture provisions to settlements.

*1. Split Recovery Under Article 47.* — Article 47 of the Chinese Tort Law states in relevant part that "the injured party may request appropriate punitive damages." The clear implication seems to be that the entire award of punitive damages will go to the plaintiff. However, if there is a concern in China that punitive damages awards will overcompensate plaintiffs for their losses, it would be possible to consider whether a portion of such an award should be forfeited to the state. In considering the wisdom of that legal step, it may be useful to consider both the structure and the record in practice of the forfeiture provisions that have been enacted in the United States.

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<sup>159</sup> See MO. REV. STAT. § 537.675(3) (Westlaw 2013) (discussing the state's lien).

<sup>160</sup> See OR. REV. STAT. § 31.735 (Westlaw 2013) (forfeiture of 70%).

<sup>161</sup> See GA. CODE ANN. § 51-12-5.1(e)(2) (Westlaw 2013)

<sup>162</sup> See IOWA CODE ANN. § 668A.1(2)(b) (Westlaw 2013).

<sup>163</sup> See OR. REV. STAT. ANN. § 31.735(1) (b) & (c) (Westlaw 2013) (discussing allocations).

<sup>164</sup> 73 PA. CONS. STAT. § 2105(3) (Westlaw 2013).

<sup>165</sup> See *e.g.* MO. ANN. STAT. § 537.675 (Westlaw 2013) ("Cases resolved by arbitration, mediation or compromise settlement prior to a punitive damage final judgment are exempt from the provisions of this section").

### *E. Limits on Employer Vicarious Liability*

The U.S. Supreme Court has held that punitive damages may be assessed against an employer under principles of vicarious liability without violating the Due Process requirements of the federal Constitution.<sup>166</sup> As the Court explained:

*Imposing exemplary damages on the corporation when its agent commits intentional fraud creates a strong incentive for vigilance by those in a position “to guard substantially against the evil to be prevented.” ...If an insurer were liable for such damages only upon proof that it was at fault independently, it would have an incentive to minimize oversight of its agents. Imposing liability without independent fault deters fraud more than a less stringent rule. It therefore rationally advances the State’s goal.<sup>167</sup>*

However, some states have enacted statutes that limited the occasions when vicarious liability for punitive damages may be imposed. For example, under Alaska law:

*In a civil action in which an employer is determined to be vicariously liable for the act or omission of an employee, punitive damages may not be awarded against the employer under principles of vicarious liability unless*

*(1) the employer or the employer’s managerial agent (A) authorized the act or omission and the manner in which the act was performed or omission occurred; or (B) ratified or approved the act or omission after the act or omission occurred; or*

*(2) the employee (A) was unfit to perform the act or avoid the omission and the employer or the employer’s managerial agent acted recklessly in employing or retaining the employee; or (B) was employed in a managerial capacity and was acting within the scope of employment.*

*In this subsection, “managerial agent” means a management level employee with the stature and authority to exercise control, discretion, and independent judgment over a certain area of the employer’s business and with some power to set policy for the employer.<sup>168</sup>*

Taking a different approach focused specifically on whether employers can be vicariously liable for punitive damages based on criminal conduct of employees, Texas law provides that:

*In an action arising out of a criminal act committed by an employee, the employer may be liable for punitive damages but only if:*

*(1) the principal authorized the doing and the manner of the act;*

*(2) the agent was unfit and the principal acted with malice in employing or retaining*

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<sup>166</sup> See *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

<sup>167</sup> 499 U.S. at 14.

<sup>168</sup> ALASKA STAT. § 09.17.020(k) (Westlaw 2013).

him;

(3) the agent was employed in a managerial capacity and was acting in the scope of employment; or

(4) the employer or a manager of the employer ratified or approved the act.<sup>169</sup>

The Alaska and Texas provisions each narrow the usual scope of liability of employers for punitive damages related to their business activities. Basic principles of vicarious liability broadly hold American employers liable for damages caused by the tortious conduct of employees within the scope of employment,<sup>170</sup> even when such conduct is prohibited by the employer<sup>171</sup> or might be characterized as criminal.<sup>172</sup>

1. *Vicarious Liability Under Article 47.* — The punitive damages provision in the Chinese Tort Law appears to focus on enterprise liability, rather than individual liability. The relevant language in Article 47 states that “(w)here any producer or seller knowingly produces or sells defective products, causing death or serious damage to the health of others, the injured party may request appropriate punitive damages.”<sup>173</sup> The provision thus seems to imply that the producer or seller, rather than the producer or seller’s constituent representatives (e.g. officers, director, employees, and agents), will be liable for the payment of the punitive award.

Nevertheless, in some cases, it may be useful to consider carefully the question of whether the conduct of employees or other representatives of an employer should be imputed to an employer for the purpose of imposing punitive damages. For example, does the fact that a lower level employee knew that a product was defective necessarily mean that the employer or producer knew about the defect? In considering such questions and determining how Chinese law should be interpreted or reformed, it may be useful to consider the American statutes which have altered the usual rules of vicarious liability and whether those modifications comport with the policies that support the imposition of

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<sup>169</sup> TEX. CIV. PRAC. AND REM. CODE § 41.005(c) (Westlaw 2013).

<sup>170</sup> See RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006) (“An employer is subject to liability for torts committed by employees while acting within the scope of their employment”); Id. § 7.07(2) (“An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer’s control. An employee’s act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer”).

<sup>171</sup> See e.g. *Smith v. Lannert*, 429 S.W.2d 8, 15 (Mo. Ct. App. 1968) (“Bettendorf-Rapp may be held responsible for the assault committed by Lannert even though Lannert acted wantonly and contrary to Bettendorf-Rapp’s instructions...provided there is proof the assault was made with intent to promote or further the master’s business”).

<sup>172</sup> See *Privacy and Publicity*, 19 BUS. TORTS REP. 154, 155 (2007) (“vicarious liability extends to acts that are negligent, willful, malicious, and even criminal, if committed within the scope of employment”).

<sup>173</sup> See Chinese Tort Law, fn.1 Article 47.

punitive awards.

### III. AMERICAN FEDERAL CONSTITUTIONAL RESTRICTIONS ON PUNITIVE AWARDS

The most amazing change in the field of American punitive damages law since the early-1990s has been the rise of federal constitutional restrictions on such awards. Until that time, the United States Supreme Court consistently rejected the idea that the power of states to award punitive damages was limited in any way by the federal constitution. However, in series of decisions during the past two decades, the Court has made clear that punitive awards are indeed subject to Due Process constraints imposed by the Fourteenth Amendment of the U.S. Constitution. Thus, America has gone from a system where state awards of punitive damages could never successfully be challenged on federal constitutional grounds to one where such claims are potentially viable and therefore virtually every substantial punitive award is subject to attack under the federal constitution.

Federal constitutional restrictions on punitive damages will be considered below. In addition, it is important to remember that non-constitutional aspects of federal law can limit the availability of punitive damages under state law. For example, the federal Paul D. Coverdell Teacher Protection Act provides that:

*Punitive damages may not be awarded against a teacher in an action brought for harm based on the act or omission of a teacher acting within the scope of the teacher's employment or responsibilities to a school or governmental entity unless the claimant establishes by clear and convincing evidence that the harm was proximately caused by an act or omission of such teacher that constitutes willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed.*<sup>174</sup>

However, the Coverdell Act further provides that:

*Paragraph (1) (quoted above) does not create a cause of action for punitive damages and does not preempt or supersede any Federal or State law to the extent that such law would further limit the award of punitive damages.*<sup>175</sup>

Thus, the federal Teacher Protection Act restricts, but in no way increases, the availability of punitive damages in certain state tort actions.

#### A. Constitutional Landmarks

Applicable provisions of state law often articulate the factors that may be taken into account in awarding punitive damages. For example, a Texas statute provides that:

*(a) In determining the amount of exemplary damages, the trier of fact shall consider evidence, if any, relating to: (1) the nature of the wrong; (2) the character of the conduct*

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<sup>174</sup> 20 U.S.C.A. § 6736(c)(1) (Westlaw 2013).

<sup>175</sup> 20 U.S.C.A. § 6736(c)(2) (Westlaw 2013).



*involved; (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties concerned; (5) the extent to which such conduct offends a public sense of justice and propriety; and (6) the net worth of the defendant.*<sup>176</sup>

However, any such list of relevant factors must be consistent with federal constitutional principles.

In *BMW of North America, Inc. v. Gore*,<sup>177</sup> the U.S. Supreme Court reversed a \$2 million punitive damages award to a car purchaser who suffered only \$4,000 in compensatory damages as a result of the undisclosed pre-delivery damage to a vehicle he had purchased. The Court found that the award violated constitutional principles because it was “grossly excessive.” In reaching that conclusion, the court articulated language which has since formed the bedrock of federal constitutional restrictions on punitive damages awards. Justice John Paul Stevens wrote for the court:

*Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose. Three guideposts, each of which indicates that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose ... , lead us to the conclusion that the \$2 million award against BMW is grossly excessive: the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases.*<sup>178</sup>

The three guideposts of the *Gore* decision have become famous landmarks in American law and are referred to by virtually every case challenging an award of punitive damages on federal constitutional grounds. However, there is another American decision on punitive damages that is even more famous, *State Farm Mutual Automobile Insurance Co. v. Campbell*.<sup>179</sup>

In *Campbell*, a large punitive award was based on evidence that for over twenty years, both in Utah and in other states, an insurance company had adhered to practices that were calculated to underpay legitimate claims. The Supreme Court reviewed the punitive damage award in light of the factors previously set down in *Gore*, and held that the amount violated the Due Process guarantee of the Fourteenth Amendment. The Court’s opinion offers substantial guidance as to what factors may be taken into account by American courts in imposing punitive damages. Justice Anthony Kennedy wrote for a

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<sup>176</sup> TEX. CIV. PRAC. & REM. CODE § 41.011 (Westlaw 2013).

<sup>177</sup> 517 U.S. 559, 575 (1996).

<sup>178</sup> 517 U.S. at 574–5.

<sup>179</sup> 538 U.S. 408 (2003).

majority of the justices:

*A State cannot punish a defendant for conduct that may have been lawful where it occurred. ... Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction. ... Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff. ... A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due 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 reprehensibility analysis....Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct.....Although...a recidivist may be punished more severely than a first offender...in the context of civil actions courts must ensure the conduct in question replicates the prior transgressions....(F)ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process....Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'...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.<sup>180</sup>*

The *Campbell* decision is the most important landmark in the American law of punitive damages. As constitutional precedent, it has many consequences. *Campbell* means, for example, that while general deterrence may be a goal of the law in imposing punitive damages, “in fixing the amount of a punitive damages award, a jury only may aim for deterrence of the specific defendant.”<sup>181</sup>

Some of the lessons of *Gore* and *Campbell* have little relevance to China. This is true because China has a single tort system with unified principles that apply across the nation, rather than differ from province to province.

However, two of the lessons of *Gore* and *Campbell* may be instructive to lawyers, scholars, and jurists in China. Those lessons relate to what is now widely called “the single-digit ratio principle” and to the significance of actual or potential harm to persons other than the plaintiff.

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<sup>180</sup> 538 U.S. at 421–5.

<sup>181</sup> *Tarr v. Bob Ciasulli's Mack Auto Mall, Inc.*, 943 A.2d 866, 868 (N.J. 2008) (emphasis added).

### *B. The Single-Digit Ratio*

There is no language in the Fourteenth Amendment, or elsewhere in the federal Constitution, that specifically articulates a single-digit ratio principle applicable to the review of punitive damages awards. Nevertheless, the Supreme Court's statement in *Campbell* that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process"<sup>182</sup> has had a transformative effect on American law. In every case, lawyers and judges are forced to think about the ratio between compensatory and punitive damages. While not every award where there is a single digit on each side of the ratio symbol (e.g. 1:1, 1:5, or 1:9) will survive a constitutional challenge, an award where there is more than a single digit on one side of the ratio symbol (e.g. 1:10, 1:100, or 1:500) is likely to be found constitutionally infirm.

The single-digit principle has clarified American thinking about punitive damages in a way that the often-complex state punitive damage capping laws, discussed above,<sup>183</sup> rarely have. The principle has greatly tamed the risk of excessive punitive damages awards.

Notwithstanding the single-digit ratio limitation, some very substantial awards have survived constitutional challenges. For example, in *McDonald's v. Ogborn*, a Kentucky court upheld a \$5 million punitive award against a McDonald's restaurant because there was evidence that, over a period of ten years, corporate management had made a conscious decision not to train or warn store managers or employees about hoax phone calls that were part of a scheme where, on more than thirty occasions, a person pretending to be a police officer "convinced restaurant managers, employees, and third parties to conduct strip searches and even sexual assaults at his direction."<sup>184</sup>

Moreover, mindful of the fact that the U.S. Supreme Court indicated that there is no hard-and-fast constitutional rule, some American courts have upheld as comporting with due process awards that have exceeded the recommended single-digit ratio. Thus, in *T.P. v. Weiss*,<sup>185</sup> the Ohio Court of Appeals approved a punitive award in a sexual assault case that was twenty times greater than the compensatory damages award.

However, in general, American courts have hewed closely to the single-digit ratio principle. For example, in *Nickerson v. Stonebridge Life Insurance Company*,<sup>186</sup> a case arising from fraudulent conduct by an insurance company, the California Court of Appeal

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<sup>182</sup> 538 U.S. at 425.

<sup>183</sup> See Part II-C.

<sup>184</sup> 309 S.W.3d 274, 280-81 (Ky. App. 2009).

<sup>185</sup> 990 N.E.2d 1098, 1107 (Ohio Ct. App. 2013).

<sup>186</sup> 161 Cal. Rptr. 3d 629, 633 (Cal. Ct. App. 2013).

reduced the punitive damages award from \$19 million to just \$350,000 to preserve a 10:1 punitive-to-compensatory damages ratio.

Less clear than *Campbell's* single-digit ratio principle was the Supreme Court's announcement in that case that "(w)hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."<sup>187</sup> There is little clarity in American law as to when a compensatory damages award is "substantial" for purposes of triggering this additional constitutional limitation.<sup>188</sup>

For example, in *Bullock v. Philip Morris USA, Inc.*,<sup>189</sup> the California Court of Appeal considered the appeal by a tobacco company of a judgment awarding the surviving daughter of a man who had died of lung cancer \$850,000 in compensatory damages and \$13.8 million in punitive damages. The defendant company argued that "there is an emerging consensus that 'six-figure damage awards are more than "substantial" enough to trigger...(the) 1:1 upper limit (mentioned in *Campbell*).'"<sup>190</sup> Rejecting that argument, the California Court of Appeal approved an award with a 16:1 ratio of punitive to compensatory damages, stating:

*We cannot discern any emerging consensus in this regard relevant to the extremely reprehensible conduct at issue in this case. Moreover, we do not regard the amount of compensatory damages as a fixed upper limit where damages are "substantial....Instead, the constitutional limit depends on the facts and circumstances of each case."*<sup>191</sup>

1. *Ratios under Article 47.* — The text of the Chinese Tort Law "provides no guidelines" for the calculation of punitive damages.<sup>192</sup> Nevertheless, such guidance might be provided means of an official interpretation of Article 47 and in particular the language authorizing "appropriate" punitive damages. Presumably, such guidance could address the relevance of the ratio between punitive and compensatory damages.

In the United States, the federal Constitution is the supreme law of the land, and state

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<sup>187</sup> 538 U.S. at 425.

<sup>188</sup> After *Campbell* was decided, the U.S. Supreme Court considered *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008). In that case arising from an Alaskan oil spill, the Court held that an award of punitive damages could not exceed the jury's award of \$507.5 million in compensatory damages, which was effectively a 1:1 ratio. However, that decision offers little guidance because the Court was ruling on a question of maritime law, rather than due process. As the Court explained, "(o)ur review of punitive damages today, ...considers not their intersection with the Constitution (arising from awards of punitive damages under state law), but the desirability of regulating them as a (federal) common law remedy for which responsibility lies with this Court as a source of judge-made law in the absence of statute." 554 U.S. at 502

<sup>189</sup> 131 Cal. Rptr. 3d 382 (Cal. App. 2011).

<sup>190</sup> 131 Cal. Rptr. 3d at 403.

<sup>191</sup> *Id.*

<sup>192</sup> See *Brandt et al.*, fn.4, at 490.

law provisions that run afoul of Constitutional dictates can be invalidated as “unconstitutional.”<sup>193</sup> However, the Chinese constitution does not play a similar role in the Chinese litigation.<sup>194</sup> Therefore, any effort to articulate a single-digit ratio principle, or some similar limitation, would need to be rooted in other jurisprudence. Presumably that would not be difficult. By its entry into the WTO, China has committed itself to the pursuit of the Rule of Law.<sup>195</sup> There are many authorities that say that the Rule of Law entails a commitment to fair procedures, including notice, due process, and proportionality.

### *C. Actual or Potential Harm to Other Persons*

In the landmark *Campbell* decision, discussed above,<sup>196</sup> the U.S. Supreme Court held that an award of punitive damages cannot be based on hypothetical claims by third persons.<sup>197</sup> More specifically, the Court stated that the “precise award in any case... must be based upon the facts and circumstances of the defendant’s conduct and the harm to the plaintiff.”<sup>198</sup>

Subsequent to *Campbell*, the Supreme Court made emphatically clear that an award of punitive damages may not be based, even in part, on the factfinder’s desire to punish a defendant for harming nonparties. In *Philip Morris USA v. Williams*,<sup>199</sup> the jury had made a large punitive damages award to the estate of a heavy smoker after the plaintiff urged the jury to consider how many other smokers had been killed by the defendant’s cigarettes. In remanding the case to the Oregon Supreme Court for further proceedings, Justice Stephen Breyer’s opinion for the court explained:

*(T)he (federal) Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those*

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<sup>193</sup> See *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 180 (1803) (“a law repugnant to the constitution is void”).

<sup>194</sup> Cf. He Weifang, *In the Name of Justice: Striving for the Rule of Law in China*, Brookings Institution Press (Washington, DC), at 68 (2012) (discussing the difference between the “text and reality” of constitutional rights in China).

<sup>195</sup> Cf. Javade Chaudhri, *Chinese Industrial Policies: Indigenous Innovation, Intellectual Property Rights, and the Trade Issues of the Next Decade*, 34 T. JEFFERSON L. REV. 1, 28 (2011) (“The WTO requires acceded countries to abide by certain clear rule of law obligations. As a consequence of its accession in 2001, China has committed to addressing a number of issues, structural or otherwise, relating to its trade obligations and rules of transparency”).

<sup>196</sup> See Part III-A.

<sup>197</sup> See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003) (“Due 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 reprehensibility analysis”).

<sup>198</sup> 538 U.S. at 425.

<sup>199</sup> 549 U.S. 346 (2007).

whom they directly represent, i.e.... essentially, strangers to the litigation. For one thing, the Due Process Clause prohibits a State from punishing an individual without first providing that individual with “an opportunity to present every available defense.”... Yet a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant’s statements to the contrary.

For another, to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate....

...

Respondent argues that she is free to show harm to other victims because it is relevant to a different part of the punitive damages constitutional equation, namely, reprehensibility. That is to say, harm to others shows more reprehensible conduct. *Philip Morris*, in turn, does not deny that a plaintiff may show harm to others in order to demonstrate reprehensibility. Nor do we.... Yet... a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.

...(It is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance. We therefore conclude that the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, i.e. seeking, not simply to determine reprehensibility, but also to punish.<sup>200</sup>

1. *The Focus of Harm Under Article 47.* — Jurists charged with applying Article 47 of the Chinese Tort Law, which allows awards of punitive damages in products liability cases, are sure to confront issues about whether a plaintiff can recover punitive damages based only on harm suffered by the plaintiff, or whether the award can reflect actual or potential harm to third persons. The decisions of the U.S. Supreme Court in *Campbell* and *Philip Morris* offer some guidance about how American courts have struggled to address similar issues.

When a product, such as tainted milk,<sup>201</sup> injures many consumers, there is a risk that a defendant may be exposed to multiple awards of punitive damages in separate tort actions. The decisions of the U.S. Supreme Court — which hold that a plaintiff may recover punitive damages based only on harm to the plaintiff, not based on harm to others or hypothetical harm — offer an example of one approach that reduces the risk of

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<sup>200</sup> 549 U.S. at 353–55.

<sup>201</sup> Cf. Liu, *Tainted Milk Incident*, fn.31 at 373.

duplicative punitive damages awards, and consequently the risk of excessive punishment.

### CONCLUSION

The value of comparative law is not that the legal experience of one country supplies definitive answers to legal questions in another country. Rather, it is that the experience of one country can illuminate the legal issues and resulting choices that another country is likely to face.

China is now engaged in the daunting task of building a new legal system that is equal to the demands of both the Rule of Law and the realities of modern life. In addressing this great challenge, it is entirely appropriate for Chinese scholars and jurists to consider with an open mind and critical eye the legal experience of other countries. Doing so is consistent with the best traditions of modern Chinese law making. As Dean Wenhua Shan has remarked, even as “the Chinese legal system is itself beginning to influence developments around the world,” it is still true that the “contemporary Chinese legal system is essentially an outcome of the functioning of comparative law and will remain so in the years to come.”<sup>202</sup>

During the past two decades, American lawmakers have devoted a great amount of time and effort to reforming the law of punitive damages. At the state level, statutes and judicial decisions have redefined the types of conduct that will justify punitive awards, raised the standard of proof, capped the amounts of punitive awards, required that punitive awards be shared with the state, and limited vicarious liability for punitive damages. In addition, as a result of federal constitutional developments, there is a new focus on ensuring that punitive awards bear an appropriate relationship to compensatory damages and are firmly rooted in the harm suffered by the plaintiff, rather than speculation about harm to nonparties or hypothetical injuries.

Many (but certainly not all) of the recent American reforms have been wise. An examination of these developments may prove useful to those charged with the task of implementing Article 47 of the Chinese Tort Law. Given the complexity and abundance of American tort law, there is an almost endless trove of source materials.

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<sup>202</sup> SHAN Wenhua, *Editorial*, 1 CHINESE J. COMP. LAW 1, 1 (2013).