

## Article

# The Need for Enforcement of U.S. Punitive Damages Awards by the European Union

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### I. INTRODUCTION: THE NEED FOR FREE TRADE IN THE ENFORCEMENT OF PUNITIVE DAMAGES JUDGMENTS

Given the rapid and dramatic increase in international transactions and the greater interdependence of nations within the global community, it is vitally important to find ways to enforce U.S. judgments in foreign countries. With some notable exceptions, few hurdles impede the enforcement of compensatory damage judgments in civil cases.<sup>1</sup> Several barriers, however, inhibit or preclude the enforcement of U.S. punitive damages awards<sup>2</sup> in foreign countries in general and in

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1. “Ordinarily, it is a relatively routine matter to ask a foreign court to enforce an American court judgment.” Adam Liptak, *Foreign Courts Wary of U.S. Notion of Punitive Damages*, N.Y. TIMES, Mar. 26, 2008, at A1. One notable exception, which is not the focus of this Article, is the category of judgments made pursuant to expansive U.S. concepts of personal jurisdiction. Professor Weintraub notes that many European Union Member States prohibit two bases for general jurisdiction that are “widely regarded as exorbitant [by Member States]—service on a defendant temporarily present in the jurisdiction (“tag” jurisdiction) and doing business [in the jurisdiction].” RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 711 (4th ed. 2001). For the U.S. position on tag jurisdiction, see *Burnham v. Superior Court of California*, 495 U.S. 604 (1990); on doing business, see *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984).

2. Punitive damages are monetary awards that do more than merely compensate the plaintiff. See Francesco Quarta, *Recognition and Enforcement of U.S. Punitive Damages Awards in Continental Europe: The Italian Supreme Court’s Veto*, 31 HASTINGS INT’L & COMP. L. REV. 752, 754 (2008) (“[T]he purpose of punitive damages is not compensation of the plaintiff for any detriment suffered, but rather

European Union (E.U.) countries in particular.<sup>3</sup> This Article addresses the discrete problem of enforcing U.S. punitive damages awards in the courts of E.U. Member States.<sup>4</sup>

In June of 2005, the United States signed the international Hague Convention on Choice of Court Agreements (Hague Convention).<sup>5</sup> The Hague Convention contains a provision that allows signatory countries to decline to enforce punitive damages awards rendered by other jurisdictions.<sup>6</sup> While written neutrally so that the enforcement difficulties run bilaterally, the effect of the provision will be felt primarily by litigants from the United States<sup>7</sup> because of the United States' long and vigorous

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punishment of the wrongdoer.”). Judicial opinions, statutes, and treaties often interchange the terms punitive and exemplary. This Article ordinarily employs the term “punitive” to connote punitive and exemplary damages.

3. Current European Union Member States include the following: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. Croatia, the Former Yugoslav Republic of Macedonia, and Turkey are candidate countries. See European Union: Delegation of the European Commission to the USA: Offices, <http://www.eurunion.org/states/offices.htm> (last visited Nov. 1, 2009).

4. This Article does not address the wisdom of imposing punitive damages in civil proceedings. This Article defers to the public policy of the jurisdiction that renders the judgment. Foreign nations' antagonism toward punitive damages awards may spill over into enforcement proceedings and it is this topic that this Article addresses, at least in the limited context of enforcement of U.S. punitive damages awards in E.U. Member States.

5. See Convention on Choice of Court Agreements, June 30, 2005, reprinted in 44 I.L.M. 1294 (2005), available at [http://www.hcch.net/index\\_en.php?act=conventions.pdf&cid=98](http://www.hcch.net/index_en.php?act=conventions.pdf&cid=98) [hereinafter Hague Convention]. The Hague Convention has been ratified by Mexico alone and has not entered into force in any country; however, whether Mexico refuses to enforce particular U.S. judgments is beyond the scope of this Article. See Status Table 37: Convention of 30 June 2005 on Choice of Court Agreements, [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=98](http://www.hcch.net/index_en.php?act=conventions.status&cid=98) (last visited Nov. 1, 2009).

6. See Hague Convention, *supra* note 5, art. 11 (stating that “[r]ecognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.” In addition, “[t]he court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.”).

7. See *id.* Note that the language of Article 11 does not say that “recognition or enforcement of a judgment may be refused by E.U. Member States if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.” Thus, it is possible that a U.S. court might refuse to enforce a judgment from an E.U. Member State. However, “most U.S. jurisdictions readily recognize and enforce the judgments of other nations. . . .” Brandon B. Danford, *The Enforcement of Foreign Money Judgments in the United States and Europe: How Can We Achieve a*

history of awarding punitive damages in civil suits.<sup>8</sup> Although the Convention covers a broader range of issues than the enforcement of punitive damages judgments, this Article focuses on that single aspect of the Hague Convention and argues that the United States made a strategic mistake in agreeing to that provision. This Article concludes that the United States should seek to amend the Hague Convention to allow for more liberal enforcement of judgments containing non-compensatory damages.

The non-enforcement-of-punitive-damages provision remains in the Hague Convention despite the fact that E.U. Member States liberally enforce judgments of other E.U. Member States under the Brussels Council Regulation on Jurisdiction, Recognition, and Enforcement of Judgments in Civil and Commercial Matters (Brussels Regulation).<sup>9</sup> These States, in turn, extend similar liberal enforcement to the judgments of members of the European Free Trade Area (EFTA)<sup>10</sup> under the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Lugano Convention).<sup>11</sup> As will be explored below, some of the

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*Comprehensive Treaty?*, 23 REV. LITIG. 381, 383 (2004).

8. See *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2620–21 (2008) (discussing punitive damages in general); *Atlantic Sounding Co. v. Townsend*, 129 S. Ct. 2561, 2573 (2009) (discussing punitive damages in maritime law).

9. Council Regulation 44/2001, On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 012) 1–23 (EC) [hereinafter Brussels Regulation]. The default in the Brussels Regulation is the enforcement of judgments from other Member States. Only if a judgment is “manifestly contrary to public policy in the Member States in which recognition is sought” may the enforcing States decline enforcement. *Id.* art. 34.

10. The EFTA was established May 3, 1960 as an alternative for countries not wishing to join the European Union. For information on the EFTA, see The European Free Trade Association (EFTA), <http://www.efta.int/> (last visited Nov. 1, 2009).

11. See European Communities-European Free Trade Association: Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9, reprinted in 28 I.L.M. 620 (1989) [hereinafter Lugano Convention]. Like the Brussels Regulation, the Lugano Convention also provides for a baseline of enforcement. An EFTA member may decline to recognize a judgment only in certain circumstances. Pertinent to this Article, an EFTA member may refuse enforcement of a punitive damages judgment “if such recognition is contrary to public policy in the State in which recognition is sought.” *Id.* art. 27. Thus, the Hague Convention, Brussels Regulation, and Lugano Convention represent three different levels of ease of enforcement. The Hague Convention allows non-recognition if the judgment contains punitive damages (whether or not the judgment violates the enforcing State’s public policy). The Lugano Convention does not specifically mention the enforcement of punitive damages judgments, but allows non-recognition if a judgment is contrary to public policy. Finally, the

judgments rendered within the European community contain non-compensatory or punitive-seeming elements and yet are still presumptively enforced, or are at least more readily enforced, under the Brussels Regulation and the Lugano Convention.<sup>12</sup> By signing the Hague Convention, the United States has signaled its willingness to permit its courts' judgments to receive something less from E.U. Member States than the respect routinely accorded by Member States to the judgments of other Member States and EFTA countries' courts.

This Article posits that the Hague Convention's method of dealing with punitive damages reflects misunderstandings by both the United States and European Union. If the United States and European Union had not labored under such misunderstandings, the Hague Convention might evidence the liberal enforcement policies incorporated into both the Brussels Regulation and the Lugano Convention.

While negotiating the terms of the Hague Convention relating to the enforcement of civil judgments, the United States did not seem to appreciate that the internal jurisprudence of several Member States had trended toward allowing non-compensatory damages, or at least toward permitting the enforcement of judgments containing non-compensatory damages.<sup>13</sup> Such recognition of non-compensatory damages should have strengthened the United States' bargaining position to request that Member States enforce U.S. judgments containing punitive damages.<sup>14</sup>

For its part, the European Union did not seem to recognize, and negotiators may not have highlighted, trends in the United States toward limiting the amount of punitive damages doled out and tying the amount of punitive damages to actual harm suffered.<sup>15</sup> The downward trend in U.S. punitive damages

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Brussels Regulation does not single out punitive damages judgments, but allows non-recognition of any judgment—including those containing punitive damages—if the judgment is manifestly contrary to public policy.

12. See *infra* Part IV.

13. Cf. Roberto Garza Barbosa, *International Copyright Law and Litigation: A Mechanism for Improvement*, 11 MARQ. INTELL. PROP. L. REV. 77, 109–12 (2007) (discussing the failed negotiations over the Hague Convention).

14. Professor Gotanda agrees: “While these developments [in the European Union] do not point toward clear sailing for acceptance of American punitive damages abroad, when viewed together they may foreshadow a change in the wind that may ultimately lead to greater enforcement of foreign awards of these damages.” John Y. Gotanda, *Charting Developments Concerning Punitive Damages: Is the Tide Changing?*, 45 COLUM. J. TRANSNAT'L L. 507, 508–09 (2007).

15. See Barbosa, *supra* note 13, at 109 (discussing the fact that “fear of U.S.

awards indicates that the Member States have little to fear about runaway U.S. juries imposing massive punitive damages awards unguided by any principles of law or of equity.

Given the rapid increase in international business transactions and the need for international enforcement of damage awards,<sup>16</sup> that such misunderstandings could be codified in the Hague Convention is troubling. Had the United States and the European Union recognized that current trends tend to diminish the differences in attitudes regarding punitive damages between the two powers, the Hague Convention's stark limitations on the enforcement of judgments containing punitive damages may not have been enacted. Because the Hague Convention, if ratified, limits—perhaps eliminates—international enforcement of punitive damages awards, the United States should seek to amend the punitive damages provision so that the next iteration of the Hague Convention provides for the liberal enforcement policy of the Brussels Regulation or the Lugano Convention.<sup>17</sup> At a minimum, the Hague Convention, if amended, should lower the hurdle for U.S. litigants seeking to enforce punitive damages awards in the countries signing onto the Hague Convention. In an international marketplace, where a tortfeasor's assets may not be situated in the same country as that in which the initial judgment was rendered, more judgment-creditors may come to rely on international enforcement of their judgments; and there should be free trade in the enforcement of judgments, including

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monetary damages awards” stunted the original negotiations over the Hague Convention). For a discussion of recent trends involving the United States' policy on punitive damages, see *infra* Part II.

16. See Winston Stromberg, *Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes*, 40 LOY. L.A. L. REV. 1337, 1339 (2007); see also Jocelyn H. Bush, Comment, *To Abstain or not to Abstain?: A New Framework for the Application of the Abstention Doctrine in International Parallel Proceedings*, 58 AM. U. L. REV. 127, 128 (2008) (discussing the global market).

17. Although the Hague Convention does not mandate the non-recognition of punitive damages awards, it gives Member States liberal license to refuse recognition. As long as the judgment contains punitive damages, the enforcing State may refuse to recognize the judgment. That the Hague Convention does not require non-enforcement is of little consequence, as it is highly unlikely that any convention would mandate non-recognition. *But see* Brussels Regulation, *supra* note 9, art. 34 (A judgment “*shall not* be recognised if such recognition is manifestly contrary to public policy in the Member States in which recognition is sought.” (emphasis added)). Of course, the Brussels Regulation only mandates non-enforcement where the judgment “manifestly” violates public policy, so the default is not pure non-recognition.

judgments containing punitive damages components.<sup>18</sup>

It is troubling that the Hague Convention does not do a better job of ensuring free trade in the enforcement of judgments. The Hague Convention's grudging attitude toward punitive damages is unfortunate for the United States,<sup>19</sup> given the E.U. Member States' willingness to enforce each others' non-compensatory damages awards through the Brussels Regulation and Lugano Convention. The Hague Convention discriminates against U.S. plaintiffs' interests,<sup>20</sup> which discourages efficiency, uniformity of treatment, and comity in a world of increasingly multinational transactions.<sup>21</sup>

This Article will explore the enforcement of U.S. punitive damages awards in the European Union. First, it will address current U.S. trends toward restricting punitive damages

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18. Free trade in enforcement would allow judgment-creditors to follow the tortfeasor's assets, wherever those may lie.

19. The attitude is unfortunate, though perhaps not unexpected given the then-President's view of punitive damages. President George W. Bush's administration was both pro-business and anti-punitive damages. See generally Jenni Khuu Katzer, *A Tale of Two Liberals: Departure at Supreme Court Review of Punitive Damages*, 29 WHITTIER L. REV. 625, 674 (2008); John T. Nockelby & Shannon Curreri, *100 Years of Conflict: The Past and Future of Tort Retrenchment*, 38 LOY. L.A. L. REV. 1021, 1033-34 (2005). For example, President George W. Bush proposed a cap of \$250,000 on all non-economic damages in medical malpractice lawsuits. See Robert Pear, *Bush Begins Drive to Limit Malpractice Suit Awards*, N.Y. TIMES, Jan. 6, 2005, at A18.

20. Fortunately, U.S. interests should not be harmed inordinately by the Hague Convention's grudging attitude toward punitive damages. Many defendants against whom these U.S. punitive damages awards are granted should have assets in the United States. If the defendant has sufficient assets within the borders of the United States to satisfy the entire judgment, the judgment-creditor will not have to look outside the United States for enforcement of the judgment. By way of example, the litigation following the Exxon Valdez oil spill resulted in the fourth largest punitive damages award in U.S. history, *Exxon Valdez v. Exxon Mobil Corp.*, 568 F.3d 1077, 1081 (9th Cir. 2009), yet the plaintiffs never had to look outside the United States for satisfaction of that judgment. Exxon had sufficient assets in the United States to satisfy both the judgment and the interest on the judgment. Moreover, as long as the defendant can cover the punitive portion of the damages award with assets located in the United States, one wonders whether the U.S. court enforcing the judgment may allocate the seized assets to the punitive portion of the judgment, leaving the compensatory relief to litigation in the foreign country. The foreign jurisdiction might allow enforcement therein because the money would go to satisfy the compensatory portion of the award and not to the punitive portion.

21. Before the Hague Convention, some scholars had posited that because the United States liberally enforces other countries' judgments, those countries had little to gain by acting in a reciprocal manner. See generally Danford, *supra* note 7; Franklin O. Ballard, *Turnabout Is Fair Play: Why a Reciprocity Requirement Should Be Included in the America Law Institute's Proposed Federal Statute*, 28 HOUS. J. INT'L L. 199 (2006).

awards, which have been undertaken by both judicial and legislative bodies in both the federal and state arenas.<sup>22</sup> Second, the current European trend toward accepting non-compensatory damages, or at least the enforcement of judgments containing non-compensatory damages, will be discussed. Third, this Article will demonstrate that European countries have entered into treaties that allow liberal enforcement of each others' judgments, even if those judgments contain non-compensatory damages. Fourth, it will show that the Hague Convention does not extend liberal enforcement to U.S. judgments by E.U. Member States and, indeed, even allows those European countries with a robust non-compensatory damages jurisprudence to deny enforcement of U.S. punitive damages judgments.

Finally, this Article will conclude that the next iteration of the Hague Convention should contain a more liberal enforcement policy than it currently does, perhaps even the same liberal enforcement policy that the Brussels Regulation or the Lugano Convention provide for E.U. Member States' judgments and EFTA judgments. In a transnational world, U.S. judgments deserve nothing more, but nothing less, than the

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22. Unless otherwise provided, while referring to "punitive damages," this Article does not distinguish between judgments rendered by state courts and those rendered by federal courts. Nor does it distinguish punitive damages based on statutory or common-law principles, nor between those awards based on an underlying state or federal law. The term "punitive damages" includes awards doled out by juries, judges, and arbitrators, and those consensual awards rendered pursuant to agreements. For the purposes of this Article, the term "punitive damages" usually does not distinguish between pure punitive damages, multiplied damages, or capped awards. Pure punitive damages allow untrammelled jury discretion and bear no relation to the compensatory damages given, although even those awards are cabined by the reasonableness standard embodied in the Due Process Clause. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003); *see generally* Serena Antonia Luisa Corongiu, *Punitive Damages Awards in the U.S. Judicial Experience and Their Recognition in Italy* 5 (2004-05) (unpublished Ph.D. dissertation, Università Degli Studi di Urbino) (on file with author) (describing pure punitive damages). Multiplied damages are the compensatory damages multiplied by a particular factor to render an amount of punitive damages. *See id.* at 6. Usually that factor is two or three. *See* DAN B. DOBBS, *LAW OF REMEDIES* 358 (2d ed. 1993) (describing multiple tier damages). Capped awards are punitive damages that are constrained by a statutory upper limit. *See generally id.* at 349. This Article discusses punitive damages in civil cases and does not reach the issue of the enforcement of criminal fines—which may be punitive in nature—in foreign countries. Nor does this Article discuss the enforcement in E.U. countries of U.S. court-issued sanctions of miscreant party behavior under doctrines such as *Chambers v. Nasco, Inc.*, 501 U.S. 32 (1991), despite the fact that such sanctions are often punitive.

respect European countries routinely accord to the judgments of Member States and EFTA countries.<sup>23</sup>

## II. THE UNITED STATES REINS IN PUNITIVE DAMAGES AWARDS

The judicial and legislative bodies in both the federal and state governments have, in recent years, become active in restricting punitive damages. The United States Supreme Court, lower federal courts, state courts, Congress, and state legislatures have all taken part in this movement to reduce the number of punitive damages judgments and the amounts awarded in punitive damages judgments.<sup>24</sup> As a preliminary step toward decreasing punitive damages amounts, some courts limited an award of punitive damages to an amount reasonably related to actual damages.<sup>25</sup> Congress and the state legislatures have enacted statutes that limit punitive damages through absolute dollar caps or ratio limitations.<sup>26</sup> The following sections survey the movement away from unbridled jury discretion in the punitive damages arena.<sup>27</sup>

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23. The signal that the United States is willing to accept less is troubling. Hague Convention, *supra* note 5, art. 11. Article 2 contains a list of exemptions to the scope of the Hague Convention, but the broadest exemptions (those found in Article (2)(1)(a)) only apply to the recognition of exclusive choice of court agreements and were put in place to protect the weaker party to a lawsuit. *Id.* art. 2. Even if the Convention has limited impact due to its exclusions from coverage, the United States should nonetheless seek to amend or eliminate the discriminatory provision.

24. See *infra* Part II.A for discussion on the United States Supreme Court's role in restricting punitive damages, Part II.B for discussion on lower federal courts' and state courts' roles, and Part II.C for discussion on state legislatures' and Congress's roles.

25. See, e.g., *Palmer v. Ted Stevens Honda, Inc.*, 238 Cal. Rptr. 363, 370 (Cal. Ct. App. 1987) (noting that "any punitive damage award must bear a reasonable relation to the actual damages" (internal quotation marks and citation omitted)).

26. See, e.g., Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3)(A)–(D) (2006) (enacting a dollar cap based on the number of employees). This statute enables punitive damages for Title VII and other actions in which the claims rest on discrimination based on federally protected classes (race, gender, etc.). *Id.* § 1981a(b)(1). The damages increase on a step basis according to how many employees the employer has. *Id.* § 1981a(b)(3)(A)–(D).

27. Substantial literature addresses punitive damages in the United States. Many scholars defend punitive damages as good social policy. See, e.g., STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES AND THE POLITICS OF REFORM* 202–04 (1995); Michael L. Rustad, *How the Common Good is Served by the Remedy of Punitive Damages*, 64 TENN. L. REV. 793 (1997). Although the United States may limit the availability and amount of punitive damages awards, it is unlikely that the



## A. UNITED STATES SUPREME COURT

Recently, the United States Supreme Court has become more amenable to restricting the punitive portion of jury awards.<sup>28</sup> The Supreme Court typically relies on the Due Process Clause to curb pure punitive damages arising from “unbridled jury discretion” or “runaway juries.”<sup>29</sup>

In *Pacific Mutual Life Insurance Co. v. Haslip*, for example, the jury award of \$1,040,000 to the plaintiff “contained a punitive damages component of not less than \$840,000.”<sup>30</sup> The Supreme Court rejected the notion that punitive damages always violate the Due Process Clause and proceeded to inquire whether this particular punitive-to-compensatory damages ratio, four-to-one, violated due process principles.<sup>31</sup> The Court reasoned that it could not “draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case,” but the Court ultimately concluded that the punitive damages awarded in this

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United States will completely eliminate this remedy.

28. Because the current Supreme Court jurisprudence limits punitive damages awards pursuant to the Due Process Clause, this section begins with *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), instead of what may be the more traditional starting point of *Browning Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (rejecting an attack on punitive damages predicated on the excessive fines clause of the Eighth Amendment). In *Browning Ferris*, the Court noted in dictum that the proper clause under which to review punitive damages awards in civil cases is the Due Process Clause. *See id.* at 276 (“There is some authority in our opinions for the view that the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme.”). The Due Process Clause of the Fifth Amendment provides: “[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law. . . .” U.S. CONST. amend. V. The Fourteenth Amendment similarly prohibits the deprivation of property without due process: “[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

29. *See Haslip*, 499 U.S. at 7; *see also id.* at 15 (explaining that the traditional common-law method for determining punitive damages allows the jury to consider the gravity of the defendant’s conduct and the need to deter future similar acts). The Supreme Court does rely on other principles, in addition to the Due Process Clause, to cabin punitive damages awards. For example, in *Exxon Shipping Co. v. Baker*, the Supreme Court relied on maritime law to announce a restriction on punitive damages awards premised on reckless behavior. *See Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2620–21 (2008) (“We granted certiorari to consider whether . . . the punitive damages awarded against Exxon in this case were excessive as a matter of maritime common law.” (citation omitted)).

30. *Haslip*, 499 U.S. at 6 & n.2.

31. *See id.* at 17–19.

particular case did not violate due process.<sup>32</sup>

Although the Supreme Court seemed to struggle to affirm the four-to-one punitive-to-compensatory damages ratio in *Haslip*—at times relying on the fact that punitive damages have a long history and at other times deferring to the jury's determination<sup>33</sup>—a mere two years later, the Court upheld a punitive-to-compensatory damages ratio of 526-to-one.<sup>34</sup> In *TXO Production Corp. v. Alliance Resources Corp.*, the jury awarded \$19,000 in compensatory damages to Alliance Resources for defending a frivolous lawsuit and awarded an additional \$10 million in punitive damages.<sup>35</sup> The Supreme Court again refused to draw a mathematical bright line delineating the constitutionally allowable amount of punitive damages.<sup>36</sup> Instead, after examining the jury's award for reasonableness, the Court upheld this staggering punitive damages judgment.<sup>37</sup>

Seemingly contradictorily, just three years after affirming the 526-to-one ratio in *TXO*, in *BMW of North America v. Gore*, the Court refused to uphold a 500-to-one punitive-to-compensatory ratio in a fraud action brought against a car manufacturer.<sup>38</sup> In *BMW*, the Supreme Court held that \$2 million dollars in punitive damages for \$4000 in actual damages for a botched paint job on a new car was “grossly excessive.”<sup>39</sup>

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32. *Id.* at 17–18.

33. *See id.* at 16–17.

34. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 453 (1993) (noting the 526-to-one disparity).

35. *See id.* at 446. This case demonstrates an award of pure punitive damages, as opposed to multiplied damages. Counsel for the defendant noted that the “jury was left to their own devices” in determining the amount of punitive damages. *Id.* at 451.

36. *See id.* at 456 (rejecting the “parties’ desire to formulate a ‘test’ for determining whether a particular punitive award is ‘grossly excessive’”).

37. *See id.* at 458, 462, 466.

38. *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996). The original jury verdict in this case could be viewed as a quasi-multiplied punitive damages award. Although there was no statute requiring or authorizing a multiplied award (which is necessary for an actual multiplied punitive damages award), the jury initially came up with the punitive damages figure by multiplying the plaintiff's compensatory damage award by the number of people whom BMW had defrauded. *See generally id.* at 567. One problem with allowing juries to consider the harm to nonparties is that other future juries can award punitive damages awards based on the same considerations, thus allowing multiple verdicts against a defendant for the harm to the same group of people.

39. *See id.* Perhaps the Court was persuaded that a BMW owner whose car has only minor cosmetic damage is not a particularly sympathetic plaintiff entitled to millions of dollars of punitive damages.

In holding the punitive damages violative of the Due Process Clause, the Supreme Court set forth factors to aid courts in determining whether future punitive damages awards are “grossly excessive”: (1) the reprehensibility of the conduct; (2) the disparity between the compensatory damages and the punitive damages; and (3) the difference between the punitive damages and the remedy authorized by or imposed in comparable cases.<sup>40</sup> Although these factors still permit juries to award punitive damages, even large awards of punitive damages, the Court finally set forth some guidelines for courts to follow in determining whether a particular jury award was too extravagant. The articulation of standards suggested that, in the future, trial judges could constrain juries’ discretion and that reviewing courts could feel more comfortable finding punitive damages grossly excessive.<sup>41</sup>

Then, in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, the Supreme Court held that federal appellate courts should use a de novo standard for reviewing the constitutionality of punitive damages.<sup>42</sup> This de novo standard sent a clear message to all federal reviewing courts in the United States that federal courts must actively review punitive damages awards and cannot mask decisions by resort to the more deferential abuse of discretion or clearly erroneous standards.<sup>43</sup> The de novo standard of review, coupled with the

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40. *See id.* at 574–75.

41. Jury discretion will be confined in the first instance by the trial judge’s instructions. After *BMW*, these instructions should reflect the factors set forth in the Supreme Court’s opinion that significantly limit a jury’s discretion in awarding punitive damages. Moreover, after *BMW*, reviewing courts can throw out or reduce a punitive damages judgment for failing to reflect the Supreme Court’s three factors.

42. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001) (“Our decisions in analogous cases, together with the reasoning that produced those decisions, thus convince us that courts of appeals should apply a *de novo* standard of review when passing on district courts’ determinations of the constitutionality of punitive damages awards.”).

43. In the abstract, the de novo standard may cut both ways. A lower court could throw out a jury’s award of punitive damages and a higher court could reinstate the award (by not deferring to the lower court’s decision). In practice, however, the de novo review seems designed to guarantee the constitutional rights of the defendant against an award of excessive damages. *See generally* Amanda L. Maxfield, Comments, *Punitive Damages: Cooper Industries v. Leatherman Tool Group: Will a Constitutional Objection to the Excessiveness of a Punitive Damages Award Save Defendants from Oklahoma’s Punitive Damages Statute?*, 55 OKLA. L. REV. 449 (2002); *id.* at 487 (“[T]he defendant’s last chance to have a punitive damages award reduced may be to seek substantive de novo review of the award by an appellate court as guaranteed by the *Cooper* decision.”); MICHAEL B. HYMAN & MELINDA J. MORALES, POUNDING OUT THE LIMITS OF *LEATHERMAN TOOL*: CASES

*BMW* factors for determining reasonableness of punitive damages awards, enabled courts to more closely examine punitive damages awards.<sup>44</sup>

The reining-in process continued in *State Farm Mutual Automobile Insurance Co. v. Campbell*.<sup>45</sup> *State Farm* involved a lethal car accident in which the defendant-insurer refused to settle the civil case within the policy's limits, thereby exposing the insured to personal liability.<sup>46</sup> The insured sued State Farm for bad faith, fraud, and intentional infliction of emotional distress.<sup>47</sup> The jury awarded the insured \$2.6 million in compensatory damages and \$145 million in punitive damages; the trial court reduced the awards to \$1 million and \$25 million respectively.<sup>48</sup> The Utah Supreme Court reinstated the jury's \$145 million punitive damages award.<sup>49</sup> On certiorari, the United States Supreme Court reviewed the punitive damages under the de novo standard of review from *Cooper Industries* and the three factors from *BMW*,<sup>50</sup> and the Court concluded that the 145-to-one punitive-to-compensatory ratio violated due process.<sup>51</sup>

In *State Farm*, the Supreme Court clarified the second *BMW* factor, explaining that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process."<sup>52</sup> Thus, the Court apparently imposed the mathematical bright line it had refused to set in earlier cases: the punitive-to-compensatory ratio should

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TESTING THE SCOPE OF CONSTITUTIONAL CHALLENGES TO PUNITIVE DAMAGE AWARDS, 2 ATLA ANNUAL CONVENTION REFERENCE MATERIALS (2002) (discussing the fact that defendants wish to expand the scope of *Cooper Industries v. Leatherman Tool* so that the de novo standard would apply to all challenges to punitive damages awards). Therefore, an appellate court would be unlikely to overturn a trial court's finding of excessiveness.

44. *Cooper Industries* itself noted the de novo appellate review was necessary to permit "appellate courts . . . to maintain control of, and to clarify, the legal principles." *Cooper Indus.*, 532 U.S. at 436 (quoting *Ornelas v. United States*, 517 U.S. 690, 697 (1996)); see also Paul F. Kirgis, *The Right to a Jury Decision on Sentencing Facts After Booker: What the Seventh Amendment can Teach the Sixth*, 39 GA. L. REV. 895, 936 (2005) (noting that, after *Cooper Industries*, a judge has the "ultimate power to set an amount of punishment").

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

46. See *id.* at 412–13.

47. *Id.* at 414.

48. *Id.* at 415.

49. *Id.* at 415–16.

50. See *id.* at 418.

51. See *id.*

52. *Id.* at 425.

be less than or equal to nine-to-one.<sup>53</sup> The timing of the *State Farm* opinion is noteworthy: it was rendered on April 7, 2003, approximately twenty-six months before the signing of the Hague Convention, which occurred on June 30, 2005.<sup>54</sup> Plainly, more than two years before the Hague Convention, U.S. courts had voluntarily limited punitive damages to a nine-to-one ratio with respect to compensatory damages.

Two years after the signing of the Hague Convention, the United States Supreme Court again revisited the subject of punitive damages awards. In *Philip Morris USA v. Williams*, a jury awarded \$79.5 million in punitive damages to the widow of a lifelong smoker;<sup>55</sup> the jury also awarded her \$821,485.50 in compensatory damages.<sup>56</sup> The trial court reduced the compensatory award to \$521,485.80 and the punitive award to \$32 million.<sup>57</sup> Both parties appealed to the Oregon Supreme Court.<sup>58</sup> Despite the U.S. Supreme Court's pronouncement in *State Farm* that the ratio of punitive damages to compensatory damages should rarely exceed the single digits, the Oregon Supreme Court found that a ratio ranging from ninety-seven-to-one (if the compensatory damages are \$821,485.50) to 152-to-one (if the compensatory damages are \$521,485.80) passed constitutional muster.<sup>59</sup> The Oregon Supreme Court reasoned that neither the nine-to-one ratio nor the *BMW* factors constituted "bright-line tests."<sup>60</sup>

The U.S. Supreme Court reversed the Oregon Supreme Court's judgment.<sup>61</sup> Philip Morris argued to the Supreme Court that the Oregon state courts failed to apply the *BMW* factors and that the punitive damages award was grossly excessive and certainly outside of the single-digit ratio assumed to be

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53. Many law review articles have characterized *State Farm* as generally creating a nine-to-one punitive-to-compensatory damages bright line. See, e.g., *Supreme Court 2002 Term, Leading Cases*, 117 HARV. L. REV. 317, 324 (2003); Michael Kahlenberg, *Broken Record Lawmaking and Stare Decisis: The Unconstitutionality of Ohio's Latest Tort Reform Effort*, 37 U. TOL. L. REV. 1087, 1096 (2006).

54. The Hague Convention was concluded June 30, 2005, Hague Convention, *supra* note 5; *State Farm* was issued April 7, 2003, 538 U.S. at 408.

55. *Philip Morris USA v. Williams*, 127 P.3d 1165, 1171 (Or. 2006), vacated, 549 U.S. 346 (2007).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 1176–82.

60. *Id.* at 1177–82.

61. *Philip Morris USA v. Williams*, 549 U.S. 346, 353, 357 (2007).

appropriate in *State Farm*.<sup>62</sup> The Supreme Court, however, did not reach those issues,<sup>63</sup> finding instead that the punitive damages award was impermissibly high because the Oregon courts had improperly allowed the jury to speculate about harm to nonparties and to include that harm in the punitive damages award.<sup>64</sup> The Supreme Court vacated and remanded the case because of the jury's improper consideration of harm to nonparties.<sup>65</sup> Although the Supreme Court's opinion could have made a stronger statement against excessive punitive damages awards in general, the Supreme Court nonetheless believed that the punitive damages in the case might be reduced on remand.<sup>66</sup>

In 2008, the United States Supreme Court handed down a strong statement against large punitive damages awards,<sup>67</sup> but not in the context of due process limitations. In *Exxon Shipping Co. v. Baker*, the Court held that a one-to-one ratio of punitive-to-compensatory damages is a "fair upper limit" in maritime cases involving reckless behavior.<sup>68</sup> In so doing, the majority

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62. *Id.* at 351.

63. *Id.* at 352.

64. *Id.* at 353, 357. The plaintiff's attorney had appealed to the jury's emotion, asking it to consider, "How many other Jesse Williams in the last 40 years in the State of Oregon there have been?" and suggesting that Philip Morris was responsible for one-third of all smoking-related deaths. *Id.* at 350–51. This is reminiscent of *BMW*, in which the jury awarded the plaintiff damages based on harm to other car buyers. *See supra* note 38.

65. *Id.* at 352.

66. *Id.* at 357–58 (noting that when the Oregon Supreme Court applies the correct standard to the case the result may be the reduction in the punitive damages award). The Supreme Court's prediction did not, however, come to pass. On remand, the Oregon Supreme Court found an adequate and independent state law ground for refusing to give Philip Morris's proposed jury instruction. *Williams v. Philip Morris Inc.*, 176 P.3d 1255, 1260 (Or. 2008). The defendant filed a petition for writ of certiorari with the U.S. Supreme Court, which contended that it was improper for the state court to use state grounds to sidestep the Supreme Court's remand order. The Supreme Court initially granted certiorari in part, *Phillip Morris USA Inc. v. Williams*, 128 S. Ct. 2904 (2008) (mem.), but later dismissed certiorari as having been improvidently granted, *Phillip Morris USA Inc. v. Williams* 129 S. Ct. 1436 (2009) (per curiam).

67. *But see* Jeffrey L. Fisher, *The Exxon Valdez Case and Regularizing Punishment*, 26 ALASKA L. REV. 1, 24–43 (2009). Professor Jeffrey L. Fisher disagrees that *Exxon Shipping Co.* represents a strong statement against large punitive damages judgments. Professor Fisher contends that, in *Exxon Shipping Co.*, the Supreme Court is asking legislatures to regularize punitive damages. He argues that the Court is signaling that, once legislatures do regularize punitive damages awards, the Supreme Court—and other courts—will accede to such legislative determinations of the proper amount of punitive damages judgments. *Id.* at 24–43. At least in the context of *Exxon Shipping*, however, Professor Fisher's argument seems incorrect because of the Court's authority over maritime law.

68. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2633 (2008). When Exxon

decreased the punitive damages allotted from the \$5 billion jury award, already reduced to \$2.5 billion by the Ninth Circuit Court of Appeals, to \$507.5 million, the amount of compensatory damages at issue in the case according to the presiding Alaska District Court.<sup>69</sup> The Supreme Court announced that this one-to-one ratio was necessary “given the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary.”<sup>70</sup> Accordingly, the Court showed that in the limited common-law realm where it truly reigns supreme, it supports drastically limiting the size of punitive damages awards.

In *Exxon Shipping*, the Supreme Court also recognized the international implications of its opinion. The Court noted that “punitive damages overall are higher and more frequent in the United States than they are anywhere else.”<sup>71</sup> The Court cited statistics regarding the use of punitive damages in other countries,<sup>72</sup> and then noted that U.S. juries have exercised “overall restraint” with respect to punitive damages awards.<sup>73</sup> *Exxon Shipping* itself, which limits punitive damages to a one-to-one ratio with respect to compensatory damages, evidences that the Supreme Court too is willing to exercise “overall

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petitioned the U.S. Supreme Court for certiorari, Exxon noted in its brief that even the \$2.5 billion punitive damages award—decreased from its original \$5 billion—was “larger than the *total* of all punitive damages awards affirmed by all federal appellate courts in our history.” Petition for Writ of Certiorari at \*i, *Exxon Shipping Co.*, 128 S. Ct. 2605 (2008) (No. 07-219), 2007 WL 2383784. Ultimately, the Supreme Court remanded the case to the United States Court of Appeals for the Ninth Circuit for entry of judgment in accordance with its opinion that punitive damages should never exceed compensatory damages in a maritime case involving recklessness. The parties stipulated to the entry of judgment in the amount of \$507.5 million in punitive damages.

Article 2 of the Hague Convention provides that the Convention does not apply to marine pollution or limitations of liability for maritime claims. Hague Convention, *supra* note 5, art. 2(2)(g). Therefore, the Supreme Court's holding in the *Exxon Shipping Co.* case may not directly apply to the Convention's provisions on enforcing punitive damages. It is, however, indicative of the United States' shift towards a more restrained approach to punitive damages.

69. *Exxon Shipping Co.*, 128 S. Ct. at 2634 (citing *In re Exxon Valdez*, 236 F. Supp. 2d 1043, 1063 (D. Alaska 2002)).

70. *Id.* at 2633.

71. *Id.* at 2623 (citing John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 COLUM. J. TRANSNAT'L L. 391, 421 (2004)).

72. *Id.* at 2623–24.

73. *Id.* at 2624 (noting that “[a] survey of the literature reveals that discretion to award punitive damages has not mass-produced runaway awards, and although some studies show the dollar amounts of punitive-damages awards growing over time, even in real terms, by most accounts the median ratio of punitive to compensatory awards has remained less than 1:1.”).

restraint” in the award of punitive damages.

But more importantly, at least for the purposes of this Article, is the Supreme Court’s awareness of how other countries view U.S. punitive damages awards. If the Court fears negative international reaction to high punitive damages awards, perhaps the Court will continue to actively police such awards. In any event, lower courts and state courts should pick up the vibrations, even if the Supreme Court’s limited docket does not allow it to flesh out its punitive damages jurisprudence to a significant extent.

#### B. LOWER FEDERAL COURTS AND STATE COURTS

All damage awards are subject to review under the Due Process Clauses of the Fifth and Fourteenth Amendments, as interpreted by the United States Supreme Court in the cases discussed above.<sup>74</sup> Even before the Supreme Court became active in supervising punitive damages awards, state courts attempted to control punitive damages by requiring that the punitive damages awarded bear a reasonable relationship to the compensatory damage award.<sup>75</sup> These courts relied principally on their states’ constitutions in attempting to restrict the amount of punitive damages awarded.<sup>76</sup>

Court decisions—both federal and state—subject punitive damages awards to further expansions and limitations.<sup>77</sup> For

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74. See *supra* Part II.A; see also *Exxon Shipping Co.*, 128 S. Ct. at 2626 (noting that its due process cases have “all involved awards subject in the first instance to state law.”).

75. DOBBS, *supra* note 22, at 343 nn.1–2; see also *Palmer v. Ted Stevens Honda, Inc.*, 238 Cal. Rptr. 363, 370 (Cal. Ct. App. 1987) (“[I]t remains the law, as the jury was instructed here, that any punitive damages award must bear a reasonable relation to the actual damages.” (internal quotation marks and citation omitted)); *Stuempges v. Parke, Davis, & Co.*, 297 N.W.2d 252, 259 (Minn. 1980) (“Since the amount of punitive damages to award is a decision that is almost exclusively within the province of the jury, we will not disturb the award on appeal unless it is so excessive as to be unreasonable.”).

76. *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 800–01 (Utah 1991) (noting that punitive damages must comport with the excessive fines and due process provisions of the Utah State Constitution, but refusing to reach the state constitutional issue because the defendant had waived its right to present that issue on appeal); see also *Roberts v. Ford Aerospace & Commc’n Corp.*, 274 Cal. Rptr. 139, 146–47 (Cal. Ct. App. 1990), *overruled on different grounds by* *Coll. Hosp. Inc., v. Superior Court*, 882 P.2d 894 (Cal. 1994) (finding that an award of \$750,000 in punitive damages for \$295,224.09 in compensatory damages did not deprive the defendant corporation of its due process rights under the state constitution).

77. For statutory limitations, see *infra* Part II.C. The Exxon Valdez litigation saga exemplifies both expansions and contractions of punitive damages awards. The



example, a few states only recognize punitive damages authorized by statute.<sup>78</sup> The courts in these states disallow punitive damages as part of the organic common law absent explicit statutory authorization.<sup>79</sup> Another example relates to the standard of proof for establishing punitive damages awards. Traditionally, punitive damages were established by the ordinary civil standard, preponderance of the evidence, but many courts now require that punitive damages be established by clear and convincing evidence.<sup>80</sup> Requiring statutory authorization for punitive damages and imposing a heightened burden of proof before allowing punitive damages both tend to restrict the frequency and amount of punitive damages awards.<sup>81</sup>

A third example of the common law development shaping punitive damages awards relates to the proof of the defendant's financial condition. Punitive damages are meant, at least in part, to punish the defendant.<sup>82</sup> Thus, it makes sense for the

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Alaska District Court that conducted the trial increased punitive damages from \$4 billion to \$4.5 billion following a remand from the Ninth Circuit. *See In re Exxon Valdez*, 296 F. Supp. 2d 1071, 1075, 1110 (D. Alaska 2004), *judgment vacated*, *Exxon Shipping Co.*, 128 S. Ct. 2605 (2008). The Supreme Court opinion that vacated the District Court's judgment, in turn, exemplifies a federal court reducing a punitive damages award under common law notions. 128 S. Ct. at 2626–27 (“Our review of punitive damages today, then, considers not their intersection with the Constitution, but the desirability of regulating them as a common law remedy for which responsibility lies with this Court as a source of judge-made law in the absence of statute.”). Thus, within a single case, we see both expansions and contractions of punitive damages awards.

78. *See* DOBBS, *supra* note 22, at 313 (citing cases in n. 28).

79. *See* *Crowley v. Global Realty, Inc.*, 474 A.2d 1056, 1058 (N.H. 1984) (explaining that “[t]he general rule is therefore that the measure of damages recoverable for misrepresentation, whether intentional or negligent, is actual pecuniary loss,” and citing the rule of New Hampshire as not allowing punitive damages for deterrence purposes).

80. DOBBS, *supra* note 22, at 328; *see also* Michael L. Rustad, *The Supreme Court and Me: Trapped in Time with Punitive Damages*, 17 WIDENER L. J. 783, 803 (2008). The burden of proof may be either a legislative or a common-law change. *See, e.g.*, ALA. CODE 1975 § 6-11-20(a) (LexisNexis 2005) (requiring proof by clear and convincing evidence); GA. CODE ANN. § 61-12-5.1(b) (2000) (also requiring clear and convincing evidence). The overlap of roles is evidence that courts and legislatures are both involved in policing punitive damages awards. Legislatures may become even more involved in the aftermath of *Exxon Shipping Co.* *See* Fisher, *supra* note 67, at 24–43.

81. *See* Victor E. Schwartz et al., *I'll Take That: Legal and Public Policy Problems Raised by Statutes that Require Punitive Damages Awards to be Shared with the State*, 68 MO. L. REV. 525, 557 (2003); Judith Camile Glasscock, *Emptying the Deep Pocket in Mass Tort Litigation*, 18 ST. MARY'S L.J. 977, 1011–12 (1987) (discussing the higher burden of proof).

82. *Exxon Shipping Co.*, 128 S. Ct. at 2628.

amount of damages to relate to the defendant's financial condition. Smaller awards will punish only those defendants who have little, while larger awards will be necessary to punish those who have more resources. Accordingly, some jurisdictions either allow or require a plaintiff to present evidence of the defendant's financial condition.<sup>83</sup> Both approaches enable a court to appropriately gauge the level of damages necessary to punish the defendant.

The desire to control punitive damages, and plaintiffs' attorneys countervailing desire to retain a more expansive punitive damages jurisprudence, has extended beyond the intellectual and legal realms to the political sphere. Thirty-eight states elect their supreme court judges,<sup>84</sup> and studies suggest not only that those judges' positions on punitive damages may affect the outcomes of those elections *ex ante*,<sup>85</sup> but also that contributions made to judges' campaigns may influence the judges' positions on punitive damages *ex post*.<sup>86</sup> One may surmise that if big business donates generously to judges' election campaigns, judges may find creative ways to continue to decrease the numbers of punitive damages awards

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83. DOBBS, *supra* note 22, at 329 nn.6–7 (citing *Adams v. Murakami*, 813 P.2d 1348 (Cal. 1991); *Adel v. Parkhurst*, 681 P.2d 886 (Wyo. 1984); *Nelson v. Jacobsen*, 669 P.2d 1207 (Utah 1983)).

84. Rachel Janutis, *Fair Apportionment of Multiple Punitive Damages*, 75 MISS. L.J. 367, 425 (2006).

85. *Id.* at 426 (“[E]ntities subject to punitive damages wield some political influence over judges reviewing punitive damages awards.”); *see also* Schwartz et al., *supra* note 81, at 541 (“Even the most well-intentioned judge may find a large punitive damages verdict easier to accept if the judge knows that the award will help reduce the tax burden on voters in his or her county or support a good cause.” (internal quotations omitted)).

86. Mike France et al., *The Battle Over the Courts*, BUSINESS WEEK ONLINE, Sept. 27, 2004, [http://www.businessweek.com/magazine/content/04\\_39/b3901001\\_mz001.htm](http://www.businessweek.com/magazine/content/04_39/b3901001_mz001.htm). The article reports that 4% of judges questioned said that contributions had “a great deal of influence” on their decisions, 22% said “some influence,” and 20% said “just a little influence.” That judges are influenced by campaign contributions has been recognized by the United States Supreme Court as a due process problem, at least in certain exceptional circumstances. *Caperton v. Massey Coal Co.*, 129 S. Ct. 2252 (2009). In *Caperton v. Massey Coal*, a jury returned a \$50 million verdict against the defendant, Massey Coal. *Id.* at 2256. When the case made its way to the Supreme Court of Appeals of West Virginia, the result was a 3-2 vote to reverse. *Id.* A judge who had received “campaign contributions in an extraordinary amount” from Massey Coal cast the deciding vote in Massey Coal’s favor. *Id.* The Supreme Court held that the Due Process Clause required the judge to recuse himself under the circumstances of the case. *Id.* at 2257. Other cases of undue influence, however, may well be less visible, as the majority itself recognized. *Id.* at 2256 (discussing the “extraordinary amount” of the campaign contribution).

or, at least, the amounts of those awards that do come to pass.<sup>87</sup>

Of course, courts are not the primary movers in limiting punitive damages awards. As the dissenters in *Exxon Shipping* noted, legislatures, rather than the courts, have the primary responsibility in shaping punitive damages awards.<sup>88</sup> Accordingly, it is legislatures who typically make empirical judgments about the amount of damages permissible in classes of cases.<sup>89</sup> The next section, therefore, examines how elected lawmakers—state legislators and members of Congress—control punitive damages by statute.

### C. CONGRESS AND STATE LEGISLATURES

Legislatures, both state and federal, have employed various devices in an attempt to constrain jury discretion, regularize the amount of punishment, and limit large punitive damages awards. While some statutes may place no explicit restrictions on punitive damages,<sup>90</sup> other statutes may disallow punitive damages in certain types of actions.<sup>91</sup> Still others take a middle

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87. For example, at oral argument for *State Farm v. Campbell*, Justice Kennedy remarked that corporations fear the legal system because of the threat of runaway punitive damages. This comment is quoted in PUNITIVE DAMAGES AFTER *CAMPBELL V. STATE FARM*, 2 ALTA ANNUAL CONVENTION REFERENCE MATERIALS (2003) (quoting Kennedy, J., as saying “Part of the harm to the larger community here is the image that this does to the judicial system when corporations, businesses, people of substance want to use the courts and they’re deterred from doing it by the threat of runaway punitive damages, and that is not good for the legal system.”) Others have also noted that businesses fear the possibility of large punitive awards. Richard Chernick et al., *The Future of Commercial Arbitration*, 9 PEPP. DISPUTE RESOL. L.J. 415, 431 (“[W]aiving punitive damages is a common provision in commercial arbitration agreements, and businesses find that waiver to be valuable because it reduces the stakes of the typical commercial dispute so that both sides are able to have an adjudication in a setting that doesn’t have that effect of [a] potential award of punitive damages.”).

88. *Exxon Shipping Co.*, 128 S. Ct. at 2634 (Stevens, J., concurring in part and dissenting in part) (“I believe that Congress, rather than this Court, should make the empirical judgments expressed in Part IV [regarding the 1:1 ratio.]”); *see also id.* at 2637 (noting that the 1:1 ratio is the sort of thing “typically imposed by legislatures, not courts.”).

89. *Id.*

90. *See, e.g.*, 18 U.S.C. § 2252A(f)(2)(B) (2006) (criminal child abuse statute authorizing civil compensatory and punitive damages); 25 U.S.C. § 305e(b) (2006) (“In addition to the relief specified in subsection (a) of this section, the court may award punitive damages and the costs of suit and a reasonable attorney’s fee.”). This is not to say that the court cannot infer such restrictions from the language of the statute, from common-law precepts, or from constitutional principles.

91. *See, e.g.*, 42 U.S.C. § 2210(s) (2006) (“No court may award punitive damages in any action with respect to a nuclear incident or precautionary evacuation against a person on behalf of whom the United States is obligated to make payments under

course and define the situations in which punitive damages may be appropriate.<sup>92</sup>

Many statutes allow punitive damages, but subject them to explicit limitations.<sup>93</sup> Legislatures generally enact two types of statutes: multiplier statutes<sup>94</sup> and cap statutes.<sup>95</sup> Cap and multiplier statutes, in conjunction with the judicial trend in limiting those punitive damages that escape any statutory limitations, currently depress and constrain U.S. punitive damages awards.<sup>96</sup>

### I. Multiplier Statutes

Multiplier statutes function in an obvious manner. The punitive damages component of an award can be no greater than some multiple of the compensatory damage award.<sup>97</sup> The use of multiplier statutes tends to show that policymakers in the United States fear unbridled jury discretion, but at the same time recognize the strong public policy in deterring certain

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an agreement of indemnification covering such incident or evacuation.”).

92. See, e.g., 15 U.S.C. § 78u(h)(7)(A)(iii) (2006) (“[I]f the violation is found to have been willful, intentional, and without good faith, [the court may allow] . . . punitive damages . . . together with the costs of the action and reasonable attorney’s fees as determined by the court.”).

93. See, e.g., Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3)(A)–(D) (2006) (placing a sliding scale cap on punitive damages depending on the number of workers employed by the defendant corporation).

94. These multiplier statutes—allowing or requiring a compensatory award to be multiplied by a particular factor to arrive at the punitive award—hearken back to Roman times. As Serena Corongiu notes in her doctoral dissertation, “In some peculiar cases [in ancient Rome] damages were calculated by doubling the actual damages suffered by the victim (*duplum*) or by multiplying them per three (*tripulum*) or per four (*quadruplum*).” Corongiu, *supra* note 22, at 7.

95. *Exxon Shipping Co., v. Baker* 128 S. Ct. 2605, 2629 (2008) (noting that many states enact a “hard dollar cap” or a “ratio or maximum multiple” for punitive damages).

96. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433 (2001) (“[L]egislatures enjoy broad discretion in authorizing and limiting permissible punitive damages awards. A good many States have enacted statutes that place limits on the permissible size of punitive damages awards.” (internal citation and footnote omitted)).

97. See, e.g., OHIO REV. CODE ANN. § 2315.21(D)(2)(a) (LexisNexis 2007) (two-to-one ratio in most tort cases); ALASKA STAT. § 09.17020(f) (2008) (greater of three-to-one ratio or \$500,000 in most cases); 42 U.S.C. § 9607(c)(3) (2006) (three-to-one ratio). For example, if the factfinder awarded \$100,000 in compensatory damages, a multiplier statute might allow that amount to be doubled, yielding as much as a \$200,000 punitive award for a \$300,000 total award. Under typical multiplier statutes, while a factfinder may award less than \$200,000 in punitive damages, it cannot award more. *But see* DOBBS, *supra* note 22, at 349 (suggesting that, in some situations, the jury could award more).

aberrant antisocial conduct.<sup>98</sup> Accordingly, multiplier statutes seek to punish the defendant within a range that has been deemed acceptable by elected officials. As one scholar has written:

Among the more important groups of [multiplier] statutes are those that grant multiplied damages for violation of certain social or economic rights, and those that aim at consumer protection or regulate various practices. In the latter category, antitrust statutes are perhaps the best known but federal multiple damages statutes on trademarks and patents have also been important. Treble damages are also allowed under federal and state RICO statutes. The states often have enacted multiple damages statutes covering timber trespass and some kinds of forcible entry. Consumer protection statutes also often provide for multiple damages, and so do many others.<sup>99</sup>

Multiplied damages may not be truly “punitive” because the statute absolutely limits the amount of damages a factfinder can impose and traditional punitive damages have no numerical limit.<sup>100</sup> However, with the United States Supreme Court essentially mandating a maximum single-digit ratio of punitive to compensatory damages, and with state legislatures and Congress enacting caps and other limits on punitive damages, the argument that multiplied damages are not punitive in nature has little force. Punitive damages awards in the United States are always subject to limitations.<sup>101</sup> Additionally, the key to punitive damages is not “how much” is awarded. The key is whether the amount is not compensatory in nature<sup>102</sup> and

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98. Jacqueline Perczek, Note, *On Efficiency, Deterrence, and Fairness: A Survey of Punitive Damages Law and a Proposed Jury Instruction*, 27 SUFFOLK U. L. REV. 825, 866–67 (1993) (discussing the “valid and compelling state interests” in having punitive damages, the need to avoid “unbridled jury discretion in assessing punitive damages,” and the role of courts and legislatures in reaching a compromise).

99. DOBBS, *supra* note 22, at 359.

100. *Id.* (“Multiplied damages statutes are often said to be punitive. This is not always the whole story, however.”).

101. At the very least, punitive damages awards are constrained by the reasonableness principles embodied in the Due Process Clause, such as the requirement that defendants are not subjected to arbitrarily excessive damages. Benjamin Spencer, *Due Process and Punitive Damages: The Error of Federal Excessiveness Jurisprudence*, 79 S. CAL. L. REV. 1085, 1146 (2006).

102. Perhaps U.S. punitive damages are becoming more like other jurisdictions’ moral damages. Many European Union countries allow non-compensatory “moral damages” to redress particularly offensive conduct. See Andrew Spacone, *Strict Liability in the European Union—Not a United States Analogue*, 5 ROGER WILLIAMS U. L. REV. 341, 369 (2000); see also Corongiu, *supra* note 22, at 60–62 (discussing Italian *danno biologico*, *danno morale*, *danno patrimoniale*, and *danno esistenziale*, which include monetary relief for non-economic injury). If U.S. “punitive damages”

whether the amount is designed to punish the defendant or deter similar harmful conduct.<sup>103</sup> Because multiplied damages provide money, in addition to any amounts necessary to compensate the victim, these multiplied damages qualify as punitive damages awards.<sup>104</sup>

## II. Cap Statutes

In the mid-1980s, states began placing statutory caps<sup>105</sup> on punitive damages awards.<sup>106</sup> Many jurisdictions passed statutes limiting the recovery of punitive damages as part of a sweeping nationwide “tort reform.”<sup>107</sup> In New Jersey, for example, a state statute specifies that “[n]o defendant shall be liable for punitive damages in any action in an amount in excess of five times the liability of that defendant for compensatory damages or \$350,000, whichever is greater.”<sup>108</sup> Virginia caps all punitive damages awards at \$350,000.<sup>109</sup> Georgia similarly caps most punitive damages awards at \$250,000.<sup>110</sup>

Congress has also enacted cap statutes to limit punitive

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amount to no more than what other countries—countries that eschew punitive damages—willingly dole out, there is a very strong argument that U.S. punitive damages deserve recognition in the European Union. See *infra* Parts V–VI for more information.

103. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2621 (2008) (“[T]he consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct.”).

104. Multiplied damages, therefore, fall within the meaning of “exemplary or punitive damages” as used in the Hague Convention. See Hague Convention, *supra* note 5, art. 11. Accordingly, these judgments may not be enforced in European nations that become subject to the Hague Convention. For further discussion, see *infra* Part VI.B.

105. Cap statutes work as their name implies, allowing a factfinder to give punitive damages up to a specified amount. The factfinder may choose to give less than that specified amount, but may not give more.

106. DOBBS, *supra* note 22, at 349 (discussing the tort reform movement of the 1980s, in general, and the restrictions placed on punitive damages, in particular).

107. *Id.* As of 1996, “[a]t least forty of the fifty states have imposed some kind of restrictions on punitive damages awards, with a majority of these restrictions being enacted within the past 10 years.” WEINTRAUB, *supra* note 1, at 711 n.96.

108. N.J. STAT. ANN. § 2A:15-5.14 (West 2000). For an excellent survey of state statutes allowing, disallowing, and limiting punitive damages awards, see Corongiu, *supra* note 22, at 9–12 (cataloguing and citing various state statutes discussing availability of punitive damages).

109. VA. CODE ANN. § 8.01-38.1 (2008) (requiring further that the punitive damages be deposited into the literary fund established under Article VIII, Section 8 of the Virginia Constitution).

110. GA. CODE ANN. § 51-12-5.1(g) (2000).

damages awards. For example, while the Y2K scare<sup>111</sup> was looming, Congress enacted 15 U.S.C § 6604. This provision limits punitive damages to the lesser of three times the compensatory damages or \$250,000 in any Y2K action.<sup>112</sup> Section 1981a of the Civil Rights Act also caps punitive damages subject to a sliding scale based on the number of employees who work for the non-complying employer.<sup>113</sup>

These laws demonstrate a nationwide movement by elected lawmaking bodies, at both the federal and state levels, to control jury discretion and limit punitive damages. Both multiplier statutes and cap statutes limit the amount of punitive damages doled out,<sup>114</sup> and these statutes evidence the United States' judicial and political commitment to restricting punitive damages awards.

The European Union should note this movement and, at the very least, enforce punitive damages awards in those cases and from those jurisdictions that have established meaningful restraints. Nonetheless, as the U.S. Supreme Court pointed out in *Exxon Shipping*, "some legal systems not only decline to recognize punitive damages themselves but refuse to enforce foreign punitive judgments as contrary to public policy."<sup>115</sup>

The Hague Convention, however, is problematic precisely because it does not require a Member State to compare the judgment to be enforced with its internal public policy. The Hague Convention allows non-enforcement for the simple reason that the damages are non-compensatory.<sup>116</sup> This unfortunate treaty exists even though, in the United States, both judicial bodies and legislative bodies at both the federal and state levels have been decreasing the actions for which punitive damages are available and limiting the amount of punitive damages allowable.

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111. At the turn of the millennium from 1999 to 2000, many people feared that there would be widespread computer failure because of the practice of abbreviating a four-digit year with two digits (e.g., 1982 as 82). See Barnaby J. Feder & Andrew Pollack, *Trillion-Dollar Digits: A Special Report.; Computers and 2000: Race for Security*, N.Y. TIMES, Dec. 27, 1998, at A1.

112. 15 U.S.C. § 6604(b)(1) (2006).

113. Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3)(A)–(D) (2006).

114. See, e.g., DOBBS, *supra* note 22, at 349 (discussing caps and multipliers as statutory limitations on punitive damages); Junping Han, Note, *The Constitutionality of Oregon's Split-Recovery Punitive Damages Statute*, 38 WILLAMETTE L. REV. 477, 480 n.8 (2002) ("[L]imitation methods include placing caps on the amount of punitive damages and setting ratios to compensatory damages.")

115. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2623 (2008).

116. Hague Convention, *supra* note 5, art. 11.

### III. THE INTERNATIONAL CONTEXT: PUNITIVE DAMAGES IN THE EUROPEAN UNION

This Article has examined trends in U.S. internal law impacting punitive damages in civil proceedings based upon federal and state constitutions, common law principles, and statutes. These trends set the parameters for awards of punitive damages in differing types of cases. These trends also indicate the United States' willingness to limit juries' discretion in awarding punitive damages. The remainder of this Article explores European Union law and suggests that, when considering whether to enforce U.S. judgments awarding punitive damages, Member States should consider (i) the largely successful efforts of the United States to constrain punitive damages awards, (ii) Member States' own increasing use of non-compensatory damages, and (iii) Member States' willingness to enforce each other's non-compensatory awards according to their treaties unless enforcement violates, or manifestly violates, the enforcing State's public policy.

Member States traditionally have shown antagonism toward imposing or enforcing punitive damages awards, principally because most did not recognize this remedy in civil proceedings.<sup>117</sup> England is the notable exception: England, the birthplace of common law punitive damages,<sup>118</sup> has had punitive damages in its internal jurisprudence since the eighteenth century.<sup>119</sup> But while England may be the only Member State that assesses punitive damages and the only Member State that readily classifies these non-compensatory damages as "punitive," it is not the only Member State whose courts allow and enforce non-compensatory damage awards.<sup>120</sup>

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117. Gotanda, *supra* note 14, at 508–09.

118. John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 COLUM. J. TRANSNAT'L L. 391, 398 (2004) (noting that the "common law tradition of awarding punitive damages traces its roots to England.").

119. Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 12 (1982) (finding that the "common law authority for courts to award punitive damages originated in eighteenth-century England . . ."); see also *Exxon Shipping Co.*, 128 S. Ct. at 2623 ("In England and Wales, punitive, or exemplary, damages are available only for oppressive, arbitrary, or unconstitutional action by government servants; injuries designed by the defendant to yield a larger profit than the likely cost of compensatory damages; and conduct for which punitive damages are expressly authorized by statute.") (citing *Rookes v. Barnard* (1964) 1 All E.R. 367, 410–11 (H.L.)).

120. See *infra* Part III.B.



## A. ENGLAND

“The common law tradition of awarding punitive damages traces its roots to England.”<sup>121</sup> As early as 1763, English courts were awarding punitive damages in certain cases.<sup>122</sup> English law prohibits excessive punitive damages awards, however, and punitive damages are generally constrained by a three-to-one ratio with respect to compensatory damages.<sup>123</sup>

In the 2001 case of *Kuddus v. Chief Constable of Leicestershire Constabulary*,<sup>124</sup> the House of Lords expressed its willingness to expand the purview of punitive damages awards in England. In *Kuddus*, the plaintiff alleged that his property had been stolen and destroyed.<sup>125</sup> Although the plaintiff never withdrew his allegation, the defendant forged the plaintiff's signature saying that the complaint had been dropped.<sup>126</sup> Accordingly, the investigation into the robbery stopped.<sup>127</sup> The plaintiff alleged misfeasance by a public officer. The lower court had dismissed a claim for punitive damages on the ground that misfeasance of office had not traditionally supported punitive damages awards.<sup>128</sup>

The House of Lords reinstated the demand for punitive damages.<sup>129</sup> Lord Slynn of Hadley's opinion noted that the Law Commission in its Report on Aggravated, Exemplary and

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121. Gotanda, *supra* note 118, at 398; see also *Exxon Shipping Co.*, 128 S. Ct. at 2620 (“The modern Anglo-American doctrine of punitive damages dates back at least to 1763, when a pair of decisions by the Court of Common Pleas recognized the availability of damages for more than the injury received.” (internal quotation marks and citation omitted)).

122. See *Wilkes v. Wood*, (1763) 98 Eng. Rep. 489 (C.P.) (awarding punitive damages in a libel case). England's Supreme Court Act of 1981 provides that juries may hear a variety of cases. See Supreme Court Act of 1981, 1981, c. 54, § 69 (Eng.) (providing that juries may hear a variety of cases). That juries may award punitive damages in England indicates that England, at least, should not refuse to enforce U.S. punitive damages awards because of the fear of juries as factfinders.

123. See Gotanda, *supra* note 118, at 442 (“In England, the punitive damages award in most cases should not exceed three times the basic damages.”). For a review of England's experience with punitive damages, see Andrew Tettenborn, *Punitive Damages—A View from England*, 41 SAN DIEGO L. REV. 1551 (2004).

124. *Kuddus v. Chief Constable of Leicestershire Constabulary* [2001] UKHL 29, [2002] 2 A.C. 122 (appeal taken from Eng.) (U.K.).

125. *Id.* ¶ 2.

126. *Id.*

127. *Id.*

128. *Id.* ¶ 3.

129. *Id.* ¶¶ 27 (L. Slynn of Hadley), 48 (L. Mackay of Clashfern), 68–69 (L. Nicholls of Birkenhead), 94 (L. Hutton of Foscote), 139 (L. Scott of Foscote).

Restitutionary Damages<sup>130</sup> “recommended that the availability of punitive damages be extended for most torts”<sup>131</sup> and that in previous cases, the House of Lords refused to eliminate the availability of punitive damages.<sup>132</sup>

It is unclear if reported cases discuss whether other European Union countries have enforced English punitive damages awards or if any cases set forth what those countries’ reactions to England’s punitive damages jurisprudence have been. Because most English judgments presumably are enforced in England, litigants may have little need to seek additional enforcement outside its borders. Alternatively, prior to the Brussels Regulation, the prevailing party in an English court case rendering punitive damages may have believed enforcement outside England unlikely, and so did not pursue the matter or settled on terms more favorable to the defendant to avoid foreign enforcement proceedings.<sup>133</sup> One might also surmise that other countries simply enforce modest awards—even awards containing punitive damages elements—without commenting on having done so, especially considering the Brussels Regulation’s pronouncement that enforcement among E.U. countries should be easy to accomplish and should not be undermined unless awards are “manifestly contrary” to public policy.<sup>134</sup>

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130. U.K. Law Comm’n, *Aggravated, Exemplary and Restitutionary Damages*, Law Comm’n Rep. No.247, ¶ 5.49 (1997). This recommendation to increase England’s use of punitive damages is particularly interesting because it comes at a time when the United States is restricting its use of punitive damages. Perhaps this could be a strong bargaining point for the United States, at least with England, because a country that not only allows punitive damages, but may be on the verge of expanding its use of punitive damages, should not look too harshly upon a country that allows punitive damages and is trying to restrict their use. In fact, this may be a fairly strong bargaining point with all Member States. After all, at least on paper, they freely enforce each other’s judgments because of the Brussels Regulation. See *infra* Part IV.A. So too should they, at least on paper, freely enforce U.S. judgments.

131. *Kuddus*, ¶ 25 (L. Slynn of Hadley) (citing *Rookes v. Barnard*, [1964] A.C. 1129 (H.L.) (appeal taken from Eng.) (U.K.) and *Broome v Cassell & Co.*, [1972] A.C. 1027 (H.L.) (appeal taken from Eng.) (U.K)).

132. *Id.*

133. Of course, that rationale would not prevail after the enactment of the Brussels Regulation, which makes the enforcement process easier among European Union countries.

134. Brussels Regulation, *supra* note 9, art. 34 (“A judgment shall not be recognised if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought.”); *cf.* Lugano Convention, *supra* note 11, art. 27 (“A judgment shall not be recognised . . . if such recognition is contrary to public policy in the state in which recognition is sought.”).

## B. OTHER E.U. MEMBER STATES

Although courts in E.U. Member States generally do not award punitive damages, Professor Gotanda predicted that “France, Germany, and the European Union may soon be more receptive to awards of punitive damages.”<sup>135</sup> In France, a proposed revision to the Civil Code explicitly authorizes non-compensatory damages and, in fact, calls them punitive damages.<sup>136</sup>

“[G]ermany has historically been steadfastly against any recognition of punitive damages in civil actions . . . .”<sup>137</sup> In fact, in 1992, Germany’s highest court refused to enforce a punitive damages judgment from the United States.<sup>138</sup> Despite this apparent hard stance against punitive damages, “German courts frequently awarded damages that could not seriously be held to be purely compensatory because they tended to include punitive elements.”<sup>139</sup>

Italy too allows some forms of non-compensatory damages, mostly notably through Section 96 of the Italian Code of Civil Procedure (CPC).<sup>140</sup> Dr. Corongiu finds that “pursuant to

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135. Gotanda, *supra* note 14, at 516.

136. The proposed revision states:

One whose fault is manifestly premeditated, particularly a fault whose purpose is monetary gain, may be ordered to pay punitive damages besides compensatory damages. The judge may direct a part of such damages to the public treasury. The judge must provide specific reasons for ordering such punitive damages and must clearly distinguish their amount from that of other damages awarded to the victim.

Avant-projet de reforme du droit des obligations (Articles 1101 à 1386 du Code civil), et du droit de la prescription (Articles 2234 à 2281 du Code civil), art. 1371 (Sept. 22, 2005) available at [http://www.henricapitant.org/sites/default/files/Avant-projet\\_de\\_reforme\\_du\\_droit\\_des\\_obligations\\_et\\_de\\_la\\_prescription\\_et\\_expose\\_des\\_motifs.pdf](http://www.henricapitant.org/sites/default/files/Avant-projet_de_reforme_du_droit_des_obligations_et_de_la_prescription_et_expose_des_motifs.pdf), translated in [http://www.henricapitant.org/sites/default/files/Traduction\\_definitive\\_Alain\\_Levasseur.pdf](http://www.henricapitant.org/sites/default/files/Traduction_definitive_Alain_Levasseur.pdf) [hereinafter France Proposal]. Also found in Gotanda, *supra* note 14, at 517.

137. Gotanda, *supra* note 14, at 518.

138. Bundesgerichtshof [BGH] [Federal Court of Justice] June 4, 1992, *Entscheidungen des Bundesgerichtshofes in Zivilsachen* [BGHZ] 118 (312), 1993 (F.R.G), translated in 32 I.L.M. 1320 (1993).

139. Volker Behr, *Punitive Damages in American and German Law—Tendencies Towards Approximation of Apparently Irreconcilable Concepts*, 78 CHI.-KENT L. REV. 105, 126 (2003); see also Gotanda, *supra* note 14, at 518–19.

140. Dr. Corongiu translates the pertinent part of Section 96 of the CPC in the following manner:

Should it result that the losing party has filed a suit or has committed itself in the proceedings with fraud or culpable negligence, the Judge, upon request of the prevailing party, condemns the losing party not only to pay

Section 96 CPC, the Court is free to condemn the losing party to pay whatever sum it deems appropriate, notwithstanding the real damage effectively suffered by the prevailing party.”<sup>141</sup> To the extent that Section 96 does not limit damages to payment of compensation, any excess damages resemble pure punitive damages similar to those that might be assessed absent statutory caps or multiplier statutes in the United States.<sup>142</sup>

Other European Union countries also allow non-compensatory damages in the form of “moral damages.” Moral damages may include damages for “particularly offensive” acts.<sup>143</sup> U.S. courts have often said that punitive damages punish bad behavior by defendants, thus the particularly offensive act requirement seems to coincide with the U.S. approach.<sup>144</sup> Denmark, Finland, and Sweden permit awards of moral damages for certain offenses.<sup>145</sup> France also allows judgments containing moral damages.<sup>146</sup>

The European Union as a whole may soon allow punitive damages awards for breach of antitrust rules. The European Commission issued a Green Paper, which, among other things,

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the legal expenses, but also to pay the prevailing party an amount of damages, which is liquidated by the Judge in its decision.

Corongiu, *supra* note 22, at 51–52.

141. *Id.* at 54; *see also id.* at 57–58 (noting that “according to the interpretation of Section 96 CPC given by the Corte di Cassazione, a supplemental damage should be awarded against a party which has behaved in a negligent or fraudulent way during a civil proceedings [sic], notwithstanding the Court’s assessment of other ‘compensative’ damages.”).

142. Even though Italy allows some forms of non-compensatory damages, the Italian courts recently refused to permit a mother to collect her \$1 million dollar reward for her son’s death because the U.S. law regarding punitive damages offended Italian notions of justice. *See Parrot v. Fimez S.P.A.*, Corte app. Venezia, 15 oct. 2001, n.1359, Guir. It. II 2002, 1021, *translated in* Lucia Ostoni, *Italian Rejection of Punitive Damages in a U.S. Judgment*, 24 J.L. & COM. 245, 251–62 (2005); *see also* Corongiu, *supra* note 22, at 3. The Venice Court of Appeal had to resort to a public policy defense in order to refuse enforcement of this award; how much easier will it be for the Venice Court of Appeal to reject enforcement of the next award? If the Hague Convention comes into effect in Italy, the court may simply point to Article 11, which allows non-recognition if the judgment contains non-compensatory elements.

143. *See Commission Green Paper on Compensation to Crime Victims*, at 14–15, COM (2001) 536 final (Sept. 28, 2001) (explaining that many Member States seek to make crime victims whole through moral damages).

144. *See, e.g.*, *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2620–21, 2628, 2631 (2008); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001).

145. *Commission Green Paper on Compensation to Crime Victims*, *supra* note 143, at 15.

146. *See id.*

calls for allowing double damages in certain antitrust actions.<sup>147</sup> This Green Paper may lead to legislation. Professor Gotanda believes that the proposal, if adopted, would evidence the most significant change with respect to the European Union's attitude toward punitive damages.<sup>148</sup>

As this section has shown, many E.U. Member States, which previously prohibited punitive damages and even looked with suspicion at non-compensatory damages, are now trending toward permitting some awards with extra-compensatory aspects.<sup>149</sup> As the European Union's attitude shifts regarding their own allowance for punitive damages, so too should its attitude change regarding the enforcement of U.S. judgments containing punitive damages elements.

#### IV. E.U. MEMBER STATES LIBERALLY ENFORCE EACH OTHERS' JUDGMENTS

##### A. BRUSSELS REGULATION

The Brussels Regulation<sup>150</sup> evidences a liberal policy of enforcing judgments among E.U. Member States.<sup>151</sup> Article 33 requires that "[a] judgment given in a Member State shall be recognised in the other Member States without any special procedure being required."<sup>152</sup> Article 36 prohibits any review of the substance of the underlying judgment.<sup>153</sup> Taken in conjunction, Articles 33 and 36 indicate that neither technical nor substantive objections will bar the enforcement of Member States' judgments in the courts of other Member States.

The Brussels Regulation does not explicitly mention punitive damages. It does, however, have one important provision that may be deployed to limit enforcement of punitive damages awards. Article 34 provides that a judgment "shall not

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147. Gotanda, *supra* note 14, at 520.

148. *Id.* at 520.

149. *See id.* at 517–21.

150. Brussels Regulation, *supra* note 9.

151. Some have likened the liberal enforcement policy among European Union Member States to the similar liberal enforcement policy among states in the United States under the Full Faith and Credit Clause. Danford, *supra* note 7, at 390. This Article will explore that contention later in this section. See *infra* text accompanying notes 162–165.

152. Brussels Regulation, *supra* note 9, art. 33.

153. Brussels Regulation, *supra* note 9, art. 36 ("Under no circumstances may a foreign judgment be reviewed as to its substance.").

be recognised if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought.”<sup>154</sup>

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154. *Id.* art. 34. As stated in the American Law Institute’s Recognition and Enforcement of Foreign Judgments:

The word ‘manifestly’ was added to the original text taken from the Brussels Convention to emphasize that public policy should only rarely serve as a justification for refusing recognition or enforcement. The same approach is taken even by countries not linked by treaty . . . . [P]ublic policy (or *ordre public*) is meant to be an escape hatch that should rarely be used . . . . The fact that the *lex fori* on the same point differs from the foreign law is not a sufficient ground for denying recognition to the foreign claim. Fundamental values must be at stake.

RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FED. STATUTE § 5 cmt. at 76–77 (Proposed Final Draft 2005) (internal quotation marks and citations omitted). The vast majority of United States courts enforce foreign money judgments pursuant to the UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 U.L.A. 89 (Supp. 2000). Notably, there is a “public policy” exception. WEINTRAUB, *supra* note 1, at 703 (internal citation omitted). But “courts have seldom used it.” *Id.*

Recently, all E.U. Member States (with the exception of Denmark, who was also not a signatory to the Brussels Regulation), signed the Conflict of Laws, “Rome II” Regulation, governing non-contractual obligations, and Rome II went into effect in January 2009. Like the Brussels Regulation, Rome II also provides for liberal enforcement of judgments among E.U. countries. Of particular importance—and strongly echoing the Brussels Regulation—Clause 32 of the preamble provides as follows:

Considerations of public interest justify giving the courts of Member States the possibility, *in exceptional circumstances*, of applying exceptions based on public policy and overriding mandatory provisions. In particular, the application of a provision of a law designated by this Regulation which would have the effect of causing non-compensatory[,] exemplary[,] or punitive damages of an *excessive nature* to be awarded *may*, depending on the circumstances of the case and the legal order of the Member States court seised, be regarded as being contrary to the public policy (*ordre public*) of the forum.

Rome II Regulation 864/2007, pmbl., cl. 32, 2007 O.J. (L 199) 40, 42 (EC) (first, second, and third emphases added). Rome II specifically mentions punitive damages, but it should be noted that only in “exceptional circumstances,” where those punitive damages are “of an excessive nature” may Member States rely on Rome II to justify refusing to enforce judgments of sister States. Moreover, Rome II explicitly acknowledges the importance of free enforcement of judgments. Clause 6 of the preamble provides that

The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the *free movement of judgments*, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which the action is brought.

*Id.* at pmbl., cl. 6, 40 (emphasis added). The need for the “free movement of judgments” underscores the need for Member States to enforce each other’s punitive damages awards, at least in those unexceptional circumstances in which the awards

The issue relates to whether a particular judgment is “manifestly contrary” to the public policy of the Member State in which recognition is sought.

The determination of what constitutes public policy lies at the heart of Article 34’s imperative. It is no easy question and is one that has plagued courts.<sup>155</sup> Different contexts yield different considerations and may even require contrary resolutions. The public policy defense in the European Union typically turns on each State’s own internal public policy.<sup>156</sup> The public policy defense allows “the enforcing court to deny recognition if a foreign judgment is . . . repugnant to [the enforcing jurisdiction’s] laws, morals, or sense of justice.”<sup>157</sup> Thus, at least to the extent the enforcing State itself would allow similar non-compensatory damages, the enforcing State cannot say that the other State’s punitive damages award is “manifestly contrary” to the enforcing State’s public policy simply because there is a non-compensatory component to the award.<sup>158</sup> Of course, a

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are not so excessive as to violate public policy in the enforcing State.

155. “Some countries have interpreted [the public policy] exception broadly so that any award violating domestic public policy may be denied recognition and enforcement.” Gotanda, *supra* note 14, at 512. In these countries, the law of the particular country may serve to bar enforcement. *Id.* Other countries interpret the exception narrowly, and for these States, only international public policy may serve to bar recognition. *Id.* (discussing France) (citing Code de procedure civile [C. Pr. Civ.] art. 1502 (Fr.), *reprinted in* 7 Y.B. Com. Arb. 281–82 (1982)); *cf.* Loucks v. Standard Oil Co. of New York, 120 N.E. 198, 202 (N.Y. 1918) (explaining that, in the choice of law context for entertaining a sister state’s claim, the public policy defense would not apply unless upholding the claim “would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.”). *Loucks* did not address enforcement of judgments. In the enforcement of judgments context, “the scope for a public policy exception is even narrower due to the competing policy in favor of recognition.” RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FED. STATUTE, *supra* note 154, § 5 cmt. at 73.

156. *See* Danford, *supra* note 7, at 430–31. France, however, reads the public policy exception narrowly and will only decline to enforce a judgment that runs contrary to international public policy. Gotanda, *supra* note 14, at 512 (“Unlike domestic public policy, which includes all of the imperative rules of the State in which enforcement is sought, international public policy encompasses only those basic notions of morality and justice accepted by civilized countries.”).

157. Danford, *supra* note 7, at 427 (internal citation omitted). By way of example, in refusing to enforce a \$1 million dollar judgment against an Italian helmet maker, the Italian Supreme Court said that the punitive portion of the judgment violated its public policy. *See* Parrot v. Fimez S.P.A., Corte app. Venezia, 15 oct. 2001, n.1359, Guir. It. II 2002, 1021, *translated in* Ostoni, *supra* note 142, at 251–62; Liptak, *supra* note 1.

158. Although this proposition appears uncontroversial, it seems that some countries “cling . . . to a double standard,” at least in other contexts:

punitive damages award may be grossly excessive, and on that account may be contrary to the public policy of the enforcing State, even if that Member State's courts would enter a more modest punitive damages award in similar circumstances.

The public policy defense in the Brussels Regulation allows non-enforcement only when a foreign judgment is *manifestly* contrary to public policy.<sup>159</sup> Note the strong language chosen by the drafters: the judgment must not simply differ from local policy; it must be blatantly contrary to it.<sup>160</sup> This implies that Member States should generally enforce each other's judgments even if those judgments do not neatly fit into the enforcing State's internal laws.

The significance of the Brussels Regulation cannot be overstated: it allows the free flow of judgments among countries of the European Union. Indeed, one scholar has referred to the Brussels Regulation as "the single most important private international law treaty in history."<sup>161</sup> Another author has opined that the Brussels Regulation has created "an essentially federal system of recognition of judgments"<sup>162</sup> similar to the Full Faith and Credit Clause of the United States Constitution.<sup>163</sup>

This analogy to the Full Faith and Credit Clause is interesting because of the strong presumption of inter-state enforcement in the United States pursuant to the Full Faith and Credit Clause.<sup>164</sup> At least one fundamental difference, however,

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The United Kingdom still clings to a double standard for personal jurisdiction and, absent a treaty, will not recognize foreign default judgments unless based on nineteenth century bases—service while present, appearance, or prior consent. Yet, for its own courts, the U.K. maintains a modern long-arm regime exercising specific jurisdiction in contract, maintenance, tort, and other matters.

WEINTRAUB, *supra* note 1, at 708–09.

159. Brussels Regulation, *supra* note 9, art. 34. Recall also the Rome II Regulation, which asks for free enforcement of judgments across the European Union and only disallows enforcement, even of punitive damages awards, if, in an "exceptional circumstance," the award is truly "excessive." See Rome II Regulation, *supra* note 154, at pmb., cl. 32, at 42.

160. See Brussels Regulation, *supra* note 9, art. 34.

161. Friedrich K. Juenger, *A Hague Judgments Convention?*, 24 BROOK. J. INT'L L. 111, 116 (1998).

162. Danford, *supra* note 7, at 390.

163. U.S. CONST. art. IV, § 1 ("Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."); see also 28 U.S.C. § 1738 (2006).

164. See *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 492 (2003) (explaining that the Full Faith and Credit Clause mandates interstate respect for final judgments so long as they are rendered by a court with personal and subject matter jurisdiction).



distinguishes the Full Faith and Credit Clause from Article 34 of the Brussels Regulation. In the United States, the enforcing state may not rely on public policy to refuse the enforcement of a sister state judgment.<sup>165</sup> The more restrictive the reading of Article 34 of the Brussels Regulation and its “manifestly contrary to public policy” requirement, the more closely the Brussels Regulation parallels the Full Faith and Credit Clause, and the more likely the Member States will feel obligated to enforce each other’s judgments.

## B. LUGANO CONVENTION

The Lugano Convention<sup>166</sup> is an agreement among the members of the EFTA that is, in large part, identical to the Brussels Regulation with respect to the enforcement of judgments containing punitive damages. The Lugano Convention “is intended to ensure the free movement of judgments.”<sup>167</sup> Thus, the Lugano Convention extends to non-European Union EFTA states—such as Iceland, Norway, and Switzerland—similar rights and duties with respect to the enforcement of judgments that the Brussels Regulation extends

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165. Under the Full Faith and Credit Clause, Congress has the authority to regulate the effect of sister state acts, records, and proceedings. State courts do not have that same authority absent congressional legislation. *See Baker v. General Motors Corp.*, 522 U.S. 222, 233 (1998) (“A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. For claim and issue preclusion (*res judicata*) purposes, in other words, the judgment of the rendering State gains nationwide force.”). The Supreme Court clearly precluded any “roving ‘public policy exception’ to the full faith and credit due *judgments*.” *Id.* There may be isolated exceptions to the notion that U.S. states give full faith and credit to sister courts’ adjudications—such as the fact that some state courts threatened not to honor gay marriages performed in other states—but marriages are not traditional civil judgments. Moreover, Congress has enacted the Defense of Marriage Act, which exempts gay marriage from the traditional full faith and credit enforcement mechanism:

No State, territory, or possession of the United States, or Indian Tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

28 U.S.C. § 1738C (2006). This one exception regarding inter-state enforcement of a civil act helps prove the rule that, generally, inter-state enforcement of judgments is taken for granted under the Full Faith and Credit Clause.

166. Lugano Convention, *supra* note 11.

167. Danford, *supra* note 7, at 397.

to signatory E.U. Member States.

In language paralleling that of Article 33 of the Brussels Regulation, Article 26 of the Lugano Convention provides, “A judgment given in a Contracting State shall be recognized in the other Contracting States without any special procedure being required.”<sup>168</sup> Like Article 36 of the Brussels Regulation, Article 29 of the Lugano Convention does not allow the enforcing State to review the foreign judgment as to its substance.<sup>169</sup> Finally, and most importantly for purposes of this Article, in a provision almost mirroring Article 34 of the Brussels Regulation, Article 27 of the Lugano Convention provides, *inter alia*, that a “judgment shall not be recognized if such recognition is contrary to public policy in the State in which recognition is sought.”<sup>170</sup> Note, however, that enforcement must be declined if the judgment is contrary—not manifestly contrary—to public policy.<sup>171</sup> Because the provisions of the Brussels Regulation and the Lugano Convention are nearly identical,<sup>172</sup> EFTA states, like E.U. Member States, must liberally enforce punitive damages awards among contracting states.

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168. Lugano Convention, *supra* note 11, art. 26.

169. *Id.* art. 29.

170. *Id.* art. 27.

171. For a draft version of the updated Lugano Convention, see Lugano Convention 2007, Oct. 30, 2007, *available at* [http://www.ofj.admin.ch/etc/medialib/data/wirtschaft/ipr.Par.0022.File.tmp/260307\\_entw\\_lugano\\_convention-e.pdf](http://www.ofj.admin.ch/etc/medialib/data/wirtschaft/ipr.Par.0022.File.tmp/260307_entw_lugano_convention-e.pdf). Some format and placement changes are proposed for the articles, but the substance remains similar. Article 26 will be moved to Article 33. “A judgment given in a State bound by this Convention shall be recognised in the other States bound by this Convention without any special procedure being required.” The language of Article 29 remains unchanged, but will move to Article 36. Finally, Article 27 will become Article 34 and will use the “manifestly contrary” language of the Brussels Regulation. The Lugano Convention will provide: “A judgment shall not be recognised if such recognition is manifestly contrary to public policy in the State in which recognition is sought.” The switch from “contrary” to “manifestly contrary” is interesting because it shows that European countries recognize the especially high bar to non-recognition created by the “manifestly contrary” language.

172. See Brussels Regulation, *supra* note 9, art. 34 (providing that “A judgment shall not be recognised: 1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought”); Lugano Convention, *supra* note 11, art. 27 (providing that “A judgment shall not be recognized: 1. if such recognition is contrary to public policy in the State in which recognition is sought”).

## V. MULTI-NATIONAL ENFORCEMENT OF PUNITIVE DAMAGES AWARDS

### A. THREE HYPOTHETICALS

To put the punitive damages issue in perspective, consider the following three examples in which a U.S. court has entered a judgment, which includes punitive damages, against an E.U. corporation. For these hypotheticals, assume that the Hague Convention is in effect in both the United States and E.U. Member States. Suppose further that the E.U. corporation lacks sufficient assets in the United States to satisfy the judgment, and the U.S. judgment-creditor must enforce the judgment in an E.U. Member State. The corporation resists enforcement based on Article 11 of the Hague Convention, which allows non-recognition of a foreign judgment if the judgment awards exemplary or punitive damages.<sup>173</sup> In each hypothetical, consider whether the identity of the factfinder, judge, or jury, is or should be relevant to the enforcing country.<sup>174</sup>

(1) A judgment against the E.U. corporation grants compensatory damages, which a judge doubles pursuant to the applicable multiplier statute. The excess damages are labeled “punitive damages.”<sup>175</sup>

(2) A judgment against the same E.U. corporation is based

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173. Article 11 provides as follows:

1. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered. 2. The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.

Hague Convention, *supra* note 5, art. 11.

174. It has been stated that the true reason underlying the European attitude against enforcement of American punitive damages awards lies in the European Union’s distrust of the U.S. jury system. For example, Lord Denning stated that U.S. juries award damages in “fabulous” amounts. *Smith Kline & French Lab. Ltd. v. Bloch*, [1983] 1 W.L.R. 730, 734 (C.A. 1982) (L. Denning M.R.). U.S. juries, however, cannot award punitive damages in “fabulous” amounts when they are constrained by statutes, case law, and constitutional principles.

175. Would there be any difference where the additional damages are designed to cover costs, expenses, and perhaps other intangibles? The Hague Convention indicates that the answer to that question is “yes.” Article 11 states that the enforcing court “shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.” Hague Convention, *supra* note 5, art. 11.

on the Civil Rights Act of 1991.<sup>176</sup> The statute contains a sliding scale cap on punitive damages whereby the amount of punitive damages is related to the size of the employer (i.e., the defendant). The judge in charge of the case consults the statute to determine the appropriate limit for punitive damages.<sup>177</sup>

(3) A judgment against the same E.U. corporation based on product liability principles. The jury finds that the defendant attempted to conceal its wrongdoing and engaged in cover-ups including the destruction of incriminating evidence. In addition to compensatory damages, the jury awards pure punitive damages, unrestrained by any statute.<sup>178</sup>

In reality, it is not the identity of the fact finder that matters most.<sup>179</sup> The enforcement of non-compensatory damages in general and punitive damages in particular rests, in part, on the type and amount of punitive damages. It logically follows that the more constrained the damages, either by statute or by judicial pronouncement, the more likely that Member States will enforce such damages for each other and the more likely that they will enforce them when they appear in judgments rendered by courts of the United States.

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176. Civil Rights Act of 1991, 42 U.S.C. § 1981 (2006).

177. The sum of the amount of punitive damages awarded in cases of intentional discrimination in employment:

Shall not exceed, for each complaining party—(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$50,000; (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$100,000; and (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$200,000; and (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$300,000.

42 U.S.C. § 1981a(b)(3)(A)–(D).

178. Although pure punitive damages are unconstrained by statute, they are not “pure”—that is, untouched by any constraints at all—because even pure punitive damages are subject to the reasonableness principles espoused by the Fifth and Fourteenth Amendments of the United States Constitution. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003); *see also supra* note 22. Under such cases as *State Farm*, the punitive damages are likely to be no more than nine times greater than the compensatory damages. *Id.*

179. Of course, the identity of the fact finder does matter for issues of institutional competence. The jury lacks the ability to compare the award it is about to hand down against other awards to ensure similarity of punishment for similar behavior. The jury is also largely unaccountable for its actions and will not feel the sting of a reversal by a higher court.

If Member States find punitive damages simply distasteful, then the U.S. judgment-creditor in each of the hypotheticals will be unable to enforce any of these judgments in the European Union. Once in effect, the Hague Convention will seal this result because it allows E.U. Member States to refuse to enforce judgments that contain elements “that do not compensate a party for actual loss or harm suffered.”<sup>180</sup> Presumably, under such a standard, Member States may refuse to enforce even punitive damages that are not contrary to the enforcing State’s public policy.

If, however, European countries most fear untrammelled jury discretion, then a Member State may be far more likely to enforce punitive damages in hypotheticals (1) or (2) because the punitive elements of those awards are constrained by statutes: by a multiplier statute in hypothetical (1) and a cap statute in hypothetical (2).

In practice, hypothetical (1) likely poses the fewest enforcement problems because the punitive damages awarded are constrained by the statute to a one-to-one ratio with respect to compensatory damages. England itself generally allows non-compensatory damages of up to a three-to-one ratio.<sup>181</sup> Thus, this award presumably would be enforced by at least England, unless England applies a double-standard of permitting punitive damages in its own jurisprudence while simultaneously denying the enforcement of another country’s punitive damages award.<sup>182</sup>

If the award doled out in hypothetical (1) had been entered by an English court originally—rather than by a court in the United States—the judgment would likely be enforced by other Member States and EFTA states based on the liberal enforcement policy of Article 33 of the Brussels Regulation and Article 26 of the Lugano Convention. Under either treaty, a

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180. Hague Convention, *supra* note 5, art. 11.

181. Gotanda, *supra* note 118, at 442 (“In England, the punitive damages award in most cases should not exceed three times the basic damages.”).

182. England may succumb to just such a double-standard: “The United Kingdom has gone so far as to pass a ‘claw-back’ statute that not only refuses to recognize foreign judgments for punitive and multiple damages, but also authorizes suits to recover any amount of the judgment already paid that was not purely compensatory.” WEINTRAUB, *supra* note 1, at 710; *see* Protection of Trading Interests Act, 1980, c. 11, § 6 (U.K.) (claw-back statute of the United Kingdom). The existence of the claw-back statute heightens the need for a revision to the Hague Convention so that England cannot treat its judgment-creditors more favorably than those haling from the United States. *See infra* Parts V–VIII.

two-to-one punitive-to-compensatory ratio found in the hypothetical appears reasonable and therefore should not be contrary—or manifestly contrary—to public policy.<sup>183</sup>

Under the Hague Convention, however, E.U. countries other than England<sup>184</sup> may legitimately decline to enforce this judgment if it issued from a U.S. court.<sup>185</sup> To sidestep this result, the clever U.S. judgment-creditor could domesticate the judgment in England and employ the Brussels Regulation or Lugano Convention to enforce the “English” judgment in another country.

Hypothetical (2) may be more problematic for the U.S. judgment-creditor, even though the judge is constrained by statute, because the cap on punitive damages is tied to the corporation’s size, not the extent of its misconduct. A larger but less culpable corporation could be subjected to a higher punitive damages judgment than would a smaller but more culpable corporation. Such an award, with only limited connection to a corporation’s blameworthiness, could run afoul of a foreign nation’s public policy.<sup>186</sup> After all, punitive damages punish; they should punish the worst behavior, not the deepest pockets. Accordingly, E.U. countries could legitimately resist enforcement even among other signatories of the Brussels Regulation and the Lugano Convention.<sup>187</sup> So much the worse for a judgment-creditor contending with Article 11 of the Hague Convention, which allows non-recognition simply because the damages are punitive, not compensatory.

Of the posited hypotheticals, case (3) creates the potential for the type of enormous punitive damages awards that E.U. Member States most fear and are most inclined to refuse to enforce. In hypothetical (3), the jury is free to impose whatever amount of punitive damages it deems appropriate, subject only

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183. A two-to-one punitive-to-compensatory ratio is not the “fabulous” amount that Member States claim to fear. *Smith Kline & French Lab. Ltd. v. Bloch*, [1983] 1 W.L.R. 730, 734 (C.A. 1982) (L. Denning, M.R.).

184. Absent a double-standard, England should enforce an out-of-country judgment that contains punitive damages that England’s courts would themselves allow. Of course, the language of the Hague Convention is lenient to the enforcing State, so England could refuse to enforce a U.S. judgment that included punitive damages simply because the judgment included punitive damages. The plain language of the Hague Convention allows for such an incongruous result. *See* Hague Convention, *supra* note 5, art. 11.

185. *Id.*

186. What runs afoul of “public policy” is discussed *supra* Part IV.A–B.

187. *See* Brussels Regulation, *supra* note 9, art. 34; *see also* Lugano Convention, *supra* note 11, art. 27.

to due process principles. Therefore, the pure punitive damages envisioned in hypothetical (3) are the least likely to be enforced by an E.U. Member State.

#### B. U.S. PUNITIVE DAMAGES JUDGMENTS MERIT ENFORCEMENT IN THE EUROPEAN UNION

Although an E.U. Member State is unlikely to enforce the punitive damages award in a situation similar to hypothetical (3), these damages should be enforced by E.U. Member States, as is clear with some revisions to the hypothetical. Assume the punitive damages award is rendered in France, with its newfound tolerance toward punitive damages,<sup>188</sup> rather than in the United States. Assume further that the damages are awarded in a ratio less than or equal to the three-to-one punitive-to-compensatory ratio tolerated in England. As long as an English court would have allowed punitive damages in a similar case, England should presumptively enforce the French judgment because it is “not manifestly contrary” to English public policy.

Of course, the French court could have given more punitive damages than the three-to-one ratio. France is not bound by England’s jurisprudence. Even assuming the French court doled out punitive damages in a ratio higher than three-to-one with respect to compensatory damages, such a judgment still should not “manifestly” violate the public policy of England. The award may exceed the English cap, but the concept of punitive damages is not foreign to England and certainly not manifestly so. For example, it is difficult to argue that while \$100,000 in punitive damages comports with public policy, \$150,000 “manifestly” does not. Thus, England should enforce the French judgment, even if the judgment is higher than that which English courts would normally tolerate.<sup>189</sup>

If the enforcing English court does decide that the French judgment is “manifestly contrary” to English public policy, it would have three options: *first*, discard the “excess” portion of the punitive damages judgment and enforce the remainder, including that portion of the punitive damages that England does not consider excessive; *second*, throw out the punitive damages portion of the award; or *third*, refuse to enforce the

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188. See France Proposal, *supra* note 136.

189. Perhaps only those Member States that completely eschew all forms of non-compensatory damages could logically claim that punitive damages per se violate public policy.

judgment in its entirety. The most sensible response seems to be the first,<sup>190</sup> although it raises the question: how much is the “excess” that manifestly violates England’s public policy?<sup>191</sup>

Assume as a further revision to hypothetical (3) that the English court grants punitive damages. The plaintiff seeks enforcement in Germany, which does not permit punitive damages and has found punitive damages violative of its public policy.<sup>192</sup> Germany could rely on Article 34 of the Brussels Regulation to resist enforcement of the punitive damages aspect of the English award. But even this may be improper for two reasons.

First, Article 34 is a safety valve to block awards *manifestly* contrary to the Member States’ laws, morals, or sense of justice. Member States generally make “sparing use of the public-policy exception.”<sup>193</sup>

Second, at the time Germany signed the Brussels Regulation, all Member States presumably knew that English law permitted punitive damages. As noted previously, Articles 33 and 36 require enforcement of foreign judgments without regard to procedural niceties or substantive review.<sup>194</sup> Article 34 seems to be the only provision in the Brussels Regulation that might block the enforcement of punitive damages awards through the exercise of its public policy exception. But that provision does not specifically address punitive damages awards and, moreover, does not require the resistance of such damages. It merely authorizes the Member States’ courts to resist enforcement of truly outlier judgments. A punitive damages judgment in a limited amount does not seem to be such an outlier judgment. It is therefore unlikely that enforcing such

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190. Indeed, as will be discussed in Part VI.B, *infra*, the Hague Convention allows countries to refuse the enforcement of a judgment “if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.” Hague Convention, *supra* note 5, art. 11. This bolsters the intuition that the most reasonable reaction to an excessive damage award is not to disavow the award in its entirety, but instead to cull down that award “to the extent” that it violates the enforcing State’s notions of fairness.

191. Obviously, punitive damages in amounts greater than three-to-one are more than English courts would ordinarily permit, but does that mean that anything in excess of three-to-one violates public policy? Manifestly so?

192. Danford, *supra* note 7, at 430. *But see* Behr, *supra* note 139, at 160 (finding that Germany does allow some non-compensatory damages in civil cases); Liptak, *supra* note 1.

193. Danford, *supra* note 7, at 430.

194. *See supra* Part IV.A.



damages would be manifestly contrary to Germany's public policy. After all, Germany willingly signed the Brussels Regulation despite the fact that, at the time of its enactment, at least England tolerated punitive damages judgments.

If the foregoing analysis is correct, then it stands to reason that if that same constrained judgment were awarded by a U.S. court instead of an English court, Germany should enforce the punitive damages judgment. After all, the punitive damages should not offend Germany's public policy more deeply simply because they were granted by a U.S. court and not an E.U. Member State's court.

Nonetheless, E.U. Member States seem to harbor grave misgivings about U.S. punitive damages awards and, because of the Hague Convention's grudging attitude toward punitive damages, the German court in this fact pattern is probably less likely to enforce the punitive damages judgment coming from a U.S. court than from an English court. Certainly, it would be easier for Germany to justify non-enforcement under the Hague Convention than it would be for Germany to do so under the "manifestly contrary" clause of the Brussels Regulation.<sup>195</sup> This result strikes a foul chord because U.S. judgments deserve to be treated with the same respect as do judgments from courts of E.U. Member States.

## VI. THE ENFORCEMENT OF U.S. PUNITIVE DAMAGES AWARDS

### A. BEFORE THE HAGUE CONVENTION

Enforcement of U.S. punitive damages awards varied in E.U. Member States before 2005, the date of the Hague Convention.<sup>196</sup> Member States sometimes used "public policy" to decline enforcement.<sup>197</sup>

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195. Hague Convention, *supra* note 5, art. 6. In an increasingly global market, courts should strive to treat judgment-creditors similarly. It is simply an accident of geography that a judgment-creditor hales from the United States, not England, or an accident of finances that the defendant lacks sufficient assets in the United States to cover the entire judgment. Such fortuity seems unfair given that a U.S. court has determined that the judgment-creditor is entitled to, and that the defendant deserves to be punished by, punitive damages.

196. Of course, the Hague Convention is not yet in effect in any country in the European Union or in the United States. *See supra* note 5.

197. *Id.* art. 9. This suggests that even if the Hague Convention had similar

In two highly publicized cases, both Germany and Italy relied on public policy to deny the enforcement of punitive damages judgments emanating from U.S. courts. In 1992, the German Bundesgerichtshof<sup>198</sup> held that enforcement of an award of punitive damages would violate German public policy.<sup>199</sup> In 2002, the Venice Court of Appeal held that a \$1 million punitive damages judgment contravened Italian public policy.<sup>200</sup>

Germany, however, has retreated from its earlier position against enforcement of punitive damages awards.<sup>201</sup> In a later case, the German Supreme Court held that damages for privacy right violations may be awarded in an amount that would deter repetition of the conduct.<sup>202</sup> Accordingly, Germany may authorize the enforcement of punitive damages awards, as long as that judgment does not go “substantially beyond that which is required for appropriate compensation for the injured person.”<sup>203</sup>

Prior to the Hague Convention, other E.U. and EFTA countries enforced U.S. punitive damages judgments, determining that the awards did not violate their public policy. A Spanish court, for example, enforced a U.S. treble damages award, even though Spain is a civil law country that does not authorize awards of punitive damages.<sup>204</sup> The court analogized

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language to the Brussels Regulation and Lugano Convention, Member States might still refuse to enforce U.S. punitive damages awards. If this is so—that is, if the liberal enforcement language of the Brussels Regulation and Lugano Convention would have the effect of blocking the enforcement of American punitive damages awards—it seems odd that the drafters of the Hague Convention chose the heavy-handed language employed in Article 11.

198. The Bundesgerichtshof is the highest appeals court in Germany for civil and criminal matters. Federal Court of Justice of Germany, <http://www.statemaster.com/encyclopedia/Federal-Court-of-Justice-of-Germany> (last visited Nov. 1, 2009).

199. Bundesgerichtshof [BGH] [Federal Court of Justice] June 4, 1992, *Entscheidungen des Bundesgerichtshofes in Zivilsachen* [BGHZ] 118 (312), 1993 (F.R.G), translated in 32 I.L.M. 1320 (1993); see also Ronald A. Brand, *Punitive Damages Revisited: Taking the Rationale for Non-Recognition of Foreign Judgments Too Far*, 24 J.L. & COM. 181, 185 (2005) (holding that punitive damages are “a function of criminal proceedings in the German legal system”).

200. See *Parrot v. Fimez S.P.A.*, Corte app. Venezia, 15 oct. 2001, n.1359, Guir. It. II 2002, 1021, translated in Ostoni, *supra* note 142, at 251–62.

201. WEINTRAUB, *supra* note 1, at 709.

202. *Id.*

203. *Id.* at 710.

204. Scott R. Jablonski, *Translation and Comment: Enforcing U.S. Punitive Damages Awards in Foreign Courts. A Recent Case in the Supreme Court of Spain*, 24 J.L. & COM. 225, 231–43 (2005). While discussing the Spanish case, Professor

the punitive aspect of the damages to Spain's moral damages.<sup>205</sup> Switzerland, a member of the EFTA, enforced a California punitive damages judgment even though Swiss law does not authorize punitive damages awards.<sup>206</sup> France reads the public policy exception narrowly and will only decline enforcement of a judgment if the judgment runs contrary to international public policy.<sup>207</sup>

The foregoing indicates that punitive damages did not need to be available in the enforcing European jurisdiction for that country to enforce U.S. punitive damages awards. These courts took seriously the notion that damages awards, even if high and imposed to punish a bad actor rather than to compensate a victim, did not necessarily violate local public policy.<sup>208</sup>

Before 2005, U.S. litigants had met with some hostility with regard to enforcement of punitive damages awards in European Union and EFTA States. But U.S. litigants also met with some success. Accordingly, scholars cautioned that the United States should enter into a multi-lateral treaty with other countries to secure enforcement of such awards.<sup>209</sup> The United States did

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Gotanda notes that the court "took notice of the fact that U.S. courts have adopted the principle of 'proportionality' in awarding punitive damages, and here the treble damages award corresponded to 'the material injuries effectively caused' and was part of the 'legal norm.'" Gotanda, *supra* note 14, at 522 (*citing* Miller Import Corp. v. Alabastres Alfredo, S.L., STS, Nov. 13, 2001 (Exequátur, No. 2039/1999) (Spain)).

205. Jablonski, *supra* note 204, at 242.

206. Brand, *supra* note 199, at 191. Of course, there are U.S. enforcement cases outside of Europe, and Brand surveys such cases in his article. He discovers that a Japanese court refused to enforce an award of punitive damages, while a Canadian court did enforce punitive damages. *Id.* Given the recent toy, baby formula, and dog food scares coming out of China, it seems that major tort cases might proceed against Chinese defendants. See Gardiner Harris, *The Safety Gap*, N.Y. TIMES, Nov. 2, 2008, at MM46. If punitive damages are handed down by U.S. court pursuant to U.S. punitive damages jurisprudence—a choice of law question beyond the scope of this Article—it is possible that enforcement proceedings will need to commence in China. Similar enforcement problems that the United States currently encounters in the European Union may be encountered in Pacific Rim countries.

207. Gotanda, *supra* note 14, at 512.

208. If this is so, the more restrictive language of the Hague Convention does have force, and that language will likely restrict such liberal enforcement in the future. The Hague Convention specifically allows an E.U. Member State to decline to enforce a judgment that contains punitive damages simply because the judgment contains punitive damages. See Hague Convention, *supra* note 5, art. 11.

209. See generally Danford, *supra* note 7, at 398. Danford explains that:

because the United States is not a party to any judgment-enforcement treaty, whenever a U.S. judgment is taken abroad for enforcement, it is subject to local laws that sometimes require the institution of a new action on the merits of the case in the forum in which enforcement is sought. It is thus clear that U.S. judgments receive less favorable treatment in Europe

enter into an agreement in June 2005. However, the Hague Convention did not turn out to be a panacea for those seeking to enforce U.S. punitive damages judgments in E.U. Member States.

#### B. AFTER THE HAGUE CONVENTION

The Hague Convention may make the enforcement situation worse for U.S. judgment-creditors.<sup>210</sup> Unlike the Brussels Regulation and the Lugano Convention, the Hague Convention not only mentions punitive damages, but it also explicitly allows countries to refuse to enforce them.<sup>211</sup> Article 11 provides as follows:

1. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.
2. The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.<sup>212</sup>

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than do judgments emanating from courts of Brussels Member States. According to one commentator, many academics across the country, as well as the U.S. State Department, believe this to be so.

*Id.* Should a new action be commenced, the distinct possibility exists that the enforcing court will find the U.S. judgment deficient in one or more respects. One can only wonder whether the U.S. judgment remains enforceable in the United States if the United States accepts the doctrine of issue preclusion with respect to foreign courts. Therefore, Ballard, *supra* note 21, at 237–38, argued that a reciprocity requirement would be “a major step forward” for the United States. Reciprocity in enforcement, however, assumes that both countries authorize similar types of damages in their judgments—and so would have to enforce the similar judgment from the other country. If the E.U. country does not hand down judgments with non-compensatory damages, then there can never be complete parity of enforcement between that country and the United States. Either that country will wind up enforcing the U.S. judgment (without the United States being required to do the same for the E.U. country), or that country will decline to enforce the U.S. judgment (because the United States does not have to enforce similar judgments from that country). Neither result is truly reciprocal.

210. See Note & Comment, *The Hague Convention on Choice of Court Agreements: Creating an International Framework for Recognizing Foreign Judgments*, 3 *BYU INT'L L. AND MGMT. REV.* 43, 65 n.112 (2006) (noting that the Hague Convention excludes the United States' use of punitive damages from recognition).

211. See Hague Convention, *supra* note 5, art. 11.

212. *Id.* The Hague Convention perhaps poses even greater problems if the word “actual” is narrowly construed. For example, future medical expenses may not be “actual loss or harm suffered” because by their very nature, they are potential loss or harm that may be suffered in the future. And how would a foreign court

By their very nature, punitive damages do not compensate a party for actual loss or harm suffered. Enforcement of punitive damages judgments may therefore be refused, notwithstanding whether the enforcing State could have handed down a similar judgment.<sup>213</sup> While courts of Member States liberally enforce judgments of other Member States' courts through the Brussels Regulation and extend liberal enforcement to EFTA courts' judgments through the Lugano Convention, judgments from U.S. courts do not receive similarly favorable treatment. Under Article 11 of the Hague Convention, England could decline to enforce a U.S. punitive damages award, even if English courts would have permitted punitive damages in the same case. If England, which clearly recognizes punitive damages and labels them as such, may refuse to enforce U.S. punitive damages awards under the Hague Convention, so too may France,<sup>214</sup> Germany,<sup>215</sup> and Italy,<sup>216</sup> which are only beginning to recognize non-compensatory damages, and so too may other Member States, which do not authorize punitive damages in their internal jurisprudence.

## VII. PROPOSAL

The United States should not have acceded to such unfavorable language in the Hague Convention, and it is unclear why it did so. The Article 11 language may have resulted from misunderstandings on both sides.

The United States did not seem to fully grasp that some European countries do recognize punitive damages, although they may be called by other names, such as "moral damages" or "*danno biologico*."<sup>217</sup> Nor did the United States appear to

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characterize an award of liquidated damages in a contract action?

213. A real question in these cases relates to the definition of exemplary and punitive damages. If capped and multiplier awards are not considered punitive within the meaning of U.S. law, do they nevertheless fall within the ban of Article 11 because they do not "compensate . . . for actual loss or harm suffered"? The answer seems to be "yes." Words may, and often do, have different meanings in different contexts.

214. France is only considering authorizing punitive damages in its Civil Code. See France Proposal, *supra* note 136.

215. Germany may have relaxed its stance against punitive damages. See *supra* text accompanying notes 135–139.

216. Dr. Corongiu has suggested that Italy has punitive damages in its CPC. See *supra* text accompanying notes 140–142.

217. See Corongiu, *supra* note 22, at 60–61; *supra* text accompanying notes 143–146.

recognize the importance of the fact that European countries permit liberal enforcement among themselves, even of judgments containing non-compensatory damages. Recall that the Member States of the European Union enacted the Brussels Regulation, whose default position requires enforcement, unless the judgment is “manifestly contrary” to the enforcing State’s public policy. The Member States extended this liberal enforcement policy to the members of the EFTA in the Lugano Convention, which only allows non-enforcement if the judgment is “contrary” to public policy. “Manifestly contrary”—even “contrary”—creates a high bar. Thus, judgments, even those containing non-compensatory damages, are likely to be enforced under the Brussels Regulation and Lugano Convention, especially considering that more and more Member States are incorporating non-compensatory, or punitive-like, damages into their laws. Even the Conflict of Laws, “Rome II” Regulation among the E.U. Member States requires enforcement of punitive damages awards unless the award is unusually excessive; otherwise, Article 6 of Rome II requires the “free movement of judgments.”<sup>218</sup>

On the other side of the negotiating table, the European Union did not give the United States enough credit for its restrictions of punitive damages through both court pronouncements and legislative acts.<sup>219</sup> Indeed, during a time when many European countries are expanding their use of non-compensatory damages, the United States is attempting to curb its punitive damages awards. Both ends appear to be moving toward the middle. Thus, it seems unfair for the European Union to liberally enforce judgments among its Member States and EFTA Member States while meagerly enforcing punitive damages judgments from the United States.

Perhaps the European Union noted these U.S. trends, but simply decided it did not need to grant more liberal enforcement of U.S. punitive damages awards. Professor Weintraub has noted that, despite the United States’ attempt to rein in

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218. Rome II, *supra* note 154, pmbl. cls. 6.

219. “[T]here are signs that the gap between the United States and the rest of the world is narrowing, as American courts and legislatures start to limit punitive awards and other countries start to experiment with them.” Liptak, *supra* note 1. One may also wonder, in today’s economic market, whether E.U. countries might impose punitive damages on foreign companies that cause immense injuries through outrageous conduct to their people. Would it thwart an E.U. country’s public policy to enforce a punitive damages award if the beneficiaries of the punitive damages were citizens of the European Union and the defendants were U.S. corporations?

punitive damages awards other countries may still be reluctant to enforce these awards.<sup>220</sup> Professor Weintraub's statement is the very reason that the United States should seek an amendment to the Hague Convention—so that other nations, particularly the powerful Member States of the European Union, cannot simply ignore the trends in the United States and continue to rely on the outdated fears of excessive and unrestrained jury verdicts or of punitive damages in general.

Another potential reason for the devastating Article 11 language is that the European Union had little to gain by allowing enforcement of U.S. punitive damages judgments. After all, the United States has been enforcing E.U. money judgments for years.<sup>221</sup> Member States thus had little reason to offer more liberal enforcement to U.S. litigants. Indeed, that is why, before the Hague Convention, the American Law Institute was drafting a federal statute that would have required reciprocal enforcement in other countries before the United States would enforce similar judgments from those countries within U.S. borders.<sup>222</sup>

Because the European Union decided not to grant liberal enforcement to U.S. punitive damages awards, while simultaneously granting liberal enforcement to Member States' punitive damages and non-compensatory damages judgments, the United States has strong equitable grounds from which to request amendments to the Hague Convention. The United States should note its internal trends to constrain punitive damages and the European Union's trends toward awarding and enforcing non-compensatory damages judgments. Based on these concurrent movements, the United States should use its

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220. Professor Weintraub recognized this conundrum when he stated that “[d]efense of punitive damages will *not* be helped by the facts that most states have, by statute or decision, placed limits on punitive awards and that the United States Supreme Court has held that a ‘grossly excessive’ award of punitive damages violates due process.” WEINTRAUB, *supra* note 1, at 711 (internal citation omitted) (emphasis added).

221. See, e.g., *Hilton v. Guyot*, 159 U.S. 113 (1895), as referenced in Danford, *supra* note 7, at 386 (“[M]ost U.S. jurisdictions readily recognize and enforce the judgments of other nations.”). However, now that Member States are beginning to authorize non-compensatory damages, it is possible that the United States may begin to decline to enforce Member States' judgments.

222. See generally RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FED. STATUTE, *supra* note 154, § 7(a) (“A foreign judgment shall not be recognized or enforced in a court in the United States if the court finds that comparable judgments of courts in the United States would not be recognized or enforced in the courts of the state or origin.”).

influence to seek an amendment of Article 11 of the Hague Convention.

At a minimum, the United States should ask to substitute the draft language of Article 11 of the 1999 Hague Convention. This draft language provides U.S. litigants a better chance of having their punitive damages awards enforced in the European Union by requiring other countries to enforce American punitive damages to the extent that punitive damages or other non-compensatory damages would be allowed in the enforcing jurisdiction.<sup>223</sup> The draft language provides: "In so far as a judgment awards non-compensatory, including exemplary or punitive, damages, it shall be recognised at least to the extent that similar or comparable damages could have been awarded in the State addressed."<sup>224</sup>

This draft language is preferable to the currently enacted draft language for the U.S. judgment-creditor seeking enforcement in an E.U. Member State for at least two reasons. First, the default requires the recognition of punitive damages awards: the judgments "shall be recognised." To the contrary, the default in the currently enacted language is "refusal" to enforce.<sup>225</sup> Second, even if the enforcement of punitive damages is not presumed under the "shall be recognized" language of the 1999 draft of the Hague Convention, England and other jurisdictions recognizing punitive damages, moral damages, and other non-compensatory damages may nonetheless be required to honor U.S. punitive damages judgments at least to the extent the non-compensatory damages might have been awarded in the enforcing jurisdiction.<sup>226</sup> The "at least" language also proves helpful to U.S. judgment-creditors because it allows E.U. Member States to enforce an award that is greater than an award that would have been doled out by the Member States' own courts. The draft language accordingly stands in marked

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223. Of course, the draft language of Article 11 would embrace the reciprocity principle so that U.S. courts would have to enforce E.U. judgments that contained non-compensatory damages to the extent that similar damages could have been awarded in the U.S. court. Hague Convention Draft Language art. 33, Oct. 30, 1999, [http://hcch.e-vision.nl/upload/wop/jdgm\\_drafte.pdf](http://hcch.e-vision.nl/upload/wop/jdgm_drafte.pdf).

224. *Id.*

225. Gotanda, *supra* note 14, at 527 (referring to the current provision as a "[c]loud on the [h]orizon" for the enforcement of U.S. punitive damages awards abroad).

226. See, e.g., Corongiu, *supra* note 22, at 60–61 (cataloguing different types of Italian damages, including the *danno biologico*, *danno morale*, *danno patrimoniale*, and *danno esistenziale*); France Proposal, *supra* note 136.



contrast to the current language of Article 11, which allows refusal simply because the award does not compensate a party for actual loss or harm suffered.<sup>227</sup>

Even under the 1999 draft language, however, U.S. judgments granting punitive damages may not fare well. Under that language, a Member State need not enforce a punitive damages award if the enforcing State does not have a comparable substantive law allowing punitive damages in a particular type of case.<sup>228</sup> Moreover, E.U. Member States could still retreat to their public policy exceptions, finding the judgment manifestly violative of their jurisprudence.<sup>229</sup> In fact, Professor Ronald Brand notes that this draft language “may, as a practical matter, be little more than another way of approaching the traditional public policy defense to recognition and enforcement of foreign judgments”<sup>230</sup> because if the enforcing State does not recognize similar damages, the draft language would permit non-enforcement of the judgment on public policy grounds.

While Professor Brand has a point, surely the 1999 draft language was more likely to lead to enforcement of U.S. punitive damages awards than is the current language, which (on its face) allows non-enforcement even if the enforcing State’s law allows non-compensatory or punitive damages. Under the draft language, for example, a European country that awards non-compensatory damages for particular violations would find it

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227. Hague Convention, *supra* note 5, art. 11.

228. See Hague Convention Draft Language, *supra* note 223, art. 25. For example, assume that a U.S. jury awards punitive damages in connection with a Title VII claim. Enforcement is then sought in England. If England does not permit punitive damages in employment discrimination cases, under the draft language, English courts would not have to enforce the U.S. punitive damages judgment because “similar or comparable damages” could not have been awarded in England. The court, however, would have the discretion to enforce the judgment, and the default would be to enforce, not to refuse enforcement.

229. Of course, we can imagine a more restrictive provision to the effect that “in so far as a judgment awards non-compensatory, including exemplary or punitive, damages, it shall be recognised *only* to the extent that similar or comparable damages could have been awarded in the State addressed.” That would clearly render the punitive damages award in the Title VII case non-enforceable if there were no comparable non-compensatory damages allowed in the enforcing State. At least the present Hague Convention does *allow* the enforcing State to enforce the punitive damages judgment even if that State would not have provided non-compensatory damages in that case or a similar case. Note that an even more restrictive provision could allow or even mandate the refusal to recognize the compensatory aspect of the judgment.

230. Brand, *supra* note 199, at 194.

difficult to deny enforcing U.S. punitive damages awards for the same type of violation. The same cannot be said for the current language of the Hague Convention.

If, however, those seeking to amend the Hague Convention find that the 1999 draft language would not allow sufficiently liberal enforcement of reasonable U.S. punitive damages awards, the United States could encourage the use of the same “manifestly contrary” standard used in the Brussels Regulation or the “contrary” language used in the Lugano Convention.<sup>231</sup> Remember that European States apply that exception to avoid enforcement sparingly.<sup>232</sup> Because the “manifestly contrary” standard is a more liberal standard of enforcement than the discarded draft language of the Hague Convention, however, the United States might face strong opposition by E.U. Member States to the inclusion of that language in any future amendments to the Hague Convention.

### VIII. CONCLUSION

Whatever amendment the United States seeks, Member States need not fear the prospect of having to enforce huge punitive damages awards for three reasons. First, the United States Supreme Court has restricted punitive damages, in most cases, to a ratio of less than or equal to nine-to-one.<sup>233</sup> Additionally, lower federal courts and state courts have further limited punitive damages judgments.<sup>234</sup> Second, Congress and state legislatures have capped punitive damages in some statutes and have created multipliers above which punitive damages may not be awarded in others.<sup>235</sup> Third, even under

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231. Since the United States liberally enforces European judgments, this would probably not dramatically affect enforcement in the United States.

232. See *supra* Part IV.A–B.

233. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (“Single-digit multipliers are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution.”); see generally *supra* Part II.a.

234. See *supra* Part II.B.

235. See *supra* Part II.C. That individual states—through their legislatures and courts—have limited punitive damages awards may not help the United States during possible future negotiations over the Hague Convention. The other side of the bargaining table might well be reviewing the U.S. federal system, not individual states’ systems. If amendments to the Hague Convention do not simply allow the enforcement of U.S. punitive damages awards in E.U. countries, the amendments should, at the very least, require a jurisdiction-by-jurisdiction analysis. That way, states with stricter laws with respect to punitive damages awards will reap the

the liberal enforcement scheme of the Brussels Regulation, no State need enforce a damage award that is “manifestly contrary” to that State’s public policy.<sup>236</sup>

What the U.S. should ask for, and what the U.S. should receive, is nothing more, but also nothing less, than the respect that European countries accord each other. Many Member States can no longer demur and repeat the mantra that their law authorizes only compensatory damages. Thus, U.S. punitive damages judgments are no longer aberrant in worldwide jurisprudence.<sup>237</sup> Even States such as Germany that do not allow non-compensatory damages have indicated that their courts may enforce some non-compensatory damages.<sup>238</sup>

In one respect, those who seek reciprocity in enforcement were once right in saying that the United States gave up a bargaining chip when its courts began liberally enforcing foreign judgments without requiring reciprocal treatment for U.S. judgments.<sup>239</sup> The United States’ liberal enforcement of money judgments probably lessened Member States’ desire to write a broad enforcement provision for judgments containing punitive damages. In another respect, however, the United States was not giving up anything in Article 11 of the Hague Convention. After all, few E.U. judgments explicitly contained punitive damages, and even fewer of these judgments needed to be enforced in the United States. Because the Hague Convention runs bilaterally, U.S. courts may refuse to enforce an E.U. Member State’s punitive damages judgment pursuant to Article 11.

The United States, however, should not stop enforcing others’ judgments; rather E.U. Member States should start enforcing U.S. judgments.<sup>240</sup> In a world with increasing amounts of cross-border transactions, it is imperative that judgments can be enforced in countries other than the one

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benefits of those stricter laws and may see their judgments enforced more readily in E.U. countries than will those states with laxer rules and correspondingly higher punitive damages awards.

236. Brussels Regulation, *supra* note 9, art. 34; *see generally supra* Part IV.A–B.

237. *See, e.g.,* Gotanda, *supra* note 14, at 517–21.

238. WEINTRAUB, *supra* note 1, at 709–10 (noting that German courts have enforced small awards of punitive damages).

239. Danford, *supra* note 7; Ballard, *supra* note 21.

240. *But see* RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FED. STATUTE, *supra* note 154, § 7(a) (“A foreign judgment shall not be recognized or enforced in a court in the United States if the court finds that comparable judgments of courts in the United States would not be recognized or enforced in the courts of the state of origin.”).

handing down the judgments. If another round of negotiations begins over the provisions of the Hague Convention, this author hopes that both sides will be more informed about the trends in punitive damages and will use that information to grant reciprocal, uniform, and liberal enforcement to all foreign judgments.