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## Two Figures in the Picture: How an Old Legal Practice Might Solve the Puzzle of Lost Punitive Damages in Legal Malpractice

John M. Bickers

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# Two Figures in the Picture: How an Old Legal Practice Might Solve the Puzzle of Lost Punitive Damages in Legal Malpractice

JOHN M. BICKERS<sup>1</sup>

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<sup>1</sup> Professor, Salmon P. Chase College of Law, Northern Kentucky University. I am indebted to those who reviewed earlier versions of this Article, especially Monroe Freedman, John Leubsdorf, and John Valauri and the rest of my colleagues at Chase. Any errors are my own, and I fully understand if readers do not agree with the views I offer here.



It is an old woman. The picture is of an old woman. She is out in the cold: her hair is wrapped in a scarf or shawl, and her chin is drawn down, seeking the warmth of a furred collar. Her drawn expression testifies to the times and the troubles she has seen. Her eyes, only barely visible under the shock of dark hair that peeks out under the scarf, are either downcast with sorrow or narrowed against the wind.<sup>1</sup>

But then a second viewer looks at the picture. She observes aloud that the picture is of a young woman. Having heard the second observer say this, the first viewer can now see the young woman as well. The old woman's tightly wrapped shawl becomes part of a festive hat. Her nose transforms into the young woman's chin line, turned demurely away from the viewer. The old woman's slightly open mouth has become a necklace. Suddenly, everything has changed; indeed, the older woman's left eye has become the younger woman's left ear. The first viewer wonders how he might ever have seen the picture as an old person. He says so out loud.

Upon hearing this, the second viewer has precisely the opposite experience. She first saw a young woman. Now, she has had the elderly figure pointed out to her. For her, the transformation simply worked in the reverse order. Chin became nose, ear became eye, and so on. Indeed, now that both

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1. The drawing may also be seen at Figure 3-22, CAROLYN M. BLOOMER, *PRINCIPLES OF VISUAL PERCEPTION* 44 (1976).

viewers have seen both images, they can easily flip back and forth, seeing either at will.

Optical illusions help illustrate how the human brain works: the ways in which the mind fuses distinct stimuli into a binocular image, decides what to focus on and what to disregard, and fills in missing details to make a coherent whole.<sup>2</sup> In many optical illusions, the mind will apply patterns to complete images, or even add movement where there is none.

But this particular optical illusion also illustrates a second principle: equipoise. There is simply no way to decide which version, the younger woman or the older, is the “correct” way to see the painting. The details are deliberately ambiguous, offering an equal number of clues to support either approach. Hence the mind’s behavior: flitting between the two ways of seeing the image, with neither able to refute the other convincingly.<sup>3</sup> One can see the old woman or the young woman, as one pleases.<sup>4</sup>

Such equipoise occasionally arises in the law as well. In some circumstances, two seemingly equally legitimate ways to characterize a legal issue will occur. Like the two women in the picture, neither will be “correct,” if that word means unquestionably the single meaning of the issue. Observers can look at the opposing doctrines from either of two compelling but mutually exclusive ways.

Courts, though, unlike viewers of optical illusions, must ultimately choose. So they select one outcome or the other, announcing their holding in ways that are as persuasive as the court can possibly make them. The behavior of courts in such situations is similar to that of an observer of the painting confidently pronouncing that, although petitioner argues that this object is an eye, it is clearly an ear. When the pronouncement comes from a state supreme court, the other courts in the state need merely look for details in future cases, knowing that what could be either eye or ear is, in this jurisdiction, an ear. Of course, the decision in *Eye v. Ear* is not binding on other states, some of which will opt for Eye. Jurisdictions arriving at the question later are left to determine whether the forces of Eye or the forces of Ear are the most persuasive. In a true equipoise situation like the one in the picture of the old or young woman, though, neither answer can fairly be described as “correct.”

This is precisely what has happened to the issue of lost punitive damages in legal malpractice cases. When the substandard performance of a lawyer has caused a client to lose a legal claim, states have long allowed

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2. *Id.* at 50-51.

3. *Id.* at 44 (“[L]ike a caged animal, your mind carries out a repetitive pattern: it goes endlessly back and forth between possible meanings, unable to confirm one view as more correct than another.”).

4. Or if one is a reader of the *Game of Thrones* series of books, the Crone or the Maiden. See GEORGE R.R. MARTIN, A FEAST FOR CROWS 197 (2006).

that client to sue for the loss. The puzzle comes when determining the amount of the loss. Some states have allowed the clients to recover not only the compensatory damages that were forfeited because of the lawyer's errors, but also the punitive damages that the jury determines would have been awarded.<sup>5</sup> Other states have rejected this decision, holding that the original punitive damages are not properly part of the legal malpractice suit, and may not be assessed against the lawyer.<sup>6</sup>

The state courts, in deciding these questions, set forth their rationales. Commentators have also weighed in, typically siding with one set of courts or the other. The arguments are patiently lined up against one another as an eye against an ear, a chin against a nose, a mouth against a necklace. Yet, the reader is not to be faulted if she is not ultimately convinced that either side is clearly right or clearly wrong. The arguments and the responses are in equipoise.

This Article will review the arguments and counterarguments about lawyer malpractice and punitive damages. Ultimately, though, no solution will appear that is dictated and compelled by logic.<sup>7</sup> Indeed, the arguments appear to be in equal balance. A solution, therefore, can only be based on appeal to a principle not internal to the question. In the case of the figure, viewers can only decide which figure is "correct" by seeking some evidence outside of the picture. If a caption states that the figure is of an old woman, that caption will resolve the issue.<sup>8</sup> Otherwise, there will simply be no closure; observers will be left to flip back and forth between images. In the area of lost punitive damages, any answer that will resolve the problem must similarly appear outside of the doctrinal areas of legal malpractice, indeed of tort and contract law generally. Without appeal to such a principle, this Article will suggest, courts and commentators have only two sets of equally compelling ways to view the problem.

The Article will consider also the related problem of malpractice by defendant's counsel.<sup>9</sup> In such cases, the second trial must determine not whether punitive damages were lost, but whether the punitive damages that were actually paid should be recoverable by the client. This version of the problem is inherently less speculative: there is no need to evaluate hypothetical juries, as an actual jury assessed the punitive damages. Yet, despite this fact, courts are no more consistent in deciding on the figure in the painting. As in the lost punitive damages context, some state courts spy an

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5. *See infra* Part II.

6. *See infra* Part III.

7. I hope this Article will convince some; I acknowledge that some will be unpersuaded.

8. At least for some viewers; others will argue with the caption, maintaining that the artist is not entitled to deference about the subject matter of the work.

9. *See infra* Part 0.

old woman and some a young one. Without some principle extrinsic to this field of law, no resolution of this problem can ever be reached.

This Article locates such a guiding principle in an admittedly primitive notion: the medieval and renaissance legal idea of the deodand.<sup>10</sup> Under the law of deodancy, inanimate objects that had been the cause of a death would be forfeited to the king.<sup>11</sup> A look at how this doctrine was used by our legal ancestors will demonstrate a fact about transactions that accounts for the equipoise problem: the determination of what is just offers a different solution depending on whose position in the transaction one is taking. The resolution of that dilemma regarding deodands will offer a policy reason that could itself resolve the lost punitive damages puzzle. Because this solution is based on a policy choice regarding the appropriate point of view for the puzzle, it is not a solution based on irresistible logic. It thus will not convince every court or commentator. Nonetheless, as a decision must be made, this principle will offer a way to make one.

#### I. THE PROBLEM: THE LAWYER'S ERROR AND THE CLIENT'S LOSS

When lawyers err, clients must pay the price. This is no different than for any other professionals: medical malpractice causes patients to suffer, not doctors. Legal malpractice differs from all other professional malpractice, though, in that the very system designed to respond to all forms of professional malpractice is the system in which legal malpractice had occurred. Thus it is that many legal malpractice actions take on a two-layer form. The “trial within a trial”<sup>12</sup> system is meant to resolve legal malpractice actions by determining whether the lawyer's malfeasance actually harmed the client.<sup>13</sup> If a lawyer did a terrible job in an unwinnable case, the client may be annoyed, but she has not been harmed. So, the outer trial in a legal malpractice action is a very conventional case involving the behavior of the lawyer: Did the lawyer owe a duty to the client, did the lawyer's conduct breach that duty, did that breach cause harm to the client, and does the lawyer have some defense to liability.<sup>14</sup> The last two questions set up the

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10. See *infra* Part VI.

11. See *infra* note 167 and accompanying text.

12. Temple Cmty. Hosp. v. Superior Ct., 20 Cal. 4th 464, 488 (Cal. 1999) (Kennard, J., dissenting) (defining such a trial as “a retrial of the underlying action in which the malpractice occurred requiring the plaintiff to show that, but for the malpractice, the outcome of the underlying action would have been different.”).

13. 4 RONALD E. MALLIN & JEFFREY M. SMITH, WITH ALLISON D. RHODES, LEGAL MALPRACTICE § 37:1 (2014). Of course, in doing so, as the authors note, it “frequently thrusts the parties, the judge and the jury into a virtual fantasy world of hypothetical questions of fact and law with assumed plaintiffs and defendants, facing theoretical claims of liability and using evidence that is not quite what it seems.” *Id.*

14. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 48 (2000).

inner trial—for the client was only harmed if the verdict below would have been in her favor. If the client would have lost her underlying case regardless of the lawyer’s breach, there was no harm.<sup>15</sup> Thus it is that in a conventional legal malpractice action, a client may prevail against her attorney only if she can demonstrate not only the breach of duty by the lawyer, but that it was more likely than not that she would have won the underlying case.<sup>16</sup> To do so necessitates presenting to the finder of fact the cause of action for which she retained the lawyer who is now the defendant. The judge or jury must be persuaded that the original would-be defendant also owed a duty to the client, breached that duty, and harmed the client.<sup>17</sup> If the client convinces the finder of fact that both the original defendant and her original lawyer had harmed her, the measure of damages for the client is the amount of the damages that the finder of fact concludes that she would have been awarded in the underlying action.<sup>18</sup> Because the lawyer’s action, or inaction, prevented the client from receiving that amount, the lawyer must now pay that amount to make the client whole.<sup>19</sup>

But what does it mean to make the client whole? The puzzle appears when the jury or judge determines that punitive damages against the original defendant were appropriate. Punitive damages, after all, are not meant to restore the client to her original position.<sup>20</sup> By definition, they are meant to punish the original defendant for the egregiousness of his conduct.<sup>21</sup> The plaintiff receives them as a response to the lawsuit, but there is no necessary

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15. The two trials generally occur together, although they may be bifurcated. *See* MALLEN ET AL., *supra* note 13, at § 37:31. The authors note that bifurcation of the two trials need not require fully separate proceedings, but may require only that the judge instruct the jury separately on the legal malpractice and underlying claim, with a third set of instructions covering both. Some courts have allowed full bifurcation, however, and at least one state statutorily allows for severance of the two parts of the trial on motion of the lawyer. *E.g.*, ALA. CODE § 6-5-579(a) (Ala. 1988).

16. For a powerful argument that the underlying action should always be separated from the trial of attorney malpractice, see Dwayne J. Hermes, Jeffrey W. Kemp & Paul B. Moore, *Leveling the Legal Malpractice Playing Field: Reverse Bifurcation of Trials*, 36 ST. MARY’S L.J. 879 (2005).

17. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53 cmt. b (2000).

18. *Id.*

19. *Id.*

20. *See* Exxon Shipping Co. v. Baker, 554 U.S. 471, 492 (2008) (“Regardless of the alternative rationales over the years, the consensus today is that [punitive damages] are aimed not at compensation but principally at retribution and deterring harmful conduct.”).

21. *Id.* at 491 (noting that these damages were labeled as “exemplary” because they were intended to respond to extraordinary wrongdoing, but also citing the 1763 Court of Common Pleas case of *Wilkes v. Wood* for the proposition that such damages were exemplary in that they were intended “to deter from any such proceeding for the future.”).

link between the plaintiff's injury and the punitive damages.<sup>22</sup> There is no part of the client's injury that demands them as compensation, which leads to the puzzle, and the dual nature of the solutions. States have either chosen to make the lawyer in the malpractice action responsible for the punitive damages,<sup>23</sup> or they have not.<sup>24</sup> Like deciding whether the figure in the drawing is an old lady or young woman, state courts have simply asserted one set of ways to see the problem before them or the other, often while giving short shrift to the alternate view of the puzzle.

## II. PUNITIVE DAMAGES ARE WHAT THE CLIENT LOST: THE LAWYER SHOULD PAY

For the states that have held the lawyer responsible for punitive damages that the client would have received, the calculus is a simple one. The client, as determined in the underlying action, would have received some amount. That amount would have included punitive damages. Thus, the punitive damages are what the client lost because of the lawyer's failure to perform his duty with due care.<sup>25</sup>

In this way, the punitive damages of the inner trial become ordinary compensatory damages in the outer trial. They have no special character, and are merely a part of the ordinary design of all malpractice cases—they make the wronged plaintiff whole.<sup>26</sup> If the lawyer's conduct was the proximate cause of the plaintiff's loss of the inner trial action, and the inner trial would have resulted in the assessment of punitive damages against the original tortfeasor, then the lawyer is now responsible to compensate his former client for that loss.<sup>27</sup> Nothing could be simpler; the figure in the picture is an elderly woman.

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22. As the Supreme Court noted, an additional theory of some early cases was that the punitive damages in fact provided compensation for types of injury not then recognized by the law. *Id.* at 491-92.

23. See *infra* Part II.

24. See *infra* Part III.

25. See, e.g., *Patterson & Wallace v. Frazer*, 79 S.W. 1077, 1083 (Tex. Civ. App. 1904) (noting that if attorney negligence caused the loss of damages “the fact that a part of the judgment which might reasonably have been expected to be recovered and collected might have been for exemplary damages would make no difference.”).

26. See *Haberer v. Rice*, 511 N.W. 2d 279, 286 (S.D. 1994) (describing the punitive damages that might have been awarded in the earlier trial as “part and parcel of the damages” that resulted from the attorney's negligence).

27. See *Patterson & Wallace*, 79 S.W. at 1083 (“It is known that judgments for damages, actual and exemplary, are recovered and collected for slander, and it will not do to say that attorneys at law are not liable to their clients for negligence in managing such cases, because of the difficulty a jury may have in arriving at the damages occasioned by such negligence, for this would absolve them from all liability for negligence in such cases.”).

Such views often elide over the fact that punitive damages are, in fact, special. Not all jurisdictions even allow them.<sup>28</sup> Many jurisdictions have limited them,<sup>29</sup> and some are considering new ways to alter the way in which they are assessed or collected.<sup>30</sup> The Supreme Court has held them to be specially limited by the Due Process Clause, in ways in which compensatory damages are not limited.<sup>31</sup>

Responding to the special nature of punitive damages, state courts that have allowed their assessment against lawyers have noted that while punitive damages serve a deterrent goal, that goal is not lost when it is the lawyers who are required to pay them. Indeed, some courts have noted, attorneys will be “motivated”<sup>32</sup> to avoid negligence in cases where punitive damages are at issue. Some opinions have even suggested that removing lost punitive damages from the realm of possible outcomes in legal malpractice would encourage lawyers to “rest easy.”<sup>33</sup>

Several of the earliest attempts to solve the puzzle of punitive damages in legal malpractice cases feature the same thinking that occurs to many first-time viewers of the old woman/young woman picture. Seeing one image first, they simply adopt it, assert its rightness, and fail ever to see any other image.

For example, in *Elliott v. Videan*,<sup>34</sup> an Arizona Court of Appeals considered whether punitive damages could be awarded against an attorney whose negligence led to dismissal for lack of prosecution of Elliott’s

28. Nebraska courts, for example, have found that they violate the state constitutional right to due process. *See Miller v. Kingsley*, 230 N.W.2d 472, 474 (Neb. 1975) (“It is a fundamental rule of law in this state that punitive, vindictive, or exemplary damages are not allowed.”). Perhaps ironically, an early pronouncement that the state legislature had exceeded their authority by enacting a statute providing for treble damages took place in a case involving attorney wrongdoing. *See Abel v. Conover*, 104 N.W.2d 684 (Neb. 1960).

29. For example, by requiring proof by clear and convincing evidence rather than a simple preponderance. *See, e.g., KY. REV. STAT. ANN. § 411.184 (2)* (West 2014).

30. Several states cap punitive damages. *See, e.g., Colorado*, which limits the amount of any exemplary damages to the amount of compensatory damages, although it provides exceptions in cases of particularly egregious conduct. *COLO. REV. STAT. ANN. § 13-21-102* (West 2013). Some states have bifurcated the question of punitive damages from that of compensatory liability. *See, e.g., Missouri*, which will separate the issues at the request of any party. *MO. ANN. STAT. § 510.263* (West 2013). Finally, several states have adopted a recovery-splitting system in which the state is entitled to large portion of any punitive damages award. *See infra* note 192 and accompanying text.

31. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) (holding that a state may establish punitive damage regimes for punishment and deterrence of illegal conduct but if “an award can fairly be categorized as ‘grossly excessive’ in relation to these interests” it will have entered “the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.”).

32. *Jacobsen v. Oliver*, 201 F. Supp. 2d 93, 102 (D.D.C. 2002).

33. *Hunt v. Dresie*, 740 P.2d 1046, 1057 (Kan. 1987).

34. *Elliott v. Videan*, 791 P.2d 639 (Ariz. Ct. App. 1990).

claim.<sup>35</sup> Ironically, the underlying case was itself a legal malpractice suit—one based on conflict of interest that involved Governor Mecham and his brothers and a business formed by Elliott, his father-in-law, and the lawyer he would later sue, Morris.<sup>36</sup> After Videan, Elliott’s lawyer in the case against Morris, negligently allowed the suit against Morris to expire, Elliott sued Videan. The trial court proceeded with the classic trial-in-a-trial format. The jury found that Morris had committed malpractice and awarded Elliott more than sixty thousand dollars in compensation and an additional \$800,000 in punitive damages.<sup>37</sup> After the jury’s award, the trial judge set aside the punitive damages portion of the award.<sup>38</sup>

The appellate court saw the issue as a simple one: What was the proper measure of damages? The answer it announced was equally simple: “[T]he tortfeasor is liable for all damages that occur as a result of the commission of the tort.”<sup>39</sup> Thus, despite the fact that the jury had not found that Videan, the second lawyer, had acted “motivated by an evil mind[.]”<sup>40</sup>—which was required to award punitive damages under state law—the jury’s award showed that they found that the first lawyer, Morris, had. Because Videan’s conduct caused Elliott to lose the punitive damages that Morris would otherwise have paid, Videan would have to pay them. There is no hint in the opinion that anything more complicated might be at issue. The Arizona court saw only an old woman in the picture, and said so loudly. Similar ability to see only one of the two women in the sketch appeared in opinions from Kansas,<sup>41</sup> Colorado,<sup>42</sup> and South Dakota.<sup>43</sup>

Other courts have shown more willingness to recognize another way to view the same facts, despite reaching the same conclusion. An example of this more nuanced view was on display in the District Court for the District of Columbia in *Jacobsen v. Oliver*.<sup>44</sup> David Jacobsen was kidnapped and held hostage for almost two years by Hezbollah, a terrorist group “funded,

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35. *Id.* at 641.

36. *Id.* at 640-41.

37. *Id.* at 641.

38. *Id.*

39. *Elliott*, 791 P.2d at 645.

40. *Id.*

41. *Hunt v. Dresie*, 740 P.2d 1046, 1046 (Kan. 1987).

42. *Scognamillo v. Olson*, 795 P.2d 1357, 1358 (Colo. App. 1990).

43. In *Haberer v. Rice*, 511 N.W.2d 279 (S.D. 1994), the Supreme Court of South Dakota evaluated a claim by the Haberer family against attorney Rice. In holding that the damages in the malpractice case might include the punitive damages lost by the attorney’s negligence, the court noted matter-of-factly that “the proper measure of damages is the entirety of the prior judgment regardless of the theory upon which the prior judgment was entered or the nature of the damages assessed thereunder.” *Id.* at 288.

44. *Jacobsen v. Oliver*, 201 F. Supp. 2d 93 (D.D.C. 2002).

supported, and controlled by the Iranian government.”<sup>45</sup> After he regained his freedom, he retained attorney James Oliver and his firm to sue the Islamic Republic of Iran.<sup>46</sup> Although he was ultimately awarded nine million dollars in compensatory damages,<sup>47</sup> he later sued Oliver because the lawyer had withdrawn his original claim for punitive damages.<sup>48</sup> Oliver had done so rather than amend it in accord with the judge’s determination that only agents or instrumentalities of a state, not the state itself, could face punitive damages under the governing statutes.<sup>49</sup>

In evaluating the request for those punitive damages now to be assessed against the attorney, the court recognized that there were “legitimate but competing policy considerations.”<sup>50</sup> It limited those considerations to two, however: The former client’s need to be made whole, which was only possible “if he can recover the entire value of the claim lost,”<sup>51</sup> versus the purpose of punitive damages, which the court described as “deterrent and punitive.”<sup>52</sup> Having set out these considerations, the court then adopted the former, noting Professor Monroe Freedman’s characterization of the issue as “not the purpose of punitive damages, but the purpose of compensatory damages, which is to give the client what she lost because of the lawyer’s negligence.”<sup>53</sup> The court even went so far as to attempt incorporation of a seemingly countervailing policy consideration, arguing that lawyers in cases with possible punitive damages would be more likely to exercise care in the handling of those cases if they knew they might be liable for any punitive damages lost through simple negligence.<sup>54</sup>

Courts taking this view of the problem predominated the early years of dealing with the lost punitive damages problem. Experts in the field of professional responsibility frequently supported this view.<sup>55</sup> When one considers also the position taken by the most widely-read treatise in the area at the

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45. *Id.* at 95-96.

46. *Id.* at 95.

47. *Id.* at 98.

48. *Id.* at 97.

49. *Jacobsen v. Oliver*, 201 F. Supp. 2d 93, 97 (D.D.C. 2002).

50. *Id.* at 100.

51. *Id.*

52. *Id.* at 101.

53. *Id.* (quoting Monroe Freedman, *Caveat Lector: Conflicts of Interest of ALI Members in Drafting the Restatements*, 26 HOFSTRA L. REV. 641, 653 (1998)).

54. *Jacobsen v. Oliver*, 201 F. Supp. 2d 93, 102 (D.D.C. 2002).

55. *See, e.g.*, Freedman, *supra* note 53, at 652 (“[T]he client should recover the lost punitive damages regardless of how the measure of damages standard in legal malpractice is phrased.”).

time,<sup>56</sup> it was fair to describe the position that lawyers bore responsibility for those damages, as one author did in 2003, as the “majority rule.”<sup>57</sup>

### III. PUNITIVE DAMAGES ARE PUNISHMENT: THE LAWYER SHOULD NOT PAY

A decade later, it is no longer at all clear that this label is accurate.<sup>58</sup> The change may have begun in New York. In the late 1990’s, a federal court reviewing New York law concluded, in a single paragraph, that state law would not support assessment of lost punitive damages against an attorney in a malpractice action.<sup>59</sup> The court almost casually announced that “[a]lthough generally a defendant attorney is liable to the plaintiff for the claim he would have recovered in the dismissed suit . . . punitive damages are not included in this general claim theory.”<sup>60</sup> The rationale was simple, and simply put: “[I]f the purpose of punitive damages in the dismissed action was to punish Titan [the original defendant], it is illogical to hold Defendant liable for those damages. Having Defendant pay punitive damages

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56. MALLEN ET AL., *supra* note 13 (quoted in Freedman, *supra* note 53, at 652) (“If the client should have recovered exemplary damages in the underlying action but for the attorney’s wrongful conduct, then such a loss should be recoverable in the malpractice action as direct damages.”).

57. Lonn Weissblum, *A Modest Proposal for Classifying Lost Punitive Damages in a Legal Malpractice Case: Look to the Deceased Tortfeasor for Guidance*, 27 J. LEGAL PROF. 67, 71 (2003).

58. Indeed, preeminent treatise-writers Mallen and Smith noted the change in the law. Although earlier editions had, as Professor Freedman has noted, announced forthrightly that malpracticing attorneys were a proper source for compensation for lost punitive damages, they subsequently took a different view, as they now note the split among the courts. *See* Freedman, *supra* note 56; MALLEN ET AL., *supra* note 13, at §21.7 (“There is jurisdictional disagreement about whether to allow a cause of action for the failure to recover punitive damages or for the imposition of such damages upon a client. The issues are resolved based on a causation analysis, and the disagreement is whether cause-in-fact or proximate cause analysis controls.”). Although the Restatement notes that jurisdictions differ on recoverability, it goes on to note that “such recovery is not required by the punitive and deterrent purposes of punitive damages.” This is because “[c]ollecting punitive damages from the lawyer will neither punish nor deter the original tortfeasor and calls for a speculative reconstruction of a hypothetical jury’s reaction.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53 cmt. h (2000). John Leubsdorf, the primary drafter of the malpractice sections of the Restatement, has noted that he agreed with the introduction of this provision because of the trouble that punitive damages were already in, and their status as an exceptional remedy. E-mail from John Leubsdorf, to author (Jun. 19, 2014, 08:55 EST) (on file with author).

59. *Cappetta v. Lippman*, 913 F. Supp. 302, 306 (S.D.N.Y. 1996).

60. *Id.*

would not deter future violations . . . by Titan.”<sup>61</sup> The only person the court could see in the picture was a young woman.<sup>62</sup>

It was only later, in California, that a court acknowledged that there might be two figures in the picture, and offered a theory for preferring one. For in California, appellate courts in separate jurisdictions had reached opposite answers to the question of whether lost punitive damages were recoverable in legal malpractice actions.<sup>63</sup> To answer the question, the Supreme Court of California took on a non-opt-out class action lawsuit in which some class members had objected to the settlement term dismissing punitive damage claims with prejudice.<sup>64</sup>

The unusual procedural footing would have allowed the court to avoid the direct resolution of the lost punitive damages question had it wished—indeed, a concurrence and dissent by three justices would have limited the holding to this relatively rare class action punitive damages context, rather than deciding once and for all whether punitive damages would be recoverable.<sup>65</sup>

Instead, the majority took a broader view, treating the problem as one involving all lost punitive damages.<sup>66</sup> The court did not reject the older view that a proper measure of damages in legal malpractice was the loss

61. *Id.*

62. Four years later, a New York court’s one-page affirmance of a dismissal accepted this reading of New York law, citing the “illogical” nature of assessing lost punitive damages against an attorney. *Summerville v. Lipsig*, 270 A.D.2d 213 (N.Y. App. Div. 2000).

63. *Compare Merenda v. Superior Court*, 4 Cal. Rptr. 2d 87, 94 (Cal. Ct. App. 3d Dist. 1992) *disapproved of by* *Ferguson v. Lief, Cabraser, Heimann*, 69 P.3d 965 (Cal. 2003) (allowing recovery of punitive damages because “[i]n the malpractice action, such damages are compensatory, not punitive.”) *with Piscitelli v. Friedenber*, 105 Cal. Rptr. 2d 88, 107 (Cal. Ct. App. 4th Dist. 2001) (disallowing such recovery because “[i]t is incorrect to characterize a punitive damage claim as a ‘loss’ . . . award of punitive damages, though perhaps justified for societal reasons of deterrence, is a boon for the plaintiff.”).

64. *Ferguson*, 69 P.3d at 966. At issue in *Ferguson* was a mass tort following the improper release from a Union Oil Company of California (Unocal) refinery of hydrogen sulfide and a toxic chemical named Catacarb. In supervised settlement proceedings, class counsel agreed to dismiss the punitive damages class claims as part of an agreement garnering eighty million dollars for compensation of personal injury and property damage claims. The settlement master, a retired judge, found that the agreement’s terms were reasonable. When eight of the twelve thousand members of the class objected, the trial court dismissed their objections, finding that settlement achieved “the public’s interest in punishing Unocal for its conduct . . . and in deterring Unocal from future such conduct.” *Id.* at 966-68.

65. *Id.* at 974-75 (Kennard, J., concurring and dissenting). Justice Kennard reasoned that the public policy favoring settlement of class action lawsuits sufficed to resolve this more limited version of the question. “If we permitted all dissident members of a class to pursue a malpractice action against class counsel for punitive damages relinquished by settlement, attorneys would have little incentive to bring class actions and even less incentive to settle them.” *Id.* at 975.

66. *Id.* at 969.

caused by the attorney; it did not even reject the use of a but-for test to determine the extent of the injury.<sup>67</sup> Instead of stopping there, however, the court focused on whether the lost punitive damages were proximately caused, as well as being caused-in-fact, by the lawyer's conduct.<sup>68</sup> It answered that question in the negative, finding that proximate cause was "related not only to the degree of connection between the conduct and the injury, but also with public policy."<sup>69</sup> And public policy, the court held, weighed decisively against recovery by the plaintiff because "the attorney did not commit and had no control over the intentional misconduct justifying the punitive damages award."<sup>70</sup> The court also found that the assessment of such damages in the trial-within-a-trial would be too speculative, as the assessment of punitive damages under California law was not a matter of right,<sup>71</sup> and hence was a subjective determination. Thus, the jury would be asked to find, not what appropriate punitive damages were, but what an earlier jury would have found the appropriate level of punitive damages to be, which the court called "a moral judgment."<sup>72</sup> The majority recognized, too, that settlement of class action cases, at least those in which forfeiture of a claim to punitive damages was a settlement term, would be much more difficult if lawyers could be held liable for them later.<sup>73</sup>

The court noted two further reasons for denying the assessment of lost punitive damages.<sup>74</sup> First, the court observed, the legal standards for compensatory and punitive damages differed under California law.<sup>75</sup> While the former were judged under a preponderance of the evidence standard, the latter required the proof by clear and convincing evidence.<sup>76</sup> To ask a single jury to apply two distinct standards, nesting one within the other, the court noted, required "mental gymnastics."<sup>77</sup>

The final reason the court announced might be the most astonishing. The court noted that a rule allowing recovery of lost punitive damages in legal malpractice actions "may exact a significant social cost."<sup>78</sup> The cost

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67. *Ferguson v. Lieff, Cabraser, Heimann*, 69 P.3d 965, 969 (Cal. 2003).

68. *Id.*

69. *Id.* at 969 (quoting *PPG Industries, Inc. v. Transamerica Ins. Co.*, 20 Cal. 4th 310, 316 (Cal. 1999)).

70. *Id.* at 970.

71. *Id.* at 971.

72. *Ferguson v. Lieff, Cabraser, Heimann*, 69 P.3d 965, 971-72 (Cal. 2003).

73. *Id.* This was the major point of agreement with the separate opinion. *See id.* at 974 (Kennard, J., concurring and dissenting).

74. *Id.* at 972.

75. *Id.*

76. *Ferguson v. Lieff, Cabraser, Heimann*, 69 P.3d 965, 972 (Cal. 2003).

77. *Id.* (quoting *Wiley v. County of San Diego*, 79 Cal. Rptr. 2d 672, 679 (Cal. 1998)).

78. *Id.*

described by the court might well be described as inappropriately parochial—the majority cited the increased cost of legal malpractice insurance, the development of defensive law practices, and the financial burden on attorneys.<sup>79</sup> Although the court did suggest that such impacts on the legal profession “would probably make it more difficult for consumers to obtain legal services,”<sup>80</sup> it confessed that neither the parties nor the amici had supported this claim with any “concrete evidence.”<sup>81</sup> Yet, despite the lack of evidence, the court decided, it was “unwise to inflict the risk” on the legal profession and its potential clients.<sup>82</sup> The apparently self-serving nature of this proclamation did not seem to trouble the court, which is unfortunate. A more frank view of the nature of malpractice compensation would admit that this “significant social cost” is true in absolutely every area of professional practice.<sup>83</sup> If it is too grave a risk to impose liability on lawyers for their errors because it might affect their practice, it is difficult to see why it would not be similarly grave to impose such liability on doctors, therapists, accountants, or any other group of professionals offering a service to clients.<sup>84</sup>

Additional states subsequently confronting this question have generally chosen the California and New York model over that offered by Arizona and South Dakota. In 2006, the Illinois Supreme Court weighed in on the question, noting that it was one “on which reasonable minds can certainly disagree.”<sup>85</sup> The court followed the lead of California, though, because although plaintiffs who lost punitive damages would not receive as much money as they would have absent legal malpractice, “[c]ompensating plaintiffs . . . is but one of several factors that must be balanced” in malpractice cases, and “[t]here is no reason in logic or the law why it should be given

79. *Id.* at 972.

80. *Id.*

81. *Ferguson v. Lieff, Cabraser, Heimann*, 69 P.3d 965, 973 (Cal. 2003).

82. *Id.*

83. It is also quite possible that the risk of incurring this cost is vanishingly small. See Charles Marshall Thatcher, *Recovery of “Lost Punitive Damages” as “Compensatory Damages” in Legal Malpractice Actions: Transference of Liability of Transformation of Character?*, 49 S.D. L. REV. 1, 2 (2003) (“Considering how infrequently the question of attorney liability for lost or imposed punitive damages has arisen in the past hundred years, the majority’s concern about the adverse impact that sanctioning such liability might have on the cost, coverage, and availability of professional liability insurance appears to be unwarranted.”).

84. Among the states that have subsequently aligned with the reasoning of the *Ferguson* court, the author can find none that refer to this rationale. Perhaps its possible unseemliness is to blame.

85. *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 856 N.E.2d 389 (Ill. 2006). The majority acknowledged other jurisdictions, and the dissent in the instant case, as demonstrating that “sound arguments can be made for both sides of the issue.” *Id.* at 417.

preeminent effect.”<sup>86</sup> As in *Ferguson*, the court relied on the argument that punitive damages were designed to punish and deter, and held that the payment of them by some other party would remove the punitive damages from their “doctrinal moorings.”<sup>87</sup>

Recently, Kentucky joined the list of states adopting the New York-California solution to the problem of lost punitive damages.<sup>88</sup> Brenda Osborne’s suit against the pilot who had crashed his plane into her house was dismissed on an unopposed summary judgment motion because her attorney had filed it a full year after the statute of limitations had run. She then sued her attorney, both for compensatory and punitive damages in the initial case, as well as attorney fees, mental anguish, and punitive damages stemming from the representation itself.<sup>89</sup>

The Kentucky Supreme Court began by noting that jurisdictions had taken alternate views of the problem.<sup>90</sup> The court acknowledged that the choice of which figure to see in the picture boiled down to whether the underlying punitive damages should be “converted to compensatory damages,” or whether this conversion should be “prohibited because the purpose of punitive damages would not be advanced.”<sup>91</sup> It then selected the latter view as more in keeping with Kentucky law “[b]ecause of our longstanding case law noting the purpose of punitive damages.”<sup>92</sup>

#### IV. THROUGH THE LOOKING GLASS: THE RELATED PROBLEM OF PAID PUNITIVE DAMAGES

A twist on the problem of lost punitive damages occurs when the plaintiff in the legal malpractice action was not the failed plaintiff in the original action, but the defeated defendant. While the complaints are similar, enough differences exist to cast an interesting relief on the arguments over lost punitive damages. The former defendant, after all, is not complaining about speculative dollars that would have flowed to him if his lawyer had met professional standards; instead, his claim is that actual dollars that he lost would remain his but for the substandard attorney performance.

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86. *Id.*

87. *Id.* An Ohio appellate court followed suit four years later, commenting favorably on the *Ferguson* observation that lost punitive damages required “analytical gymnastics[.]” *Friedland v. Djukic*, 945 N.E.2d 1095, 1100 (Ohio Ct. App. 2010). The original trial had featured the odd result of a jury verdict, to which Djukic’s counsel did not object, which found in favor of punitive damages but set the amount at zero dollars. *Id.* at 1059.

88. *Osborne v. Keeney*, 399 S.W.3d 1 (Ky. 2012).

89. *Id.*

90. *Id.* at 19.

91. *Id.*

92. *Id.*

In one early case in this area, the Supreme Court of Kansas uncoiled a complicated case in which a former defendant sued his lawyers for their representation of him more than a decade earlier.<sup>93</sup> Hunt, as the sole owner of Construction and Development, Inc., brought two suits against another corporation, owned in part by his former partner, and former litigation opponent, Sampson.<sup>94</sup> After two years he dismissed both lawsuits, at which point Sampson sued for malicious prosecution, and won awards of twenty thousand dollars compensatory and \$600,000 punitive damages.<sup>95</sup>

Hunt then sued his attorneys, arguing that their malpractice was responsible for the verdict in the malicious prosecution lawsuit.<sup>96</sup> In resolving many of the issues that had arisen in the case at trial, the Kansas Supreme Court dealt in an almost perfunctory fashion with the punitive damages question. It first quoted the Court of Appeals' resolution of the issue:

The damages Hunt had to pay under the *Sampson* judgment included damages called punitive damages from the vantage point of that lawsuit. From the vantage point of *this* lawsuit, should Hunt be successful, all the damages are simply those which proximately resulted from his attorneys' negligence; they are no longer properly called punitive damages.<sup>97</sup>

The supreme court then confirmed its agreement with the lower court, holding that “[b]ut for the legal malpractice, the client would have had no judgment against him.”<sup>98</sup> Therefore, in a case in which a lawyer negligently failed to raise a statute of limitations defense “with the result being a judgment for actual and punitive damages against the client, the failure to raise the defense is the *entire* cause of his damage.”<sup>99</sup> The use of the term *entire* is dramatic: By its use, the court separated the client from responsibility for his misconduct that prompted the assessment of the punitive damages. Because he might, in different circumstances, have avoided paying them, he has no more role in causing them. While an ordinary sort of comment in the case of lost punitive damages, this observation is startling in the case of a defendant's counsel committing malpractice. After all, while it is true that the lawyer's failure to assert the statute of limitations allowed the award of damages to take place, it is also true that it was entirely the defendant's underlying conduct that justified the award of punitive damages. Indeed, the

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93. Hunt v. Dresie, 740 P.2d 1046, 1057 (Kan. 1987).

94. *Id.* at 1050.

95. *Id.* at 1051.

96. *Id.*

97. *Id.* at 1057 (emphasis in original).

98. Hunt v. Dresie, 740 P.2d 1046, 1057 (Kan. 1987).

99. *Id.* (emphasis added).

very purpose of such damages was to punish the defendant and deter similar behavior by similarly situated people.

While the litigation in *Hunt* was proceeding, five investors in Colorado were suing American Tool and Grinding, alleging fraud in the sale of machine tool distributorships.<sup>100</sup> Robert Olson defended American Tool through a trial that ended with the defendants being assessed over two hundred thousand dollars in compensatory damages and more than four times that amount in punitive damages.<sup>101</sup> The co-founders of American Tool subsequently sued Olson, arguing that he had represented them jointly, despite their having potentially conflicting interests and that his failure to evaluate properly their liabilities prevented them from settling the case before judgment.<sup>102</sup>

In finding that the former defendants could, in fact, sue their lawyer for the punitive damages that they had been required to pay, the Colorado court was succinct. The court set forth a simple logical equation. The major premise was that the initial trial's findings set the amount of the damages to be at issue in the legal malpractice case.<sup>103</sup> The minor premise was that at the initial trial, the damages had included punitive damages.<sup>104</sup> The inevitable conclusion was that the legal malpractice action could take into account the punitive damages assessed and paid earlier.<sup>105</sup> The issue was simple and straightforward; there was only one woman in the picture, and she was young.

An equally simple but opposite view appeared more than a decade later in a Georgia court.<sup>106</sup> After a production and recording studio was found liable for both compensatory and punitive damages when sued by a former partner, the studio sued its law firm, alleging professional negligence caused the result at trial.<sup>107</sup>

The trial court dismissed the claim for recovery of punitive damages, noting that "the plaintiffs' own conduct and not legal malpractice was the

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100. *Scognamillo v. Olson*, 795 P.2d 1357, 1358 (Colo. App. 1990).

101. *Id.*

102. *Id.* at 1359.

103. *Id.* at 1361 ("[I]f the defendant attorney's negligence results in entry of a judgment when there otherwise would have been no judgment, the proper measure of damages is the entirety of the prior judgment regardless of the theory upon which the prior judgment was entered or the nature of the damages assessed thereunder.").

104. *Id.* ("It is true that, at least as to plaintiff Faircloth, the claimed damages included his liability under the *Alling* judgment for punitive damages.").

105. *Scognamillo*, 796 P.2d at 1361. ("Thus, the punitive damages assessed in the underlying case are part and parcel of the damages plaintiffs suffered as a result of defendants' alleged negligence.").

106. *Paul v. Smith, Gambrell & Russell*, 599 S.E.2d 206 (Ga. Ct. App. 2004).

107. *Id.* at 208. The alleged malpractice included failure to call a particular witness and a conflict of interest.

sole cause of the award of punitive damages in the underlying case.”<sup>108</sup> The Georgia Court of Appeals agreed, noting the purpose of punitive damages “is to penalize, punish, or deter the defendant and not the conduct[.]”<sup>109</sup> and adding that under Georgia law, “[p]unitive damages as a personal tort action are nonassignable.”<sup>110</sup>

The clash between these cases illustrates a greater truth hinted at in the lost punitive damages context. There appears to be no way to choose which legal conclusion is “correct.” The Colorado court was right in that the damages the client suffered because of attorney malpractice included the assessed punitive damages. The Georgia court was similarly correct in that it was the behavior of the defendant at the initial trial that was found to be worthy of penalty, punishment, or deterrence. Each of these courts set forth a compelling way to view the problem, and neither appears inherently more or less logical or accurate than the other. Intriguingly, each also utterly ignored the countervailing arguments, similar to what has frequently happened in courts deciding the more common lost punitive damages version of the problem. Each court announced that it saw a figure in the picture, and described whether it saw a young woman or an old woman. Reading both opinions, and being aware that each figure appeared to one of the courts, there is seemingly no objective way for viewers to determine which is right. There is seemingly no objective way to decide whether the picture depicts an old woman, or a young one.

## V. EQUIPOISE

Cases considering lost or inappropriately paid punitive damages in legal malpractice, then, tend to follow one of two models. Either they focus on only one set of arguments, apparently unable even to discern the trace of another face in the picture,<sup>111</sup> or they note the presence of arguments on each side, and then simply announce a preference.

In the Illinois case prohibiting the assessment of lost punitive damages, the latter technique by the majority served to invigorate the dissent.<sup>112</sup> Because the majority had accepted the fact that “[d]isallowing lost punitive

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108. *Id.*

109. *Id.* at 211.

110. *Id.*

111. This, too, mirrors the phenomenon of optical illusions like the old woman and young woman: the brain is simply unable to process both ideas simultaneously. *See, e.g.*, BLOOMER, *supra* note 1, at 37 (“Psychologists generally agree that both views cannot be perceived simultaneously. That is, although you see different meanings in turn [creating an overall ambiguity], at any given instant you can see only one meaning.”).

112. *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 856 N.E.2d 389, 419 (Ill. 2006) (Freeman, J., concurring in part and dissenting in part).

damages means that plaintiffs in legal malpractice actions may not receive as much money as they might have if the underlying action had been handled properly,”<sup>113</sup> the dissent desired a fuller justification than it ultimately received. Indeed, the dissent noted that readers would expect “a thorough discussion of the reasons why this court is going to allow legal malpractice plaintiffs to be candidly undercompensated.”<sup>114</sup> Instead, the majority merely focused on the fact that punitive damages were designed to punish a wrongdoer, and that had not been the attorney.<sup>115</sup> The dissent, on the other hand, was more moved by the fact that it was “indisputable” that the attorney’s malpractice “deprived Tri-G of a punitive damages award and that Tri-G will not receive all sums to which it was entitled in the underlying case unless Burke [the attorney] is directed to pay an amount equal” to the lost punitive damages.<sup>116</sup>

It does not appear, though, that the Illinois Supreme Court had deliberately hidden any potential supporting argument in justification of its result. The majority simply found the idea that punitive damages were designed to punish defendants more important than the idea that compensatory damages exist to make plaintiffs whole. The dissent took the opposite view. The dissent was quite right in complaining that the majority could point to no compelling argument for preferring the former characterization over the latter. It is equally true, however, that the dissent gave no corresponding argument for preferring the compensation of an injured plaintiff over the punishment of an attorney whose malpractice did not rise to the level of wrongfulness that would independently justify punitive damages. Each simply found one image in the picture to be more natural and obvious, while the other made for that side of the court only a secondary, and less important, appearance.<sup>117</sup>

Indeed, that phenomenon seems to be true about almost all of the offered rationales given to justify decisions on the lost punitive damages question—they are equally strong and equally weak. Courts and scholars who disagree with a particular answer to the question can point quite easily to a countervailing reason to each one presented.

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113. *Id.* at 417.

114. *Id.* at 419 (Freeman, J., concurring in part and dissenting in part).

115. *Id.*

116. *Id.*

117. Similarly, in the Kentucky case holding lost punitive damages to be non-recoverable, one Justice wrote separately to object to that part of the decision. He argued that the question was phrased wrongly, as the claim in legal malpractice was only for compensatory damages. *See Osborne v. Keeney*, 399 S.W.3d 1, 24 (Ky. 2012) (Venters, J., concurring in part and dissenting in part) (“The Majority errs because Osborne does not seek to impose punitive damages upon Keeney for Quesenberry’s conduct. That aspect of her complaint is not a claim for punitive damages; it is a claim for compensatory damages.”).

As noted earlier, the California Supreme Court has given the fullest argument to date for excluding lost punitive damages from legal malpractice actions.<sup>118</sup> The court in *Ferguson* articulated five reasons, each arguably independently justifying the result in the case. Yet to each reason one can set a countervailing view of the problem. In no case does either hold an edge in logic that would support an observer pronouncing it the one right answer.

Setting aside for a moment the public policy consideration,<sup>119</sup> which is at the heart of this dispute, we can note that the other four rationales provided by the *Ferguson* court do not really compel the viewing of either figure exclusively in the picture. The first of these is the court's denunciation of assignment of punitive damages in a trial-within-a-trial as too speculative for a jury.<sup>120</sup> Of course, as one commentator noted, the very notion of a trial-within-a-trial calls for a jury to determine what an earlier, hypothetical jury would have done in a particular case.<sup>121</sup> That being the case, the entire proceeding is built on speculation. It is difficult to understand why one component of the earlier jury's behavior would be any more speculative in this situation than any other.

A deeper consideration of the words the court used in *Ferguson* shed light on this assertion, but only by making the problem even more disturbingly impractical. The court noted that what separated the determination of liability for compensatory damages from punitive damages in the underlying trial was that only the former were "objective" in nature.<sup>122</sup> The court characterized punitive damages as the expression of "moral condemnation," which was "inherently subjective."<sup>123</sup> If the court meant to use "subjective" in the individualistic way it is normally used in the law,<sup>124</sup> it was announcing that the existence and size of punitive damages in any given setting were entirely, and rightly, randomized by the jury pool process. This may well be true; cynics would certainly embrace it. As a pronouncement by the highest judicial body in a state, however, it creates suspicion about the entire enterprise of punitive damages. Why should the legal system counte-

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118. See *supra* notes 64–82 and accompanying text.

119. *Ferguson v. Lief, Cabraser, Heimann & Bernstein*, 69 P.3d 965, 970 (Cal. 2003).

120. *Id.* at 971.

121. Thatcher, *supra* note 83, at 29.

122. *Ferguson*, 69 P.3d at 971.

123. *Id.*

124. BLACK'S LAW DICTIONARY 1465 (8th ed. 2004) (giving as the first definition of *subjective*: "Based on an individual's perceptions, feelings, or intentions, as opposed to externally verifiable phenomena.").

nance an overtly lottery-like system under the guise of compensation for the injured?<sup>125</sup>

If, though, the use of subjective is meant to be more subtle, merely allowing for the vicissitudes of individual finders of fact, then Professor Freedman's characterization seems exactly right. He has noted that

[I]t is pointless to contend that a punitive damage award "calls for a speculative reconstruction of a hypothetical jury's reaction." The same is true in any lawyer malpractice case involving a lost claim in which it is necessary to reconstruct what a hypothetical jury would have found with regard to liability and compensatory damages.<sup>126</sup>

Indeed, it is somewhat ridiculous to announce that it asks too much of a jury to reconstruct what an earlier jury would have done with the punitive damages question, when reconstruction of what the earlier jury would have done is precisely the primary role of the jury in a legal malpractice setting. There is simply no difference, in regard to the speculative nature of the decision, between the questions of punitive and compensatory damages.

The third rationale offered by the *Ferguson* court was that asking a jury to decide two questions with two distinct standards of proof was simply too hard.<sup>127</sup> The "mental gymnastics" required to determine punitive damages in the underlying case by one standard, and compensatory damages in the legal malpractice case by another, would be "difficult to comprehend[,] much less execute."<sup>128</sup> The court noted that under California law this would require the jury to find by a preponderance of the evidence that the attorney's malpractice had prevented the hypothetical jury from finding by clear and convincing evidence that punitive damages were appropriate. This idea of having a standard-within-a-standard, in a trial-within-a-trial, was simply too much for the California Supreme Court to put on the shoulders of a jury.

This framing of the issue, though, obscures the basic notion that in every case involving punitive damages under California law, the jury will

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125. Indeed, some practitioners have observed growing discomfort with this aspect of litigation. See, e.g., Victor E. Schwartz, Mark A. Behrens & Cary Silverman, *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, 534 (2003) ("Our experience has been that the public wants to see egregious conduct punished, but people feel uneasy about making a particular plaintiff an overnight millionaire (or billionaire) for acting as a 'private attorney general.'").

126. Freedman, *supra* note 53, at 653.

127. *Ferguson*, 69 P.3d at 972.

128. *Id.* (quoting *Wiley v. County of San Diego*, 966 P.2d 983, 990 (Cal. 1998)).

be asked to perform precisely these mental gymnastics. A California jury must always use preponderance of the evidence as the standard for liability, assessing punitive damages only if they subsequently determine the requisite level of defendant wrongfulness—“oppression, fraud or malice”—by clear and convincing evidence.<sup>129</sup> It is true that a legal malpractice jury would have to use a standard-within-a-standard. It is equally true that every California jury tasked with considering punitive damages must do precisely the same thing. As one commentator noted, this alleged difficulty “does not appear to be any greater than the pragmatic difficulty the trier of fact in the underlying action would have had.”<sup>130</sup> Thus the claim either proves too much—that juries should never be trusted with the question of punitive damages—or nothing at all. Of course, this flaw in the argument does not itself show any reason why lawyers should be liable for lost punitive damages, merely that it does not show that they should not be so liable. So here, too, the argument for one characterization of the problem is no greater than the other.<sup>131</sup>

The next, and probably most compelling, reason for the *Ferguson* court’s decision was that this particular action arose in the class litigation context, and specifically as a settlement in which claims for future punitive damages were forfeited by class members.<sup>132</sup> This rationale was compelling enough that the court was unanimous on this point; the concurring and dissenting opinion concurred on precisely this point,<sup>133</sup> but would have limited the ban on lost punitive damages to the class action context.<sup>134</sup> All agreed that compelling public policy arguments favored the consideration of punitive damages in mandatory class actions. Such actions prevented the unfairness to potential plaintiffs of turning the matter into a race to the courts, in which early plaintiffs might receive a punitive windfall to the exclusion of later plaintiffs.<sup>135</sup> On the other side of the balance, such actions prevented the equally unfair result of punishing one defendant on multiple occasions for the same misconduct.<sup>136</sup> Even one of the most pronounced critics of the

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129. *Id.* at 972.

130. Thatcher, *supra* note 83, at 17.

131. But also no weaker. Adding the complexity of a standard-within-a-standard into a legal malpractice case does not improve those cases in any obvious way.

132. *Ferguson*, 69 P.3d at 972.

133. *Id.* at 975 (Kennard, J., concurring and dissenting) (“If we permitted all dissident members of a class to pursue a malpractice action against class counsel for punitive damages relinquished by settlement, attorneys would have little incentive to bring class actions and even less incentive to settle them.”).

134. *Id.* (“[L]eaving for another day” the question of lost punitive damages outside of the class action context).

135. *Id.* at 972.

136. *Id.* It is possible, though, that proper instruction by the trial court could prevent this problem. See *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (“[T]he Consti-

*Ferguson* opinion seemed to have conceded that it was rational to prohibit the recovery of lost punitive damages in settings such as this.<sup>137</sup>

The dissent and Professor Thatcher may have been overgenerous on this occasion, however. If one accepts the framing offered on behalf of those arguing in favor of recovery generally, it is difficult to see why any of the arguments should yield in this instance. If the lawyer's error has transformed punitive damages in the initial matter into compensatory ones, there is no reason that should not be so when the ultimate victims of the lawyer's malpractice are many in number. Indeed, if the deterrence of attorneys by the imposition of lost punitive damages is justifiable at all, it might be especially so in the class action context; after all, it is in class actions where lawyers are least subject to control of the objectives of the litigation by clients. The certification of a class creates a degree of freedom of movement for lawyers not present in other settings.<sup>138</sup> With such freedom comes the possibility of its abuse, and fears that counsel for class plaintiffs are putting their own interests ahead of their clients are manifest in the literature.<sup>139</sup> Removing the possibility of subsequent recovery of lost punitive damages in this context would seem to increase the possibility of bad behavior by attorneys.

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tution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties . . . .").

137. Thatcher, *supra* note 83, at 18 (describing the prohibition of such damages in class action cases as "the most persuasive basis" for the majority opinion).

138. The Model Rules of Professional Conduct, in dividing the authority of the lawyer and client, grant to the client control over "the objectives of representation," and include the directive that the "lawyer shall abide by a client's decision whether to settle a matter." MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2013). This is not possible in the class action setting, and so the federal rule governing class actions shifts this duty to the court, allowing the court to approve a binding settlement of a class action only if it finds that the settlement is "fair, reasonable, and adequate." FED. R. CIV. P. 23(e)(2). As Judge Weinstein has noted, this leaves an inherent problem, in the inability of the clients meaningfully to check the potential danger that the lawyer seeks a settlement for personal financial interest. See Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 504 (1994) ("Where a single lawyer represents one or a few clients, the lawyer's obligation to follow the clients' directions usually controls the tendency to urge settlement in order to recover a quick fee" but in class action settings "the lawyer acts on behalf of a group that cannot effectively control the lawyer's conduct of the litigation."). See also Michael D. Ricciuti, *Equity and Accountability in the Reform of Settlement Procedures in Mass Tort Cases: The Ethical Duty to Consult*, 1 GEO. J. LEGAL ETHICS 817, 829 (1988) (arguing that there "exists no set of ethical rules to guide the conduct of class action attorneys nor any mechanism to approximate the attorney-client relationship like that existing in other types of cases.").

139. See, e.g., David J. Kahne, *Curbing the Abuser, Not the Abuse: A Call for Greater Professional Accountability and Stricter Ethical Guidelines for Class Action Lawyers*, 19 GEO. J. LEGAL ETHICS 741 (2006); Natalie C. Scott, *Don't Forget Me! The Client in a Class Action Lawsuit*, 15 GEO. J. LEGAL ETHICS 561 (2002).

The final reason the *Ferguson* majority offered in support of its decision was the concern that there would be a societal cost from subjecting attorneys to lost punitive damages in malpractice cases.<sup>140</sup> The court noted that such a decision “would likely increase the cost of malpractice insurance.”<sup>141</sup> This, in turn, “would probably make it more difficult for consumers to obtain legal services.”<sup>142</sup>

The dissent took factual issue with this as a predictive matter, noting that most of the states addressing the rule had (up to that date) allowed such punitive damages and wondering why California’s agreement with them would cause a crisis for legal insurers.<sup>143</sup> It also noted the fundamental policy nature of this issue—surely this sort of decision should be left to the legislature.<sup>144</sup>

Of all the reasons offered for a regime that prohibits the recovery of lost punitive damages in legal malpractice actions, this is probably the weakest. At its base, the argument translates to an assertion that the other outcome would be bad for lawyers, and that would be bad for society. Surely such arguments can be leveled at punitive damages in every context, all of which harm some entity or practice that is otherwise beneficial to society. Indeed, arguments of the form “lawsuits harm group X, which harms the public because it needs group X to thrive” have been one of the bases of the tort reform movement for decades.<sup>145</sup>

Returning to the core public policy question, one can see that the issue of which woman is depicted in the drawing is a perfect analog to the question of punitive damages in subsequent attorney malpractice cases. From the perspective of the plaintiff, harm has occurred because of the lawyer’s failure to act. As the policy behind Anglo-American tort law since medieval times has been the compensation of the injured, the question is a simple one. On the other hand, as the *Ferguson* majority noted, the policy behind punitive damages has been equally clear for almost as long.<sup>146</sup> Such damages have little to do with the plaintiff. From the point of view of the defendant, they are a way for society to penalize bad behavior, both to express outrage over the particular misconduct and to deter this defendant and oth-

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140. *Ferguson*, 69 P.3d at 972.

141. *Id.*

142. *Id.*

143. *Id.* at 976 (Kennard, J., concurring and dissenting).

144. *Id.*

145. See, e.g., *ATRA’s Mission: Real Justice in Our Courts*, AM. TORT REFORM ASS’N, <http://www.atra.org/about/mission> (last visited Dec. 10, 2013). The mission statement of the American Tort Reform Association includes the following observation about lawsuits: “They compromise access to affordable health care, punish consumers by raising the cost of goods and services, chill innovation, and undermine the notion of personal responsibility.” *Id.*

146. *Ferguson*, 69 P.3d at 973-74.

ers from repeating it. As the lawyer's negligence did not rise to the level warranting this response, the question should again be a simple one, albeit with the opposite answer. These equally simple, and equally compelling, points of view lead to equipoise. There is no way to decide which of the two policies should dominate in this instance.

Intriguingly, the same problem has appeared in other contexts, but with results that do not offer easy solutions with any more consistency. While this Article has considered the role of legal malpractice in a regime of shifting punitive damages from the wrongdoer to a third party, there are other situations where such a shift can occur. These include the problem of successor corporations and deceased tortfeasors. In the former case, the puzzle becomes one of identity: If the successor corporation is truly the former in a new guise, there is no shift in punitive damages at all. Because this inquiry becomes akin to Plutarch's puzzle of Theseus's ship,<sup>147</sup> discussions of it tend to take on a complexity of their own.<sup>148</sup>

The separate question of the defendant who dies, though, creates the familiar paradox of two figures in the picture. When a court assesses punitive damages against an estate, the court has separate and exclusive ways in which to characterize the problem. In what seems to be the current majority view, there can be no assessment of punitive damages against an estate. Such damages, courts have held, fail to meet the goals of punitive damages.<sup>149</sup> No specific deterrence is possible against the dead,<sup>150</sup> and general

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147. I PLUTARCH, *THE PARALLEL LIVES* 49 (Loeb Classical Library ed. 1914). Plutarch reported that Theseus's ship remained a treasured object for centuries, as the leaders of Athens replaced the individual planks as they began to rot. In passing, he noted that this caused a division among the philosophers, with some believing that the ship was still the same, and others that it was not. I THOMAS HOBBS, *THE ENGLISH WORKS OF THOMAS HOBBS OF MALMESBURY* 136-137 (Sir William Molesworth, Bt. ed. 1839). Thomas Hobbes made the puzzle even more complicated by suggesting a further twist: What if the old planks, when taken off Theseus's ship, were assembled into a second ship immediately adjacent to it? As both versions of this puzzle demonstrate, too casual assumptions of identity can prove troubling upon reflection.

148. See, e.g., Barry Levenstam & Daniel Lynch, *Punitive Damage Awards Against Successor Corporations: Deterrent of Malicious Torts or Legitimate Acquisitions*, 26 *TORT & INS. L.J.* 27 (1990); Douglas R. Richmond, *Products Liability: Corporate Successors and the Duty to Warn*, 45 *BAYLOR L. REV.* 535, 576-83 (1993).

149. Weissblum, *supra* note 57, at 74.

150. See, e.g., *Doe v. Colligan*, 753 P.2d 144, 145 (Alaska 1988) ("Death of the tortfeasor renders meaningless the punitive aspect of damages."). *But cf.*, *Haralson v. Fisher Surveying, Inc.*, 31 P.3d 114 (Ariz. 2001). That court offered a powerful comparison, which bears consideration in full:

There is no logical reason why courts should allow a punitive award against a defendant who survives a judgment, but deny it where death occurs earlier. Suppose, for example, two individuals commit equally culpable and outrageous acts. One is comatose and, for all practical purposes, has no reasonable

deterrence, the courts have announced, is unlikely to be served by punishing the heirs.<sup>151</sup> Some courts have found also a deep unfairness in punishing the innocent heirs for the wrongdoing of the deceased tortfeasor.<sup>152</sup>

Courts that have allowed such damages, though, have looked at the same drawing and seen a different figure. They have found compelling the idea of general deterrence flowing from the imposition of punitive damages even after the death of the tortfeasor.<sup>153</sup> Such courts have noted that the living defendant's family members, who are potential heirs of such defendants, are equally harmed by the assessment of punitive damages.<sup>154</sup> Further, the idea that heirs are harmed by the award of punitive damages against an estate ignores the fact that the same would be true if the defendant survived long enough to pay the award before dying.<sup>155</sup> Once again, there is no objective way to choose between these equally plausible ways of viewing the problem.

Is there, then, nothing to be done? Are courts left to a mere recitation of the reasons for seeing each of the two images in the picture, followed by a bald selection of preference with no way to explain it beyond a statement such as "these reasons are more in accord with our law"?

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chance of recovery. The other is dead. Is there a way to explain why the unconscious tortfeasor would have his assets exposed to punitive liability, while the deceased's estate would be immunized from it? Surely the answer does not lie in our inability to punish the dead wrongdoer.

*Id.* at 118.

151. See, e.g., *Lohr v. Byrd*, 522 So. 2d 845, 846 (Fla. 1988). Some states have added the observation that this approach keeps the treatment of punitive damages in accord with the criminal law, where death of the defendant ends the proceedings. See, e.g., *In re Vajgrt*, 801 N.W.2d 570, 575 (Iowa 2011) ("Even though criminal fines may have a general deterrence effect on other wrongdoers, the state may not continue a criminal proceeding after the defendant dies to recover a fine from his or her estate.").

152. See, e.g., *Lohr*, 522 So. 2d at 847

153. See *Kaopuiki v. Kealoha*, 87 P.3d 910, 928 (Haw. Ct. App. 2003) ("[A]s compared to a vehicle driver who knows that punitive damages cannot be imposed on his or her estate if he or she dies prejudgment, a vehicle driver who knows that punitive damages may be imposed on his or her estate and spouse, dependents and/or other loved ones if he or she dies prejudgment has more reason and motivation to avoid the kind of driving that will result in the imposition of punitive damages."). See also *Haralson v. Fisher Surveying, Inc.*, 31 P.3d 114, 116 (Ariz. 2001) (noting that another label for punitive damages is "exemplary," indicating that they "have always served to set an example").

154. *Kaopuiki*, 87 P.3d at 928 (noting that court decisions barring recovery do "not satisfactorily explain why the impact of the judgment for punitive damages upon a deceased tortfeasor's widow and children bars the judgment when the impact of the judgment for punitive damages upon a living tortfeasor's wife and children does not").

155. *Id.* ("The beneficiaries of the estate of the tortfeasor have no right or entitlement to more than the tortfeasor would have had if he or she had lived, or to more than the net of the tortfeasor's estate after payment of all legal obligations, including judgments against the estate for punitive damages.").

## VI. A BRIEF INTERLUDE ABOUT MEDIEVAL JUSTICE: THE DEODAND

Perhaps some light can be shed upon this conundrum from an unlikely source—the law of the past. There are many instances of legal theories and behaviors from the European Middle Ages that strike us today as odd or uncomfortable.<sup>156</sup> Many of them, nonetheless, have survived as foundational principles of more modern legal regimes.<sup>157</sup> Others, although they have long since vanished, furnish more than curious artifacts for scholars. Some of these have been used to illustrate seemingly dissimilar modern propositions of law, often in surprising but helpful ways.

One such area of law is that of deodancy. As the Supreme Court has noted, under the common law, “the value of an inanimate object directly or indirectly causing the accidental death of a King’s subject was forfeited to the Crown as a deodand.”<sup>158</sup> At issue was not the fault of the owner; as the Court noted, the practice “reflected the view that the instrument of death was accused and that religious expiation was required.”<sup>159</sup>

Never directly adopted into United States law,<sup>160</sup> and not directly used in any common law court since 1846,<sup>161</sup> the Supreme Court has nonetheless used this ancient legal category to explain civil forfeiture, the taking by the state of possessions that represent the proceeds of criminal activity.<sup>162</sup> Indeed, in setting the bounds of such forfeiture, Justice Scalia has suggested that the law should parallel the medieval conception that only the portion of the object that caused the harm ought to be forfeited.<sup>163</sup> Scholars have

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156. Animals, for example, were sometimes tried for the commission of crimes. *See, e.g.*, Thomas G. Kelch, *A Short History of (Mostly) Western Animal Law: Part I*, 19 ANIMAL L. 23, 45-7 (2012) (noting that medieval trials included both religious trials invoking the power of God to stop swarming animals from doing harm, and civil trials wherein individual animals that had caused deaths were subjected to the ordinary courts using ordinary procedures, just as if the beasts were human).

157. THEODORE F. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 564 (5th ed. 1956) Thus have generations of law students struggled to master *The Rule in Shelley’s Case*, a 1581 decision that itself was preceded by two centuries of legal precedent.

158. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-81 (1974).

159. *Id.* at 681.

160. *Id.* at 682 (noting that deodands “did not become part of the common-law tradition of this country.”).

161. J. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 322 (1979).

162. J. W. Goldsmith, Jr., *Grant Co. v. United States*, 254 U.S. 505, 510 (1921) (finding “some analogy to the law of deodand” in the case of a forfeiture proceeding against an automobile that had been used to transport untaxed alcohol).

163. *Austin v. United States*, 509 U.S. 602, 628 (1993) (Scalia, J., concurring in part and concurring in the result) (“Thus, if a man was killed by a moving cart, the cart and its horses were deodands, but if the man died when he fell from a wheel of an immobile cart, only the wheel was treated as a deodand, since only the wheel could be regarded as the cause of death.”).

joined the Court in finding the law of deodancy helpful for understanding not only criminal forfeiture,<sup>164</sup> but also preindustrial negligence law,<sup>165</sup> and even corporate criminality.<sup>166</sup>

The label of deodand, or thing to be given to God,<sup>167</sup> was applied to any inanimate object (or occasionally, an animal)<sup>168</sup> that caused the death of a human.<sup>169</sup> In turn, the king's agents were to use the thing to benefit someone.<sup>170</sup> Often the recipient of the proceeds of the deodand was someone who had in some way been the victim of the object.<sup>171</sup> On other occasions, though, more general projects were undertaken, such as the selling of a boat that crashed into a bridge as a deodand and using the funds generated to repair or replace the bridge.<sup>172</sup>

The modern requirement of mens rea has made the deodand a thing of the past;<sup>173</sup> we can no longer quite fully understand a legal regime that

164. See, e.g., Lawrence Kasten, *Extending Constitutional Protection to Civil Forfeitures that Exceed Rough Remedial Compensation*, 60 GEO. WASH. L. REV. 194, 199 (identifying the logic of deodancy as the source of nineteenth century customs law forfeiture cases).

165. See, e.g., KURT VON S. KYNELL, *SAXON AND MEDIEVAL ANTECEDENTS OF THE ENGLISH COMMON LAW* 214 (2000).

166. See, e.g., Albert W. Alschuler, *Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand*, 71 B.U. L. REV. 307 (1991).

167. OXFORD ENGLISH DICTIONARY (2014) (“Latin . . . *Deō dandum* that is to be given to God”).

168. Blackstone, at least, included both. See 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*300.

169. BAKER, *supra* note 161, at 322.

170. See BLACKSTONE, *supra* note 168. Blackstone emphasized the religious nature of the deodand, both in its result (“forfeited to the king, to be applied to pious uses”), and in its purpose. *Id.* As to purpose, Blackstone speculated that its source was atonement for the soul of the deceased. *See id.* That is the source, he believed, of the unusual rule that no deodand was forfeit when an infant fell from a stationary cart or wagon (“the child, by reason of its want of discretion, was presumed incapable of actual sin, and therefore needed no deodand to purchase proprietary masses . . .”). *Id.* Blackstone shifted his understanding of the purpose of deodancy, though, when he considered the fact that moving animals or objects became deodands whether their victim was a child or an adult. *See id.* To understand that, Blackstone noted that “such misfortunes are in part owing to the negligence of the owner.” BLACKSTONE, *supra* note 168, at \*301.

171. See II POLLOCK & MAITLAND, *THE HISTORY OF THE ENGLISH LAW* 473 (S. Milson ed., Cambridge Univ. Press 1968) (1895) (“[T]he sister of a man who has been run over obtains the value of the condemned cart, since she is poor and sick.”).

172. See BLACKSTONE, *supra* note 168. Blackstone’s characterization of the necessity of “pious uses” is not denied by examples such as this, as a civic construction project may well benefit many people. *See id.* Provided that the construction is done in some way to honor the deceased—which is paralleled by modern naming conventions of bridges, buildings, and stretches of roadway—it would have the expiatory effect that Blackstone saw as the foundation of deodancy.

173. See, e.g., *United States v. 1,960 Bags of Coffee*, 12 U.S. 398, 413 (1814) (Story, J., dissenting). The deodand proper has long been viewed skeptically by American courts. In

blames things for the wrongs in which they participated.<sup>174</sup> Our discomfort at blaming the runaway cart for the death of the pedestrian is similar to our discomfort at blaming the bull that tramples the person. In both cases, our modern notion of guilt as a mental state precludes condemnation of things we find unable to have that mental state.<sup>175</sup>

Nonetheless, the use of deodand comparisons in civil forfeiture cases demonstrates the utility of the concept for understanding modern legal puzzles. Even though in civil forfeiture cases the owner typically demonstrates more fault than in classic deodand cases,<sup>176</sup> forfeiture parallels deodancy in that the ownership of property shifts from the individual to the state. There is a second parallel in that it is the identity of the possessions that are at issue; this is the way in which civil forfeiture is quite different from a fine, for example. There remains a huge distinction, though, in that this modern equivalent to the deodand focuses on the owner's culpability. Although Blackstone noted that there was a hint of negligence law in at least some versions of the deodand,<sup>177</sup> such transfers could, and did, occur even when the owner was utterly blameless; it was the object whose culpability was at issue, not the owner's.

A second area that some commentators have compared to this ancient practice is that of corporate liability. One scholar has identified the source of corporate criminality as the public's hostility to bad events; our desire, in short "to snarl."<sup>178</sup> The fit here is inexact, at best.<sup>179</sup>

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what seems to have been the first use of the concept in an opinion, Justice Story responded to an argument of counsel analogizing to deodand by calling it "a peculiar case growing out of the avarice of the church and the superstition of the layity in ancient times." *Id.*

174. Even Blackstone viewed the practice with skepticism, finding its origin "in the blind days of popery." BLACKSTONE, *supra* note 168. *But see also* POLLOCK ET AL., *supra* note 171, at 475 ("We may fairly remember in our ancestors' favour that in their day the inference that he who kills has meant to kill . . . was much sounder than it would be now . . . we have surrounded ourselves with lethal engines, so that one careless act may slay its thousands.").

175. *See, e.g.*, LEO KATZ, *BAD ACTS AND GUILTY MINDS: CONUNDRUMS OF THE CRIMINAL LAW*, 113-16 (1987) (discussing criminal acquittals based on the fact that the defendant was sleepwalking or in shock).

176. Although not always. *See* *Bennis v. Michigan*, 516 U.S. 442, 446 (1996), for "a long and unbroken line of cases hold[ing] that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use." There still must be some wrongdoing at the core of the legal taking, though, while deodands were seized in many cases that we would now consider accidental.

177. *See* BLACKSTONE, *supra* note 168.

178. ALSCHULER, *supra* note 166, at 312 (Professor Alschuler explained the desire for corporate criminal liability, and by extension the deodand, this way: "To superstitious people, villains need not breathe; they may include Exxon and the phone company.").

179. Indeed, Professor Alschuler's reference to superstitious people indicated his disapproval of corporate criminality, which he called an error. *Id.* at 313. He noted that if it

There is at least one more legal lesson that might be drawn from the story of the deodand, though. Sometimes it is the surrender of a thing that is important. Several great legal historians have noted that the deodand may have been a Christianization of an early practice: The naming of a thing as a bane.<sup>180</sup> The bane (“bana,” or slayer)<sup>181</sup> was to be surrendered to the victim’s family, much as *wergild* was given to them by the killer or the killer’s kin.<sup>182</sup> Although the transfer of ownership of the deodand was to the king, or state, and not the victim, it was the transfer away from the present owner, not the transfer to a particular recipient, which was the pivotal requirement of the doctrine.

## VII. A DEODAND SOLUTION TO LOST PUNITIVE DAMAGES

The legal history of the deodand may offer us a way to choose which figure to focus on in the picture. Although the two images are in equipoise, courts must choose. With no logical reason compelling either view, courts are left to simply prefer one or the other. The doctrine of the deodand offers a way to evaluate such a preference, by separating for us the two parts of the transaction that occur when property changes hands.

For during property transactions, two distinct actions occur. The donor and recipient are conducting separate actions, each of which is necessary. The equipoise in the argument over legal malpractice and lost punitive damages occurs because, in this odd case, giving and receiving differ from each other in an unconventional way. Ordinarily in compensation, the donor and recipient are joined in the whole transaction. The defendant’s conduct caused the plaintiff’s harm; thus the defendant’s compensation to the plaintiff restores both parties to something like an original position. In legal malpractice, though, the fit between the two halves of the transaction are not exact. The lawyer-defendant has harmed the plaintiff-client, and thus should pay compensation. The lawyer assumes the position that would have been occupied by the original defendant.<sup>183</sup> But the rationale for punitive damages is focused on the tortfeasor, not the victim.<sup>184</sup> The law allows such

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could make any sense, it could not be as a deodand, but as a frankpledge, an example of the kind of group responsibility that might further instrumental regulation of society. *Id.*

180. POLLOCK, *supra* note 171, at 474.

181. *Id.*

182. The offer of payment of *wergild*, the monetary value of the victim’s life, prevented the kin of the victim from claiming the right to engage in a blood-feud against the killer and his family. THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 425-26 (5th ed. 1956).

183. *Patterson & Wallace v. Frazer*, 79 S.W. 1077, 1083 (Tex. Civ. App. 1904).

184. Ernest J. Weinrib, *Civil Recourse and Corrective Justice*, 39 FLA. ST. U. L. REV. 273, 290 (2011) (noting that the rationales for punitive damages “are one-sided considera-

damages, not to compensate the plaintiff, but to punish the defendant.<sup>185</sup> Thus the substitution of the lawyer for the original defendant creates a puzzle.

In the original setting, if a wrongdoer is asked to compensate a victim, and the behavior is so bad that punitive damages are appropriate, the viewer's perception of the compensation transaction remains consistent no matter whether we look at the case from the perspective of the plaintiff or the defendant. One is owed recovery; the other deserves to pay. Once the lawyer's simple negligence has moved the lawyer into the place the original defendant occupied, though, the picture has changed. From the perspective of the harmed victim, everything looks the same—the law sees an injured party deserving compensation. If the legal regime would allow the injured plaintiff to collect punitive damages, the source of the collection is irrelevant. The plaintiff is entitled to the punitive damages that were lost because of circumstances beyond the plaintiff's control.<sup>186</sup>

When the view shifts to the perspective of the defendant, though, the figure in the picture has changed. When the law looks at the original defendant, it sees a tortfeasor whose conduct rose to such levels of wrongfulness that exemplary damages are appropriate. When the lawyer's malpractice has substituted him for the original defendant, though, one sees an innocent being compelled to pay damages in excess of those legally supported by the level of culpability.<sup>187</sup> The law does not permit punitive damages for mere negligence. Yet from the perspective of this new defendant, that is precisely what is being ordered in cases in which lawyers have been substituted for original defendants.

From the plaintiff's side of the picture, it remains consistent. From the defendant's side, the figure shifts the moment the lawyer becomes the new defendant. Like the old and young women who alternately appear in the picture, there is no way for the mind to hold both images simultaneously. The viewer, and the court, can only select one at a time. The court must do so at the time of rendering judgment. When it is the court of last resort for a state, that choice will bind all subordinate courts in the state, rendering them permanently unable to see one of the figures, at least legally.

Such a dilemma requires some external rule to provide an answer, and the law of the deodand does just that. In deodancy, precisely the same sort of substitution did sometimes occur, but it was quickly recognized as irrelevant; the critical feature was always the surrender of the deodand, not its

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tions that focus not relationally on the parties as doer and sufferer of the same injustice, but unilaterally on the defendant (and anyone else who might be similarly situated) as doer.”)

185. *Osborne v. Kennedy*, 399 S.W.3d 1, 19-20 (Ky. 2012).

186. *Haberer v. Rice*, 511 N.W.2d 279, 288 (S.D. 1994).

187. *See Osborne*, 399 S.W.3d at 23 (“[T]he nexus between the attorney accused of malpractice and the actual wrongdoer is far too attenuated.”).

receipt.<sup>188</sup> The king, or his almoner, might choose to use the thing as he wished. He might add it to the royal treasury, present it to a local monastery, or sell it and give the funds to the family of the victim.<sup>189</sup> The fact that was consistent across any result was that the thing was given up by its current owner. The identity of the deodand was always the most important part of the legal proceeding.<sup>190</sup> If a runaway cart caused a death, and then was destroyed in a fire, there was nothing for the owner to surrender. It might well be the case that a second cart possessed by the same owner would equally benefit the family of the victim; it did not matter. The giving of the thing was the critical legal act; its receipt was secondary.

It is true, as later commentators noted, that our modern notions of responsibility make us uncomfortable with a system that removes ownership of a thing from an innocent owner. When there was no question that the death had occurred in a way we would today label accidental, it seems unfair to force the owner of the unfortunate thing to lose his or her interest in it. It may be, though, as Blackstone noted, that the law was capturing an instinct that even accidents were sometimes the responsibility of someone or something.<sup>191</sup> And, as the owner was in such cases often punished no further than by requiring the surrendering of the lethal object, the system was not a particularly ruthless one.

Upon reflection, it appears that surrender is the critical feature of the punitive damages system as well. As exemplary damages are by definition not compensatory, the law's interest is not in who receives them, but the fact that they the malefactor must pay them. Indeed, several states have initiated regimes whereby a confiscatory share of punitive damages is taken by the state.<sup>192</sup> It would be easy to dismiss such proposals as efforts by resource-strapped states to grab revenue.<sup>193</sup> On the other hand, it is difficult to

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188. See BLACKSTONE, *supra* note 168.

189. *Id.*

190. ALAN HARDING, A SOCIAL HISTORY OF ENGLISH LAW 64 (1973) (noting that when a man was killed by misadventure, "the cart or the tree was regarded as his 'bane', in some mysterious way responsible, and had to be exorcised . . . by being 'given to God'").

191. See BLACKSTONE, *supra* note 168.

192. See, e.g., MO. REV. STAT. § 537.675(3) (2010) (creating a lien on half of any punitive damages award, after deducting attorney's fees and expenses, with the money to be deposited into the state tort victims' compensation fund); IND. CODE § 34-51-3-6 (2007) (requiring the payment of punitive damages to the clerk of court, who is to deposit 75% into the state violent crime victims compensation fund, and transfer the other 25% to the person who was awarded the damages); UTAH CODE ANN. § 78B-8-201 (West 2011) (collecting as ordinary state revenue half of the amount of awarded punitive damages in excess of \$50,000).

193. One analysis of the practice from the perspective of the defense bar argued that states might "expand the availability of punitive damages awards" or take action to "promote such awards." See SCHWARTZ ET AL., *supra* note 125, at 539 (citing an amicus brief in which

argue with the philosophical position that the plaintiff is receiving a wind-fall by the regime of punitive damages.<sup>194</sup> If the plaintiff is to receive non-compensatory damages at all, the rationale must be that otherwise plaintiffs would have little incentive to sue to stop bad practices. Where such plaintiffs are functioning as a sort of private prosecutor, policing bad behavior in society, they can certainly be rewarded.<sup>195</sup> Whether the entirety of the reward belongs to them as of right, though, is a separate question. Certainly such awards are taxable as income;<sup>196</sup> it is not much of a stretch to suggest that a large portion of an award that is made on behalf of the public should go to the public.

If that notion is correct, if the critical feature shared by the deodand and punitive damages is not the receiving but the giving, then the puzzle of lost punitive damages becomes easy. The initial attorney, despite his malpractice, did not harm the plaintiff—and by extension, society—in a way that merits the award of punitive damages. The original defendant should be forced to surrender the punitive damages just as the owner of a deodand would. The surrender being the critical portion of the transaction, it matters little whether the harmed person or the village bridge is the recipient.

This is completely a reverse of the field from the question of compensatory damages. In such cases it is, in fact, the purpose of the law to focus on the recipient end of the transaction, to make whole the damaged plaintiff. Thus if it is the attorney's fault that the effort to remedy the damages failed, the attorney should bear the financial responsibility to make the client whole.

Once the plaintiff has been made whole by the payment of compensatory damages, though, no purpose is served by forcing anyone else to surrender the equivalent amount. If one is focused, for the assessment of the punitive damages, on the surrender portion of the transaction, the legally cognizable events are over once the wrongdoer is beyond the reach of the law. It would make no more sense to require a third party, even the attorney, to pay the punitive damages than it would to seize a different cart when the original was lost to fire in the accident that caused the death.

The same viewpoint would also resolve the less common problem of punitive damages paid by a defendant whose attorney committed malpractice. Because the defendant's wrong caused the damages to be assessed, the attorney should not be forced to compensate for their payment. In such cases the analogy to the law of deodand is weaker, but still intelligible. Imag-

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the Florida Department of Banking and Finance sought to have punitive damage splitting applied in arbitration awards as well as court cases).

194. *Id.*

195. WEINRIB, *supra* note 184, at 290.

196. 26 U.S.C. § 104 (2002).

ine the surrender and sale of a wagon to benefit religious purposes after a child was run down by the wagon. Even if a subsequent tribunal determined that the child was at fault, the owner could not recover the wagon. The law was used, as Blackstone noted, to find some early way to respond to dangerous conditions, making society a little safer by taking destructive objects out of the hands of those who failed to control them.<sup>197</sup> Even if bad lawyering in some sense caused the surrender, it remains true that it was the owner who failed (from the perspective of the legal regime of deodancy), to maintain control of the wagon. The attorney never even owned the wagon.

In the same way, it was the defendant's choice of conduct, not the lawyer's tactical decisions, which led the jury to assess punitive damages. Even if some legal technique, even one so basic as raising the statute of limitations, might have intervened to prevent the original defendant from paying, that fact does not change the reality that the defendant's behavior—not the lawyers—was weighed by the jury and found wanting. Because surrender is the critical part of the transaction, and because the lawyer had no control over the surrendered item, the lawyer would not be responsible for providing the deodand. In like manner, the lawyer whose malpractice failed to prevent the assessment of punitive damages should not be required to refund them. The fact that they went, in some sense, to the wrong recipient, is of no importance. It matters only that the law required the wrongdoer to pay them.

All of this may ultimately be less significant in the future than it was in the past. The political and social forces advocating for tort reform have frequently taken particular aim at punitive damage regimes.<sup>198</sup> Several states simply do not countenance them at all.<sup>199</sup> Others have placed real limits on the amounts at issue. Still others have adopted a system by which a large percentage of such awards is forfeited to the state, bringing the comparison to deodancy into an even sharper focus.<sup>200</sup>

Finally, even the United States Supreme Court has entered into the field, developing a recent thread of the law that finds that the constitutional guarantee that no property will be taken without due process acts to limit the size and scope of punitive damage awards.<sup>201</sup> It is unlikely that the im-

197. See BLACKSTONE, *supra* note 168.

198. This is not new. See, e.g., Theodore B. Olson, *The Parasitic Destruction of America's Civil Justice System*, 47 SMU L. REV. 359, 365 (1994) (complaining that liability principles in punitive damage settings are "subjective, elastic, ambiguous, and often retroactive.").

199. See *supra* note 28 and accompanying text.

200. See MO. REV. STAT. § 537.675(3) (2010); IND. CODE § 34-51-3-6 (2007); UTAH CODE ANN. § 78B-8-201 (West 2011); *supra* note 192 and accompanying text.

201. See *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

mediate future will see a reversion to a system of punitive damages in any state unchecked by federal courts.

It is also unlikely, though, that punitive damages will vanish utterly from the American legal system in the near term. Nor is it likely that attorneys will no longer be subject to suits themselves-suits alleging that they committed malpractice in the representation of clients. When those clients fail to receive punitive damage awards they would otherwise get, or pay damages that they would otherwise not, courts will still have to answer the question whether the attorney should have to pay them.

That question, like the question of who is really depicted in the picture of the old woman and the young, will continue to defy a logical, objective, internally-compelled answer. Nonetheless, the ancient practice of deodancy can offer a way to choose. By separating the surrender side of the transaction from the receipt side, courts can solve the equipoise problem. Able to focus on only one image, courts may now pronounce the problem solved without suffering the nagging fear that they have simply made a policy choice that is not supported by more than their personal preference.

#### VIII. CONCLUSION, AND A FINAL NOTE ABOUT COLLECTABILITY

The solution offered here, a focus on the party paying rather than the party receiving payment, is an admittedly imperfect one. As noted earlier, a viewer can see either figure in the portrait of the two women. Likewise, a court can reach either result without sacrificing logic. Both are logical, and the contrasting arguments are in equipoise.

Yet there is more than just the random selection of a solution from among equals that favors the deodancy-like focus on the payer. As noted earlier, other areas of the law face a similar conundrum. When dealing with the problem of holding others accountable for the payment of punitive damages,<sup>202</sup> states have similarly split when dealing with the employers and estates. Again, the arguments can be arrayed in two ways, and again the courts express fondness for one set or another of these arguments.

In one area, though, there does not appear to be any equipoise. Considering the arrangement of the states into divided camps on other issues, it is astonishing that in one area there is virtual unanimity. The area is collectability.

Throughout the history of legal malpractice actions, states have treated as unquestioned the fact that circumstances that would have prevented the original damages from being collectible similarly prohibit recovery against

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202. See *supra* notes 148-55 and accompanying text.

the malpracticing attorney.<sup>203</sup> At first glance, this seems unsurprising—after all, the premise of the trial within a trial was to determine how much the plaintiff lost. If the plaintiff would not have been able to collect even in the case of a victory, then the lawyer’s malpractice was irrelevant and caused no loss.

Upon review, though, this position is more surprising, but simultaneously more enlightening. For if subsequent bankruptcy or corporate dissolution will eliminate the need to compensate the undoubtedly aggrieved plaintiff, then compensation is not the compelling motivation it originally appeared to be. Indeed, it appears that the area of collectability offers precisely the same opportunity as punitive damages to see the same facts from either of two completely separate perspectives. Yet, in this case, the states seem collectively to have come to a uniform decision: All have agreed to see only the young woman in the picture.

Although no such unanimity can fairly be expected in the lost punitive damages or erroneously paid punitive damages cases, the law of the deodand offers hope. For if we begin to see the compensatory system as our legal ancestors did, we will see that the critical portion of the trial should result in a focus on the defendant, not the plaintiff. As to punitive damages, because of their special role, the courts should focus only on the identity of the wrongdoer. If they do so, the result will match the result in the collectability cases, and for good reason.

By concentrating on a portion of the picture and reminding ourselves that we are looking at a necklace, not a mouth, we can hold one image in our mind. Courts, required to decide cases as they are, can reach the same level of confidence in their decisions by looking at the trial within the trial and reminding themselves that they should concentrate upon the defendant, not the plaintiff. Doing so would bring clarity to the law, consistency across the states, and an end to the disturbing experience of having one’s perception flip back and forth between two inconsistent ways to see the thing the court is looking at.

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203. Where there has been state disagreement in this area of the law, it has not been about whether lawyers should have to pay if the original defendant does not have the resources to pay, but who bears the burden of proof as to whether or not original awards would have been uncollectible. *Compare* *Kituskie v. Corbman*, 682 A.2d 378, 382 (Pa. 1996) (malpracticing lawyers must demonstrate uncollectability in order to avoid responsibility for punitive damages), *and* *Power Constructors, Inc. v. Taylor & Hintze*, 960 P.2d 20 (Alaska 1998) (same), *with* *Taylor Oil Co. v. Weisensee*, 334 N.W.2d 27 (S.D. 1983) (collectability is an element of the original claim which malpractice plaintiffs must prove just like every other element), *and* *McDow v. Dixon*, 226 S.E.2d 145, 147 (Ga. Ct. App. 1976) (same). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53(b) (2000) (noting that the burden of raising the defense is on the defendant lawyer “because most civil judgments are collectible and because the defendant lawyer was the one who undertook to seek the judgment that the lawyer now calls worthless.”).