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PUNITIVE DAMAGES IN AMERICAN AND GERMAN LAW—
TENDENCIES TOWARDS APPROXIMATION OF
APPARENTLY IRRECONCILABLE CONCEPTS

VOLKER BEHR*

THE APPARENTLY UNBRIDGEABLE GAP BETWEEN AMERICAN AND
GERMAN APPROACHES TOWARDS PUNITIVE DAMAGES

For more than a century an apparently irreconcilable gap has
separated the American and German concepts of the law of damages.
In the vast majority of states in the United States of America, the
concept of the law of damages is dualistic: damages can be recovered
for the losses incurred, including loss of profit, and for punishment of
the wrongdoer. This concept allows a plaintiff to recover punitive
(exemplary) damages in addition to compensatory damages if the
defendant has damaged the plaintiff "intentionally," "maliciously,"
"consciously," "recklessly," "willfully," "wantonly," or "oppressively".1
The idea of a dual function for damages is well-established

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edges the invaluable assistance he received from the editorial board of the law review. He
especially thanks Allison Kirk, who, without hesitation, assumed the difficult tasks of checking
citations, adapted them to the American system of citations, and helped to make legible the text
of a nonnative speaker.

1. Courts in general address "reckless, willful, and wanton misconduct" of the defendant.
See Klaus Beucher & John B. Sandage, United States Punitive Damage Awards in German
Courts: The Evolving German Position on Service and Enforcement, 23 VAND. J. TRANSNAT’L
and time-honored, with punitive damages currently available in most of the fifty sister states.

On the other hand, under the German Civil Code of 1900, the law of damages is purely monistic, if taken at face value. Damages are strictly restricted to compensation. General statutory regulations on damages in sections 249 through 255 of the German Civil Code only address restitution and compensation. These regulations, however, are silent in regards to punitive damages. Nevertheless, and mostly for dogmatic and historical reasons, for about a century the nearly unanimous understanding of sections 249 through 255 of the German Civil Code can be summed up in the following way: the exclusive legitimate function of damages is compensation of the victim. Consequently, punishment of the tortfeasor is not a legitimate function of damages. German civil law and criminal law are separate. Punitive damages are punishment, and, while a wrongdoer may be punished exclusively under the concept of criminal law, by no means is such punishment allowed under the concept of civil law. In the course of time, the very idea of punitive damages has become so unfamiliar to German law that blackletter doctrine on damages scarcely gives the notion of punitive damages, or its German equivalent Strafschadensersatz. Instead, punitive damages live in the shadows. They are only incidentally mentioned under the rubric of the general purposes of damages. When discussing functions of damages, German doctrine generally starts by stating that damages have the exclusive function of giving compensation for losses. Punitive functions are then addressed negatively, by adding that the tortfeasor shall not be punished by means of an obligation to pay


4. The German Civil Code, Buergerliches Gesetzbuch [BGB], was enacted in 1896 but set in force on January 1, 1900. Its second book, Law of Obligations, was significantly modernized in 2001 and set in force on January 1, 2002. But sections on damages have remained unchanged—except for a significant alteration of section 253 allowing damages for pain and suffering in additional cases, BGBl. 2002 I, 2674.
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One of the leading textbooks on the law of obligations states that damages, being an economic and social problem of allocation, have developed in a way that prohibits further reliance on their former common root of punishment; ignoring this development would lead to a reintroduction of punitive elements into the law of damages, which would be contrary to its history and development as a purely compensatory function. The more exhaustive discussions of punitive damages are only found under the heading of enforcement of foreign judgments, notably American punitive damages awards. The general attitude of these discussions, again, is negative. In a much discussed decision on the enforcement of an American punitive damages award, the German Federal Supreme Court stated that sanctions serving the purposes of punishment and deterioration serve to protect the general legal order, which, according to German understanding, fall under the state's monopoly on punishments that is garnished by special procedural guarantees.

What seems to be but a theoretical distinction turns out to be of practical relevance when an American money judgment creditor applies for enforcement of his judgment in Germany. Enforcement of foreign judgments under German law, like under American law, will not be granted if the foreign judgment is contrary to domestic public policy. German courts and legal literature emphasize that

5. For the leading commentaries on the German Civil Code, see WOLFGANG GRUNSKY, MÜENCHENER KOMMENTAR BUERGERLICHES GESETZBUCH, § 249 n.3 (3d ed. 1994) (citing JOSEF ESSER & EIKE SCHMIDT, SCHULDRECHT, ALLGEMEINER TEIL, § 30 II (7th ed. 1993); KARL LARENZ, LEHRBUCH DES SCHULDRECHTS, ALLGEMEINER TEIL § 27 I (13th ed. 1982)).

6. ESSER & SCHMIDT, supra note 5, at § 30 II.


8. BGHZ 118, 312; Recognition and Enforcement of U.S. Judgments, supra note 7, at 1339–40.

9. Under section 723, subsection 2 of the German Code of Civil Procedure, enforcement of a foreign judgment is denied in cases where recognition of the judgment is not available under section 328. Section 328 of the German Code of Civil Procedure states that recognition of a foreign judgment is excluded when recognition leads to a result manifestly irreconcilable with fundamental principles of German law. For a more complete discussion of enforcement requirements under German law, see Volker Behr, Enforcement of United States Money Judgments in Germany, 13 J.L. & Com. 211 (1994); Dieter Martiny, Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany, 35 Am. J. Comp. L. 721 (1987).

10. This has been the case since Hilton v. Guyot, 159 U. S. 113 (1895). See also UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4.
Punitive damages are not only unknown to German law, but are contrary to German public policy. Thus, to this day, American punitive damage awards are not enforced in Germany.

This Article will examine whether the apparently unbridgeable gap between the U.S. concept of punitive damages and the German concept of restricting damages to reparation and compensation is as fundamental as it is said to be, or whether it has been bridged or narrowed to a degree such that the two systems are reconcilable with one another. Such reconciliation would put German courts in a position to eventually enforce U.S. punitive damage awards. In order to better understand what can be considered a changing attitude towards punitive damages, Part I distinguishes compensatory damages from punitive damages that are concealed under presumably nonpunitive concepts by looking beyond the standardized formula of compensation versus punishment and deterrence.

Approximation of the two apparently incoherent systems may be achieved from either side. Developments may be traced in punitive damages systems that are not strictly punitive, which releases the principle from its perceived rigidity. Likewise, over the course of time, important punitive elements might be introduced into a purely compensatory damages system without being acknowledged or fully realized. Using this approach we will discern whether within the U.S. system of punitive damages there are naturally inherent or recently developed nonpunitive elements that would eventually narrow the gap between the American and German laws of damages. Conversely, we must scrutinize the German system for noncompensatory, punitive elements.

Part II discusses the actual position of punitive damages in the United States. U.S. punitive damages law developments have been analyzed in numerous scholarly writings from an isolated American perspective. This Article does not give a full review of the history, theory, and practice of U.S. punitive damages law. Instead, in searching for tendencies towards approximation, it focuses on developments


12. Similar restrictions of damages to compensation can be found in Japanese and Swiss law. They lead to the same problems in enforcement of U.S. punitive damages awards. For a discussion of recent Japanese and Swiss courts' decisions, see Ronald A. Brand, Punitive Damages and the Recognition of Judgments, NETH. INT. L. REV. [N.I.L.R.], 1996, at 167-71. Besides the question of whether punitive damages are unenforceable on the ground that they are criminal judgments and, consequently unenforceable, the discussion of punitive damages as a public policy violation is similar to the German discussion.
from the fundamentally different German perspective, which strictly restricts damages to compensation. Those differences relate to the very concept of punitive damages and focus on ideas of punishment, deterrence, and law enforcement, which, in turn, relate to the enormous sums awarded as punitive damages. This Article highlights recent developments aimed at restricting punitive damages and assesses whether these developments indicate a turnaround situation in punitive damage theory. Additionally, Part II focuses on developments where nonpunitive aims are pursued under the guise of punitive damages.

Part III outlines the traditional, purely compensatory, German approach, and then examines modern developments in punitive damage law which do not fit into that traditional approach. These developments indicate a tendency towards implantation of punitive elements into the German legal system. Part IV attempts to measure the gap between the U.S and German systems. Currently, enforcement of U.S. punitive damage awards is contrary to German public policy requirements. Part V investigates the question of whether or to what extent this requirement is likely to be applied in future enforcement cases.

I. COMPENSATORY DAMAGES AND PUNITIVE DAMAGES—EASILY DISTINGUISHED BUT NOT ALWAYS EASILY IDENTIFIED

Punitive damages are fundamentally different from compensatory damages. Although stemming from a common root, punitive and compensatory damages have developed in different directions, distinguished mainly by the purposes they pursue.13 Hence, in theory, compensatory and punitive damages should easily be distinguished from one another based on their respective purposes. According to American and German understandings, compensatory damages exclusively aim at compensation of victims’ losses, including lost profits. They are awarded in order to compensate for damages the plaintiff has suffered or is expected to suffer and to replace something the plaintiff has lost or is expected to lose because of the wrongful act. Their one and only purpose is to restore those losses. By awarding compensatory damages, the court shall put the victim in the position he or she would have been in had the defendant not committed the

wrongful act.\textsuperscript{14} Punitive damages, on the other hand, are aimed at punishment, deterrence, and law enforcement.\textsuperscript{15} They are awarded to punish the tortfeasor for his outrageous conduct and to deter him and others like him from similar conduct in the future.\textsuperscript{16} So, in theory, as long as the purposes of punitive damage awards are kept in view, a bright line between compensatory and punitive damages should be easily and readily drawn based on their respective compensatory or punitive purposes.

But what seems simple in theory may turn out difficult in practice as soon as a legal system pretends not to apply punitive damages, and consequently, courts in such a legal system generally will not openly admit reliance on the punitive purposes of the damages they award. Under such circumstances, it may be difficult to identify whether damages are awarded for purely compensatory purposes or for punitive purposes as well. Under these circumstances, a purpose-oriented approach may fail. Instead, one must search not just for plain punitive purposes argumentation, but also for punitive elements veiled under apparently compensatory constructions. The legal analyst is forced to pierce the compensatory veil. To achieve this goal it is necessary to develop more refined criteria on which to distinguish between the two, and then rely on these indicia related to compensatory or punitive damages respectively.

A first indicator of punitive elements in damages may be derived from the objective. Depending on the different purposes of compensatory and punitive damages, the amount of damages awarded is measured in different ways. Because compensatory damages replace the losses of the victim, the amount of those damages is measured and strictly limited by those losses. Compensatory damages must be equal to the loss suffered by the individual victim.\textsuperscript{17} On the other hand, a punitive damages award is not determined exclusively, or

\textsuperscript{14} As to the United States, see \textit{id}. (distinguishing punitive damages from compensatory damages). \textit{See also} Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 54 (1991) (O'Connor, J., dissenting); \textit{see generally} \textsc{Restatement (Second) of Torts} § 903 (1979). As to Germany, see BGHZ 118, 312, (343).

\textsuperscript{15} \textit{Cooper}, 532 U.S. at 423; BGHZ 118, 312 (distinguishing U.S. punitive damages from German compensatory damages).

\textsuperscript{16} \textit{Cooper}, 532 U.S. at 432; \textit{see generally} \textsc{Restatement (Second) of Torts} § 908 (1979).

\textsuperscript{17} \textit{See Simon Greenleaf, A Treatise on the Law of Evidence} § 253, at 242-43 (2d ed. 1972) ("[damages] should be precisely commensurate with the injury."); \textit{see also} \textit{Cooper}, 532 U.S. at 432 ("[compensatory damages] are intended to redress the concrete loss that the plaintiff has suffered").
even primarily, by the losses the plaintiff suffered. Instead, the award is determined by the seriousness of the wrong, the seriousness of the plaintiff's injury, the extent of the defendant's wealth, the profit the defendant made from his wrongful act, the necessity to deter the defendant and others like him from similar wrongful conduct, and the necessity to improve law enforcement.\textsuperscript{18} In short, compensatory damages are strictly loss-oriented while punitive damages are wrong-oriented. Consequently, damages awards that give the victim more than he lost or is expected to lose and that take into consideration the seriousness of the wrongful act are likely not purely compensatory but instead influenced by punitive purposes.

Compensatory damages focus on the individual victim. In adjudicating compensatory damages, neither the tortfeasor, third persons, nor society play a decisive role. The defendant/tortfeasor is only viewed from the perspective of determining from whom to recover damages. Generally, the person of the tortfeasor is not taken into consideration. Whether he acted negligently, intentionally, or recklessly, or whether he is liable without fault, has no significance. Whether he profited from his wrongful act is unimportant. Questions of whether and how much he will suffer from the obligation to pay damages or whether or not he will change his behavior are irrelevant. For the most part, compensatory damages do not differ in amount when awarded for willful and wanton wrongful acts, negligent acts, or even nonfault acts.\textsuperscript{19}

On the other hand, punitive damages focus primarily, if not exclusively, on the tortfeasor and his wrongful act. Additional focus is given to third persons and society, but scarcely is any focus given to the victim. The individual victim and his losses give rise to an award of punitive damages, but they are not the cause or reason of punitive damages. Instead, punitive damages focus on the tortfeasor and his intent, recklessness, or similar attitude that not only determine whether punitive damages are awarded, but also influence the

\textsuperscript{18} See Pac. Mut. Life Ins. Co., 499 U.S. at 16 (stating that punitive damages have in mind the enormity of the offence rather than the measure of compensation to the plaintiff); see also BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996) (stating that punitive damages should reflect "the enormity of the offense" and the degree of fault). As to the "contemporary functions" of punitive damages, see generally Michael Rustad & Thomas Koenig, The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers, 42 AM. U. L. REV. 1269, 1309-26 (1993).

\textsuperscript{19} See MOTIVE ZU DEM ENTWURFE EINES BUERGERLICHEN GESETZBUCHES FUER DAS DEUTSCHE REICH § 218, at 799 (BGB 1896) [hereinafter MOTIVE]. This draft of the German Civil Code rejects measuring damages according to the degree of fault.
amount of those damages. Punitive damages reflect the enormity of the offense of the tortfeasor. In awarding punitive damages, courts consider the economic situation of the tortfeasor, and whether and to what extent the tortfeasor profited from his wrongful act. Punitive damages are awarded to deter the tortfeasor from committing similar acts in future. They take into consideration other victims who suffered from the tortfeasor's similar behavior and are awarded to prevent persons like the tortfeasor from similar behavior. The suffering of the named plaintiff is of relatively little importance. The victim and his losses are incidental to punitive damages.

Focusing on the victim in compensatory damages does not mean that the tortfeasor has no significance. The wrongful act and the wrongdoer are necessary prerequisites for a claim. However, these prerequisites are generally not evaluated in the adjudication of damages. On the other hand, the highlighting of tortfeasors and society in punitive damages does not mean that the victim has no significance. Similar to compensatory damages, the victim and his suffering of damages may be necessary prerequisites for a punitive award. But, again, they generally are not further evaluated unless included in the analysis of the seriousness of the offense. In short, compensatory damages are primarily victim-oriented, while punitive damages are primarily tortfeasor and society-oriented.

Under special circumstances, focusing on the relevant person may be misleading. Thus, a proviso is necessary. When determining damage amounts for pain and suffering, courts may rely on the intention, the motivation, and even the economic situation of the wrongdoer. In cases where damages are meant to comfort the victim by substituting bad feelings with good feelings, the amount of damages for pain and suffering may be measured by aspects derived from the person of the wrongdoer. A good example of this concept is where reaction to infringement with the right to personality is at stake. The German concept of satisfaction (Genugtuung) is based

20. BMW, 517 U.S. at 575 (relying on 150 years of court practice).
21. See the jury instruction cited in Cooper, 532 U.S. at 439 n.12.
22. Id. The jury instruction does not mention the victim at all. Recent court decisions on punitive damages consider the victim and his losses at least as far as the proportionality test is concerned. See BMW, 517 U.S. at 575.
23. The wrongful act in itself may lead to criminal punishment even without any damages occurring. If it is taken as a basis of a claim for damages, damages must have occurred.
24. Cooper, 532 U.S. at 432 (comparing compensatory damages with punitive damages).
25. For a lengthy discussion of this concept, see Sebok, supra note 2.
on this idea. The tortfeasor has to pay the amount of damages necessary to comfort the victim and to put the victim in a position where the bad feelings are substituted with good feelings. Thus, in cases of damages for pain and suffering, the real focus seems to be the victim and the victim’s need for comfort. Considering the person of the wrongdoer is a means of adequately compensating the victim. Consequently, German courts, in cases of violation of the right to personality, occasionally consider the person of the tortfeasor (i.e., his economic situation, or his intentional or negligent acts) when calculating the amount of damages. In order to comply with their pretend, pure compensatory system of damages, courts try to turn tortfeasor-oriented considerations into a victim-oriented approach. Courts argue that taking such facts into account is necessary to adequately compensate the victim, thus focusing on the victim instead of the tortfeasor. From this perspective, satisfaction becomes a transmission belt to turn tortfeasor-oriented considerations into victim-oriented considerations and makes compensatory what seems to be punitive.

Although somewhat intertwined with the person looked at, a final and separate distinction is the different perspectives regarding the relevant time period to be examined. Compensatory damages consider the wrong, the damages, and the persons involved more or less retrospectively. The only prospective element, which focuses on the person of the victim, is the future damages of the wrongful act that may be compensated in advance. As opposed to compensatory damages, punitive damages are mostly prospective because they are aimed at deterring the tortfeasor and persons like him from future wrongful acts and misbehavior. They are retrospective only insofar as the retaliatory function of punishment is retrospective.

In sum, compensatory damages serve to put the victim in the position where he would have been in had the wrongful act not occurred. They are loss-oriented, victim-oriented, and retrospective. On the other hand, punitive damages serve to punish and deter the tortfeasor. They are action-oriented, tortfeasor-oriented, and mostly prospective.

26. BGHZ 18, 149 (159).
27. Id. at 157; BGHZ 128, 117 (120); Federal Supreme Court, 1993 Neue Juristische Wochenschrift [NJW] 23, 1531 (1531).
II. PUNITIVE DAMAGES IN THE UNITED STATES OF AMERICA RECONSIDERED

A. Development of a Dual System Within the American Law of Damages

At least since the nineteenth century, the conceptual idea of the law of damages in the United States has been based on two distinct and mostly separate pillars: the compensation of the victim and the punishment and deterrence of the tortfeasor and others like him. The famous nineteenth-century debate regarding whether the law of damages should be purely compensatory or may also encompass punitive aspects seems to have been decided in favor of a dualistic system. The famous, often cited statement of Simon Greenleaf that “damages are given as a compensation, recompense, or satisfaction to the plaintiff, for an injury actually received by the defendant. They should be precisely commensurate with the injury; neither more nor less...” may reflect the positions of German legislation in 1900 and even modern German blackletter doctrine. But this statement does not reflect the reality of the last 150 years of the law of damages in the United States. Instead, the United States’ position since the “war on punitive damages” can best be described by the statement of Theodore Sedgwick that

the law permits the jury to give what it terms punitory, vindictive, or exemplary damages; in other words, blends together the interest of society and of the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender. This rule seems settled in England, and in the general jurisprudence of this country.

This statement still perfectly describes the American law of damages in practice. Over time, the punitive damages pillar of this dualistic system has, in many ways, been broadened to situations far beyond

28. As to the pre-nineteenth-century development, see Rustad & Koenig, supra note 18, at 1284–1334.
29. As to the nineteenth century “War on Punitive Damages,” see id. at 1298–1304.
30. GREENLEAF, supra note 17, § 253, at 242-43 (emphasis added).
31. See infra Part III.
32. Rustad & Koenig, supra note 18, at 1298.
34. See Damages Overview, supra note 2, at 370 n.31 (mentioning Nebraska as the only state to prohibit punitive damages on constitutional grounds).
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the traditional reach of punitive damages. These damages have, in a sense, become even more punitive in that in some states part of the punitive damage award no longer goes to the victim, but instead to the state or assigned organizations. At the same time, the amounts of damages awarded have skyrocketed.

B. The Impact of Modern Restrictions on Punitive Damages

Looked at through the eyes of a foreign lawyer, the actual attitude towards punitive damages within the United States can be summed up by stating that the common law concept of punitive damages is undergoing: (1) a development on the technical side from common law practice towards additional and detailed statutory regulation; (2) a development in substance, albeit still vacillating, from out-of-control amounts of punitive damages towards restrictions as to the permissible amount of punitive damages; and (3) a development in substance towards granting part of the damage award to the state, persons, or institutions other than the plaintiff. Do these developments change the conceptual idea of punitive damages and help to bridge the gap between the American and German systems of damages? While the technical shift towards statutory regulations evidently does not change the conceptual idea of punitive damages, the alterations in substance must be considered in detail.

Significant statutory law reform and the introduction of judicial limitations on punitive damages have changed the landscape of the law of damages. Although modern punitive damages vary tremendously from state to state, in recent years there has been a trend in most states toward limiting punitive damages awards. Significant limitations on punitive damages have been introduced by individual state legislation, federal legislation, and U.S. Supreme Court

35. See Sebok, supra note 2.
38. See Brand, supra note 12, at 159–63.
jurisprudence. Even the general philosophy regarding punitive damages seems to be no longer unquestioned. The number of states that restrict punitive damages either by legislation or by court decisions is growing. Although most recent state statutory regulations adhere to the general dualistic concept and have not abolished punitive damages, many states have introduced general ceilings on punitive damages or have capped the amount of allowable damages.

1. Permissible Amounts of Punitive Damages under Review

According to traditional notions, whether to award punitive damages and the amount to be awarded is within the discretion of the courts. While historically punitive damage awards had been rare and the amounts awarded rather restricted, during the last few decades the punitive award amounts have risen dramatically. There have been numerous cases in which double and triple-digit million, and even triple-digit billion dollar punitive damages have been awarded; although it should be noted that such large and arguably

41. The key case is BMW, in which the Supreme Court declared a $2 million punitive damages award unconstitutional as a violation of the Due Process Clause. The original $4 million punitive damages award from the Circuit Court of Jefferson County, Alabama, had already been reduced to $2 million by the Supreme Court of Alabama. BMW of N. Am., Inc. v. Gore, 646 So. 2d 619 (Ala. 1994).

42. For concerns on constitutionality, see Justice Blackmun’s majority opinion in Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 9 (1990). For a discussion of this controversy, see Rustad & Koenig, supra note 18, at 1298-1304 (referring to the nineteenth-century “War on Punitive Damages,” which is now reduced to a war on permissible amounts of punitive damages).


45. Restatement (Second) of Torts § 908 cmt. d (1979). This general attitude has not been erased by Supreme Court decisions like BMW, 517 U.S. at 568, and Cooper, 532 U.S. at 432. Instead, these decisions only make a review for abuse of discretion available under the Fourteenth Amendment when an award can fairly be categorized as grossly excessive.

46. See Hastlip, 499 U.S. at 61–64 (O’Connor, J., dissenting) (calling for a reassessment of the constitutionality of the time-honored practice).

excessive punitive awards have been the exception, and have often been reduced either by the parties' negotiations or by higher courts' decisions.\textsuperscript{48} Meanwhile, amidst criticism that caps on punitive damages might undermine their deterrent effect,\textsuperscript{49} a significant number of states have put caps on punitive damages by statutory regulations or court decisions.\textsuperscript{50} And the Supreme Court in \textit{BMW of North America v. Gore}\textsuperscript{51} called for a cap on punitive damages based on constitutional grounds.

Thus, the most important development in the field of punitive damages seems to be the changing attitude towards the amount of damages awarded. By attaching the permissible amount of punitive damages to actual compensatory damages, such damages obviously are not transformed into compensatory damages. But at least the effect becomes somehow more compensation-related. And a reduction in the amount of punitive damage awards could be a means to narrow the gap between the German and American systems.

2. Legislative Restrictions by Caps on Punitive Damages

During the last decade there has been a significant amount of federal and state legislation restricting the available amounts of punitive damages by putting a ceiling on available damage amounts. Statutes in about twenty states by now either generally,\textsuperscript{52} or with regards to special types of cases,\textsuperscript{53} have fixed maximum amounts\textsuperscript{54} or by limiting punitive damages to compensatory damages or restricting them to simple\textsuperscript{55} double,\textsuperscript{56} triple,\textsuperscript{57} or quadruple\textsuperscript{58} the amount of

\begin{itemize}
  \item \textsuperscript{48} See Brand, \textit{supra} note 12, at 155–58.
  \item \textsuperscript{49} Rustad \\& Koenig, \textit{supra} note 18, at 1277.
  \item \textsuperscript{50} For an overview, see \textit{BMW}, 517 U.S. at 614 (Ginsburg, J., dissenting). As to additional states having added caps on punitive damages, see \textit{Cooper}, 532 U.S. at 433 n.6.
  \item \textsuperscript{51} \textsuperscript{51} See \textit{Cooper}, 532 U.S. 424; \textit{BMW}, 517 U.S. at 559.
  \item \textsuperscript{52} \textit{E.g.}, \textit{COLO. REV. STAT.} § 13-21-102(1)(a), (3) (1998).
  \item \textsuperscript{53} \textit{E.g.}, \textit{CONN. GEN. STAT.} § 52-240b (1995) (punitive damages in product liability cases).
  \item \textsuperscript{54} \textit{E.g.}, \textit{GA. CODE ANN.} § 51-12-5.1(g) (2000) (placing a ceiling of $250,000 in some tort actions).
  \item \textsuperscript{55} \textit{E.g.}, \textit{COLO. REV. STAT.} § 13-21-102(1)(a), (3).
  \item \textsuperscript{56} \textit{E.g.}, \textit{CONN. GEN. STAT.} § 52-240b.
  \item \textsuperscript{57} \textit{E.g.}, \textit{FLA. STAT. ANN.} § 768.73(1)(a)-(b) (West 2002).
  \item \textsuperscript{58} \textit{E.g.}, S. 187, 409th Gen. Assem., Reg. Sess. (Md. 1995).
\end{itemize}
compensatory damages. Eventually, statutes will combine these types of restrictions or put other ceilings on punitive damages. For example, one important federal act that has a kind of European counterpart puts a $300,000 cap on punitive damages in cases of intentional discrimination in employment (depending on the number of workforce occupied).

On the other hand, it should be noted that even under legislation that has generally put a ceiling on punitive damages, such ceilings do not necessarily apply to all situations. Instead, in exceptional situations, unlimited punitive damages are still available.

3. Reduction of Punitive Damages Awarded in Jury Verdicts

Moreover, jurisprudence is tending to accept that there are limitations on punitive damages even where not fixed by statute. You can find these developments in state courts as well as in the federal courts. Actual discussion is fueled by BMW of North America Inc. v. Gore, where the Supreme Court of the United States in a highly controversial decision—four judges dissenting on two different sets of grounds—reversed the judgment of the Alabama Supreme Court, which already had reduced the $4 million punitive damages award of the Circuit Court of Jefferson County, Alabama, remanding the case for further proceedings not inconsistent with the Court’s opinion. But the BMW case only highlights a development which had started earlier and which was affirmed in more recent decisions.

4. Restrictions on the Amount of Punitive Damages in State Courts

It should be kept in mind that state courts have been restricting the amount of punitive damages for some time. First, state courts more than occasionally reduce punitive damages by means of remittitur. Where a jury verdict assesses damages that the court deems

60. See 42 U.S.C. § 1981a(b)(3). For the European counterpart, see infra note 180 and accompanying text.
61. E.g., FLA. STAT. ANN. § 400.0238 (West 2002).
62. BMW, 517 U.S. at 563.
63. 646 So. 2d 619 (Ala. 1994).
64. See Cooper, 532 U.S. at 424.
65. For a definition of remittitur, see BLACK’S LAW DICTIONARY 1298 (7th ed. 1999). A remittitur occurs when a jury verdict seems excessive to a court, and the judge requests a party to accept judgment for a smaller amount as a condition for denying the other party’s motion for
excessive or are beyond the state's legislative cap, the court may reduce the amount of damages. There have been challenges to the right of the court to reduce a punitive damages verdict, but, in many cases, such reductions have been upheld. On the other hand, where statutory regulations restrict punitive damages by putting caps on them, courts see no need to impose additional limits on punitive damages.

5. Restrictions of Punitive Damages in Federal Courts

For more than a decade, the Supreme Court has expressed concern about excessive punitive damages awards. In *Aetna Life Insurance Co. v. Lavoie*, the Court stated that in an appropriate setting the constitutionality of excessive punitive damages must be resolved. The Court went a step further in *TXO Production Corp. v. Alliance Resources Corp.*, stating that "when an award can fairly be categorized as 'grossly excessive' in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." Finally, in *BMW*, the Court had the opportunity to decide this constitutional question. Reversing a judgment from the Supreme Court of Alabama, the Court held that "grossly excessive" punitive damages "transcend the constitutional limit" established by the Due Process Clause of the Fourteenth Amendment and set up the guideposts regarding the degree of requisite responsibility, the proper ratio of punitive to actual damages, and the comparability of punitive damages to civil and criminal

a new trial. Some courts have suggested that the permissibility of remittitur is not relevant to the issue of damage caps because a remittitur can occur only with the plaintiff's consent, and a damage cap takes effect without the plaintiff's consent. See Lakin v. Senco Prods., Inc., 987 P.2d 463, 471 (Or. 1999). Nevertheless, no right to judgment on the verdict exists because a court might still order a new trial without the plaintiff's consent. Theoretically, a court might order new trials indefinitely. See STEVEN C. YEAZELL, CIVIL PROCEDURE 739 (4th ed. 1996) (commenting on theoretical possibility that a court might continuously order new trials).


69. Id. at 828-29.


71. Id. at 458.


73. Id. at 586.
penalties available in case of comparable misconduct.\textsuperscript{74} The recent Supreme Court decision in \textit{Cooper Industries, Inc. v. Leatherman Tool Group, Inc.}\textsuperscript{75} follows this reasoning.

\textbf{C. The Conceptual Idea of Punitive Damages Unchanged}

State legislation and court decisions may have rewritten the law of damages,\textsuperscript{76} but the system in substance seems to remain dualistic. Punitive damages still are confined to the goals of punishing the defendant, deterring him and others from similar wrongdoing, and giving an incentive to private law enforcement. According to most commentators, the conceptual ideas of punitive damages are punishment and deterrence. Punitive damages are awarded to punish the bad guy or, more precisely, the defendant's bad behavior. At the same time, punitive damages are awarded to deter the defendant and others from similar misbehavior in the future.\textsuperscript{77} These aims can be traced in recent punitive damages legislation and jurisprudence. Caps on punitive damages do not alter these aims, and, although in certain circumstances they may reduce the deteriorating effect, caps do not abolish the deterrent or retaliatory purposes.

\textbf{1. Actual Jurisprudence Stressing Punitive Function}

In a recent Supreme Court decision, Justice Stevens, delivering the opinion of the Court, described the purpose of punitive damages, stating that they are "intended to punish the defendant and to deter future wrongdoing."\textsuperscript{78} As support for this statement, Justice Stevens relied on a long line of Supreme Court decisions\textsuperscript{79} and legal literature.\textsuperscript{80} These general concepts of punishment and deterrence can best be described by a standard jury instruction stating that

\begin{quote}
[in determining whether or not you should award punitive damages, you should bear in mind that the purpose of such an award is to punish the wrongdoer and to deter that wrongdoer from repeat-
\end{quote}

\textsuperscript{74.} Id. at 575–84.
\textsuperscript{75.} Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001).
\textsuperscript{76.} See Martha Middleton, A Changing Landscape: As Congress Struggles to Rewrite the Nation's Tort Laws, the States Already May Have Done the Job, A.B.A. J., Aug. 1995, at 56.
\textsuperscript{77.} See Damages Overview, supra note 2, at 364.
\textsuperscript{78.} Cooper, 532 U.S. at 432.
\textsuperscript{79.} Id.
Thus, punitive damages are tortfeasor-oriented, act-oriented, and prospective. This has not changed despite the placement of caps on punitive damages.

There are goals in addition to punishment and deterrence. These include the desire of society to educate individuals and affirm societal standards of conduct, and the need to provide incentives for private law enforcement. But these additional purposes in a sense are still punishment or closely related to punishment. The same characterization applies to the argument that punitive damages should take from the tortfeasor the profit he derived from his wrongful act. Punitive damages are awarded to fulfill a profit-erasing function. Wrong must not pay. Thus, even if the plaintiff suffered no or minimal loss, the wrongdoer should not profit from his wrongful act. Punitive damages may take away any profits derived from the wrongful conduct.

This approach is sometimes addressed in the process of calculating punitive damages. For example, in *Grimshaw v. Ford Motor Co.*, the California Appellate Court calculated punitive damages according to the profits that the defendant had accumulated by not installing protective measures into its Ford Pinto cars, and then augmented the amount in order to punish and deter Ford. Under a purpose-oriented perspective, this approach does not focus on compensating the individual plaintiff, but instead focuses on punishing the defendant. Under a perspective that focuses on the relevant persons, taking away from the defendant the profits that he derived from his wrongful act primarily addresses the tortfeasor instead of the victim. Under a perspective of whether the plaintiff's loss or the defendant's wrongful act is decisive, it evidently is the act that counts.

In *BMW*, the Court evidently did not consider the potential profit that Gore could have made and that the defendant BMW had taken

81. See Sunstein, Kahnemann & Schkade, *supra* note 81, at 2081 (citing RONALD W. EADES, JURY INSTRUCTIONS ON DAMAGES IN TORT ACTIONS 98 (3d ed. 1993)).
82. See *Damages Overview, supra* note 2, at 374–80.
83. This article will not discuss the problem of whether at least some kind of actual damages is a necessary requirement for awarding punitive damages. In our context, the outcome of this discussion would be of no significance. As to a discussion of this problem, see Rustad & Koenig, *supra* note 18, at 1269.
away, but it was exclusively the profit BMW had derived from the wrongful act that was taken away.\textsuperscript{86}

2. Defining Goals of Punitive Damages in Statutory Regulation

New statutory regulations restricting punitive damages clearly rely on punishment and deterrence.\textsuperscript{87} These statutes sometimes only name one of the several above-mentioned aspects as its goal, but the goal(s) that are named still serve punitive purposes. They still are wrongdoer-oriented, act-oriented, and prospective, and thus punitive. A cap on punitive damages does not alter these goals. Moreover, modern statutory regulations sometimes make punitive damages even more punitive than they used to be. The most significant evidence of the quasi-criminal character of punitive damages in recent statutory regulations can be found in modern legislation allocating part of the damages award not to the plaintiff himself but to the state treasury\textsuperscript{88} or to charitable trusts.\textsuperscript{89} As a matter of principle, compensation has to go to the victim in order to fulfill its function.

D. Additional Compensatory Functions of Punitive Damages

While punitive damages in a strict sense always were and still remain act-oriented, tortfeasor-oriented, and prospectively aimed at punishment of the wrongdoer and specific and general deterrence, from a practical perspective, punitive damages also contain victim-oriented and retrospective ideas. Punitive damages have been used at least in part for compensatory purposes. This additional, compensatory function of punitive damages does not bridge the gap between a monistic, compensatory system of damages and a dualistic system. But it could narrow the gap to a degree such that a monistic system at least in part could accept punitive damages awards.

First, punitive damages are used to evade the general American rule of adjudicating costs. While under German law of civil procedure the prevailing party receives restitution of his attorneys’ fees, in

\textsuperscript{86} The trial court had calculated the punitive damages based on the total number of refinished cars that had been sold as new, providing BMW with a profit of $4,000 per vehicle. See BMW of N. Am. Inc. v. Gore, 517 U.S. 559, 564 (1996).


\textsuperscript{88} \textit{E.g.}, GA. CODE ANN. § 51-12-5.1(e)(2) (2000); KAN. STAT. ANN. § 60-3402(e) (1994). For a survey on the different beneficiaries, see BMW, 517 U.S. at 614 (Ginsburg, J., dissenting).

\textsuperscript{89} \textit{E.g.}, FLA. STAT. ANN. § 768.73(2)(a)–(b) (West 2002); MO. REV. STAT. § 537.675 (1994).
the United States each party must pay its own attorneys' fees. Thus, winning the case does not automatically include being compensated for your own attorneys' fees. From this perspective, "compensation" could be considered to be less than full compensation. Hence, without appropriate legislation, there may be no legal basis for the recovery of attorneys' fees. In such circumstances, courts may excuse the successful plaintiff from his attorneys' fees by awarding or augmenting punitive damages, taking into consideration that the plaintiff will not be able to keep the full amount of damages awarded because he must pay his attorneys' fees.

Traditional notions of punishment and deterrence could explain awarding punitive damages to help the plaintiff pay attorneys' fees, putting an even higher burden on the tortfeasor. But at the same time, deviating from the American rule of costs and exonerating the plaintiff from the economic harm the tortfeasor has caused can be considered compensatory. If the purpose of damages is examined, awarding compensatory damages serves the goal of redressing the loss the plaintiff has suffered. Paying attorneys' fees with regular compensatory damages would lead to the result that in the end the plaintiff would not be in the economic position he would have been had the tortfeasor not committed the damaging act. By examining whom to look at when exonerating the plaintiff from his attorneys' fees, the focus is not on the defendant and his wrongful act and future behavior, but instead on the victim and his losses.

90. Section 91 of the German Code of Civil Procedure allows recovery of costs including legal fees of the attorney. But it should be noticed that contingency fees are not permitted and thus not recoverable.


92. There are exceptions to this rule. For example, 11 U.S.C. § 362(h) provides that "[a]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." This indicates a differentiation between recovery of attorneys' fees and punitive damages. By putting recovery of attorneys' fees under actual damages, and, thus, in theoretical opposition to punitive damages, § 362(h) indicates that adjudicating attorneys' fees is not in itself guided by punitive purposes. See 11 U.S.C § 362(h) (2000).

93. N.Y., Chi. & St. Louis R.R. Co. v. Grodek, 186 N.E. 733 (Ohio 1933); New Orleans, Jackson, & Great N.R.R. Co. v. Allbritton, 38 Miss. 242, 272–73 (1859). As to the compensatory function of this part of punitive damages awards, see Rustad & Koenig, supra note 18, at 1321–22; Note, supra note 2, at 1902; Note, Exemplary Damages in the Law of Torts, 70 HARV. L. REV. 517, 520–21 (1957).
Second, punitive damages can be and are used to help when there are difficulties in measuring the amount of compensatory damages. This function of punitive damages can most easily be traced in cases of damages for pain and suffering. Under a system where damages for pain and suffering are restricted or not available, courts tend to shift to the available system of punitive damages. Thus, U.S. courts, up to the nineteenth century, seem to have intermingled compensatory and punitive damages and have relied upon punitive damages when compensation for pain and suffering could otherwise not be awarded. Under a functional approach, as described above, punitive damages and damages for pain and suffering are specifically interrelated. Punitive damages serve a double-headed purpose when they are used to give relief for pain and suffering. By punishing the tortfeasor for his wrongful act, they focus on the tortfeasor and persons like him. But at the same time, punitive damages focus on the plaintiff, enabling him to be compensated for the harm he suffered from the tortfeasor's wrongful act. From this point of view, punitive damages, when used to award damages for pain and suffering, can be considered to be partly compensatory. This comes close to what German law effectuates by awarding damages for pain and suffering under the heading of "satisfaction" ("Genugtuung"). However, over the course of time, as courts became more willing to include nonpecuniary losses within the scope of compensation for pain and suffering, this partly compensatory function of punitive damages seems to have been erased.

Finally, there is a third type of situation where punitive damages may be used for compensatory purposes. Actual damages are sometimes rather difficult to prove. For example, this is the case in intellectual property infringement and antitrust cases. Thus, multiple damages awards may be used to bridge the difficulties in establishing actual losses. But it should be noted that compensation awarded to redress eventual losses but not actual losses is by no means purely compensatory.

94. See Note, supra note 93, at 519.
95. See Cooper, 532 U.S. at 437–38 n.11; Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 61 (1991) (O'Connor, J., dissenting); Note, Exemplary Damages in the Law of Torts, supra note 93, at 520 (addressing the "vacillation between compensatory and punitive theories... [as] typical of many early American cases...").
96. See Note, supra note 93, at 520.
97. See id. at 521.
E. Impact of Caps on Punitive Damages and Impact of Residuary Compensatory Functions

We must now discuss whether caps on punitive damages undermine the deterrent effect and frustrate the remedy. Eventually, caps may allow potential tortfeasors to calculate in advance their maximum exposure, taking into consideration that eventual damages are less than expected profits. Beyond such reasoning, it seems to be evident that with caps, even when calculated according to the actual damages, punitive damages do not lose their character. From a theoretical point of view, these restrictions do not change the nature of punitive damages. Even where limited to the amount of compensatory damages, their purpose is punishment. Punitive damages are future-oriented and focus on the person of the tortfeasor. From a practical perspective, such limitations may lead to a less hostile attitude in foreign legislatures, as far as enforcement is concerned. The reason is that it is not just the punitive nature of punitive damages that is an obstacle to enforcement, but also the unreasonable amount of damages sometimes awarded under the heading of punitive damages. Thus, once the general adverse attitude towards punitive damages is overcome, the separate and distinct obstacle of excessiveness may be reduced.

On the other hand, residual compensatory functions of punitive damages do not change the conceptual idea of punitive damages in itself. But it can make the punitive pillar of the system more easily reconcilable with a pure compensatory system, and therefore may allow partial enforcement of a punitive award.

III. The Schizophrenic German Attitude Towards Punitive Damages—Compensatory Demands and Noncompensatory Reality Reconsidered

The German attitude towards punitive damages is somewhat schizophrenic. On the one hand, since the enactment of the German Civil Code, the general German attitude toward punitive damages is that damages have to be purely compensatory. The German law of damages is a monistic system. What presumably does not fit into this

98. See Rustad & Koenig, supra note 18, at 1277, for a discussion of the effect of capping punitive damages.

scheme will be labeled as exceptions. On the other hand, and likewise since the beginning of the German Civil Code, there is a long and steady line of court decisions that do not fit into this scheme. German courts frequently awarded damages that could not seriously be held to be purely compensatory because they tended to include punitive elements. These decisions may be labeled as exceptions, as the German legislature labeled them when drafting the Code. And eventually they were exceptions in former times.

Anyhow, meanwhile these exceptions have increased not just in number, but also in the different areas of application they concern. They have been increasing at a steady rate, and have been nourished by an influx of legislation. The number of exceptions is notably rising by developments in the area of damages for infringement on the right of personality and sex discrimination in employment. These developments will be discussed at length. For present purposes, however, we only have to question whether the exceptions have become a second pillar of the German law of damages, and whether the traditional monistic system has turned into a dualistic system and the gap between the American and the German law of damages has narrowed.

We have to rely on a step-by-step analysis of courtroom reality to determine whether the traditional system has been modified by more than just exceptional noncompensatory elements, contrary to mainstream lip service. Part III.A discusses the traditional, purely compensatory approach and how it developed. Part III.B discusses the implantation of noncompensatory elements into the German law of damages. Part III.C discusses the indications of a shift toward an implantation of punitive elements into the traditional system, which may turn out to be the establishment of a second pillar within the German law of damages.

100. See MOTIVE, supra note 19, § 728 at 799 (now Section 847 of the German Civil Code) (addressing damages for pain and suffering). Damages for pain and suffering were not considered to be purely compensatory at the time.

101. For a lengthy discussion of noncompensatory elements in German court decisions, see PETER MUeLLER, PUNITIVE DAMAGES UND DEUTSCHES SCHADENERSATZRECHT 101 (2000); see also infra Part III.A–C.

102. See supra note 100.

103. See infra Part III.
A. The Traditional Approach Towards Punitive Damages in Germany—A Purely Compensatory System with Rare Exceptions?

Until the nineteenth century, the German attitude toward punitive damages was quite similar to what was discussed in the United States at that time. There was no unanimous attitude as far as noncompensatory, and particularly punitive, damages were concerned. Punitive damages, although not available everywhere in Germany, were quite common in some German states. For example, on several occasions, the Prussian Civil Code allowed the courts to award damages greater than the loss the plaintiff had suffered, measuring damages in proportion to the fault of the tortfeasor. On the other hand, the Bavarian Civil Code stated that "as meanwhile these torts are punished in criminal law," there was to be no more use of double and quadruple actions. Anyhow, while in the United States the more practical approach of Theodore Sedgwick won over the more theoretical, dogmatic approach of Simon Greenleaf, in Germany, the war on punitive damages was decided in favor of a monistic, compensatory system. During the nineteenth century, influential legal scholars had opposed not only damages for pain and suffering, but also the very idea of intermingling damages with punishment. They argued in favor of a strict separation of damages in civil law and punishment in criminal law. But the German "war on punitive damages" was only finally decided in the unification procedure that led to the enactment of the German Civil Code of 1900.

During the legislative procedure unifying the German civil law, it was argued that damage awards, as a matter of principle, should have the exclusive function to restore the losses caused by the wrongful act. As was resolved in the preparatory documents to the German Civil Code, with respect to what later became sections 249 to 252, "moralistic or penal aspects" should be kept away from civil law.

104. For a discussion of the split situation in pre-Code Germany, see MOTIVE, supra note 19, § 218 at 17.
105. 4 CODEX MAXIMILIANEUS BAVARICUS CIVILIS part 4, ch.15, § 5.
106. See supra Part II.
107. For a discussion of the debate on damages for pain and suffering (Schmerzensgeld), see Sebok, supra note 2.
108. The author only relies on the Prussian and Bavarian attitudes. See MOTIVE, supra note 19, § 218 at 17, for additional examples.
109. See id. § 218, at 18.
110. "Inclusion of moral or penal points of view into the civil law of damages has to be kept away from the determination of the civil law consequences of illicit behavior." Id. § 218, at 17 (author's translation).
Punitive elements in the civil law of damages were considered to be contrary to the very idea of the law of damages, which is strictly restricted to compensate the victim, while punishment is restricted to criminal law sanctions. Addressing general principles that had to be applied to all statutory regulations on damages, the preparatory documents state:

Draft as to cases where damages are based on the fault of the responsible rejects the gradual system of the amount of damages according to the type or grade of fault as it is given in several codifications, namely the Prussian Civil Code. Inclusion of moral and penal points of view (into the law of damages), on which this differentiation is founded, must be kept aside in adjudicating the civil law consequences of illicit and wrongful behavior. The principle of the common law according to which the amount of damages caused delimits the amount of awardable damages from a legal point of view is acceptable and alone gives justice to the person entitled to damages.111

At the same time, repudiation of punitive elements in the law of damages was one of the central arguments for restricting damages for pain and suffering to cases of bodily harm, thus excluding infringement of reputation from this type of damages. Pecuniary damages for infringement of reputation were linked with the traditional actio injuriam aestimatoria, which was of a criminal character.112

Based on these ideas, the German Civil Code was enacted, establishing a purely compensatory law of damages. Consequently, general provisions on damages in the German Civil Code113 address reparation and compensation and include damages for lost profits.114 In rare occasions, which must be specifically permitted,115 recovery of damages for pain and suffering is available. But there is not the slightest hint of punitive damages ("Strafschadensersatz") in the original code of 1900. Legislation seems to have erased the very idea of punitive damages.

German courts and blackletter doctrine, in line with the legislative history and the German Civil Code, considered punitive damages not to be a part of the German legal system.116 Under the 1900

111. Id. § 218, at 17-18 (author's translation). This is similar to Simon Greenleaf's statement. See GREENLEAF, supra note 17.
112. For a discussion of the legislative history, see BGHZ 7, 223.
113. §§ 249-53 BGB.
114. Id. § 252.
115. Id. § 253. For the recent extension of damages for pain and suffering see supra note 4.
116. See GRUNSKY, supra note 5, at n.3 (citing, among others, ESSER & SCHMIDT, supra note 5; LARENZ, supra note 5).
German Civil Code, jurisprudence immediately adopted this attitude, at least at face value. Throughout the twentieth century, there was almost no jurisprudence expressly awarding punitive damages. On the contrary, the German Federal Supreme Court frequently stressed the exclusivity of the idea of compensation as fundamental to the law of damages, at least until the second half of the twentieth century. Damage awards should position the plaintiff to where he would be had the damage not occurred. Punitive damages should not enrich the plaintiff or aim to punish and deter the tortfeasor beyond the general effect that is inherent in all obligations of damages. In early decisions, the German Federal Supreme Court clearly stated that damages for pain and suffering are purely compensatory, and that punitive elements and the financial situation of the tortfeasor have to be ignored. Since 1900, German blackletter doctrine, like German jurisprudence, states that damage awards have to be restricted to compensation. Noncompensatory elements are not part of the German civil law of damages, but are strictly restricted to criminal law. It is even questioned whether introduction of punitive elements is reconcilable with constitutional law. The idea that damages have to be restricted to compensation is most often highlighted when German courts are faced with enforcing U.S. punitive damages awards. Enforcement of foreign judgments is only available if the result of the foreign judgment does not violate German public policy. The restriction of damages to compensation is among the fundamental principles of German law, and punitive damages awards are generally held to be contrary to German public policy.

117. The German Federal Supreme Court, e.g., declined to take into consideration the financial situation of the tortfeasor because damages for pain and suffering should have no punitive function at all. BGHZ 7, 223.
118. See id. But see BGHZ 18, 149 (relying on the tortfeasor's financial situation by awarding nonpunitive damages for pain and suffering).
119. BGHZ 7, 23.
120. See GRUNSKY, supra note 5, at n.3 (citing, among others, ESSER & SCHMIDT, supra note 5; LARENZ, supra note 5).
122. See infra Part V.
123. See id.
B. Step-by-Step Reintroduction of Noncompensatory Elements Into the German Law of Damages

But the text of the German Civil Code and the mainstream position in literature are far from mirroring reality. A more detailed analysis of cases demonstrates that courts frequently award damages that cannot seriously be considered purely compensatory. Instead, in a large variety of situations, courts frequently rely on arguments, and come to conclusions, that are not aimed at exclusively compensating the victim for losses suffered, nor are retrospective or victim or loss-oriented. Thus, the awards are noncompensatory and consistent with punitive damages arguments, conclusions, and consequences, and at least come close to the idea of punitive damages.\(^{124}\) Even in modern legislation, one may find elements that cannot be considered purely compensatory. For his recent dissertation, Peter Mueller investigated court decisions awarding damages that, at least partially, do not fit into a scheme of compensatory damages.\(^{125}\) He outlined nineteen different situations where damages are not strictly restricted to compensation, but instead include elements that, according to his understanding, must be labeled punitive.\(^{126}\) In some of these situations, it may be questionable whether courts really take a punitive damages approach. In other situations, a nondamages approach might have been available, although it was not accepted by the courts. But there seems to exist an extensive amount of case law in which courts do not fully comply with the purely compensatory system of damages.\(^{127}\) The most important situations that compare reality to the fundamental principle of the German law of damages are discussed as well as the question of whether punitive damages have been reintroduced into the German legal system as an additional principle of compensatory damages.

1. The Irresistible Progress of Implementing Noncompensatory Elements into Damages for Pain and Suffering

For many reasons, the analysis has to start with damages for pain and suffering. First, what was, and still is, happening in the field of damages for pain and suffering touches the very heart of almost two

124. See infra III.B.1–3.
125. See MUELLER, supra note 101.
126. See id. at 101–296.
127. See infra III.B.1–3.
hundred years of an increasingly hostile attitude of German domestic law towards punitive damages.128 Second, damages for pain and suffering have undergone a strange career during the last few years.129 Third, and most important, damages for pain and suffering have to be the starting point because German law in other areas of damages relies on ideas that have been developed in this field.

In order to better understand what is happening, the developments since the introduction of the German Civil Code have to be outlined. Similar to punitive damages during the nineteenth century, some of the major and most important German states did not allow damages for pain and suffering. However,130 damages for pain and suffering were available in other German states. The rejection of damages for pain and suffering was founded on dogmatic, as well as practical, reasons. First, there was the idea that pain and suffering constituted nonpecuniary loss, and that only pecuniary loss could be compensated by money. Hence, the law of damages seemed to exclude damages for pain and suffering.131 Second, there was the idea that it was almost impossible to calculate damages for pain and suffering without taking into consideration the degree of fault of the tortfeasor. But the degree of fault, again for dogmatic reasons, was not a permissible parameter in determining the amount of damages. The degree of fault was a parameter in determining whether an action may lead to damages, but not in determining the amount of damages.

As was stated in the preparatory documents to the German Civil Code, "[t]he principle of the common law according to which only the amount of losses caused by the tort exclusively determines the amount of damages to be restituted, was the only legally safe principle and was the only one to give justice to the victim."132 Third, there was the idea that, at least in the field of damages for injuries to reputation, pecuniary compensation was somehow disgusting.133

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128. See supra notes 104–15 and accompanying text.
129. See, e.g., Sebok, supra note 2 (highlighting the "strange career of satisfaction in German law.").
130. This was mostly influenced by French law, which was in force in major parts of western German territories, and Swiss law.
131. As to the development of this idea in the nineteenth century legal literature, see Karin Nehlsen-v. Stryk, Schmerzensgeld ohne Genugtuung, JURISTEN-ZEITUNG 119 (1987); see also Sebok, supra note 2.
132. See Motive, supra note 19, § 218 at 18 (regarding general regulations on damages) (this is now §§ 249–53 of the German Civil Code).
133. See, e.g., Ursula Stein, Muenchener Kommentar zum Buengerlichen GesetzbuCh, Schuldrecht, Besonderer Teil III § 847, at 2063 n.2 (3d ed. 1997).
Despite this historic split, damages for pain and suffering nevertheless were introduced into the Civil Code, but obviously with some hesitation and under the proviso that they should be available only in cases for which the Code explicitly provided for them.\textsuperscript{134} Damages for pain and suffering were considered to be an exception to the general rule that damages were to be restricted to pecuniary losses.\textsuperscript{135} Nevertheless, it seemed to be necessary to allow damages for pain and suffering at least in cases of bodily harm or deprivation of liberty to harmonize the new, unified civil law with criminal law, which had been unified since 1877. The "decisive"\textsuperscript{136} motivation for introducing an exceptional claim for damages for pain and suffering was the fact that in criminal cases, the judge was entitled to order that atonement (\textit{Busse}) be paid to the victim.\textsuperscript{137} Mostly in order to avoid discrepancies between what a criminal judge and a civil judge were entitled to award, section 782 of the draft, which later became section 847 of the German Civil Code, allowed claims for damages for pain and suffering.\textsuperscript{138} This atonement argument plainly indicates that, at that time, damages for pain and suffering were considered not to be strictly compensatory. Atonement definitely is different from compensation. According to its intent to transfer the criminal law concept of atonement to the civil law of damages, this type of damages was considered not truly compensatory.

For more than half a century while courts were awarding small damage awards for pain and suffering,\textsuperscript{139} the general attitude towards

\textsuperscript{134} § 253 BGB.

\textsuperscript{135} See \textit{Motive}, supra note 19, § 728 at 799 (now § 847 of the German Civil Code).

\textsuperscript{136} The preparatory documents state the following argument to be "ausschlaggebend," meaning decisive.

\textsuperscript{137} The historical background which led to the introduction of damages for pain and suffering into the new Civil Code is laid down in the preparatory documents at draft section 728 which later became section 847 of the German Civil Code. \textit{See also} Nehlsen-v. Stryk, supra note 131.

\textsuperscript{138} Former Section 847 German Civil Code which recently has been abolished due to the 2002 extension of section 253 reads as follows:

(1) In case of injury to body or health as well as in the case of deprivation of liberty, the victim may as well demand fair compensation in money for non-pecuniary damages. (2) A similar claim is given to a woman against whom an immoral crime or offence is committed, or who is induced by cunning or by threats, or by the abuse of a relationship of dependence to permit extra-marital cohabitation.

\textsuperscript{139} Pre-\textit{Caroline I} jurisprudence of the German Federal Supreme Court had limited damages for pain and suffering in case of violation of the right to personality to about DM 10.000. See, e.g., BGHZ 26, 349 (351) (DM 10.000); BGHZ 35, 363 (365) (DM 8.000); BGHZ 39, 124 (127) (DM 10.000. Only in its \textit{Caroline I} decision of November 15, 1994, BGHZ 128, 1 (5), the Supreme Court reversed a DM 30.000 judgment because the amount was too small. The Court of Appeals then rendered judgment increasing the awarded damages to DM 180.000. For
these types of damages underwent significant changes, adding new 
questions regarding the compensatory function of this type of damage 
award. Departure from a purely compensatory approach towards 
damages for pain and suffering took place when the German Federal 
Supreme Court began to reevaluate damages for pain and suffering. 
In a famous 1955 judgment, the German Federal Supreme Court gave 
up its traditional and purely monistic classification of damages for 
pain and suffering, stating:

The claim for damages for pain and suffering under section 847 
German Civil Code is not an ordinary claim for damages but in- 
stead a claim of its own character bearing a twofold function: This 
claim shall give to the victim adequate compensation for damages 
which are not pecuniary, and at the same time it shall take into ac-
count that the tortfeasor owes satisfaction for what he did to the 
victim.140

Thus, finally the idea of satisfaction that had been discussed during 
the nineteenth century found its way back into German jurisprudence.

Another important alteration can be found in decisions awarding 
damages for pain and suffering in cases of violation of the right to 
personality by the press. First, the German Federal Supreme Court, 
deviating from well-established decisions of its predecessor, the 
Imperial Court,141 developed a general right to personality as a right 
protected by tort law.142 Such a right had been discussed in the 
legislative procedure, but had not been introduced into the German 
Civil Code.143 Second, the Federal Supreme Court by analogy ex-
tended damages for pain and suffering to claims for violation of the 
right to personality, which was not specifically mentioned in section 
847 of the German Civil Code and, thus, was contrary to section 253, 
which restricted these types of damages to claims specifically ad-
dressed by statutory regulations. In a famous 1958 decision, the German Federal Supreme Court awarded damages for pain and suffering for abuse of the photo of a famous person in a humiliating type of advertisement, although (1) section 253 permitted damages for pain and suffering only in cases enumerated in the Code; (2) the right to personality was not listed in section 847; (3) in the course of formation of the Civil Code there was discussion on introducing a general right to personality in section 847 but the idea was rejected; and thus (4) there was no reasonable legal basis for the decision either under the Code or by way of analogy. In subsequent decisions, the German Federal Supreme Court reached the same result. The German Federal Constitutional Court held this development to be constitutional based on the strong protection the right to personality received under the German Constitution.

More interesting than the expansion of a claim beyond express restrictions in the Code is a specific restriction on such a claim and the argument used in measuring the damages. The Supreme Court restricted the claim to situations of serious fault or significant infringement of the right to personality. In introducing this restriction, the court relied in part on tortfeasor-oriented considerations. Moreover, the court did not restrict the scope of damages to what and how the victim suffered, but also considered the motives of the defendant.

While the restriction on cases of serious infringement of the right to personality may be neglected, restriction on cases of serious fault cannot because the degree of fault in compensatory damages is insignificant. Thus, this restriction apparently is based on noncompensatory ideas. Measuring damages according to the motives of the

144. Former Section 253 of the German Civil Code made available money damages for pain and suffering “only as provided by law.” This wording does not allow for an extension by analogy.
145. BGHZ 26, 349; see also Amelung, supra note 139, at 20.
146. BGHZ 35, 363 (367).
147. BVerfGE 34, 269 (269).
148. This restriction is rarely mentioned in German law, but when it is, it is typically referred to as a “curiosity.” PETER SCHWERDTNER, MUECHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, ALLGEMEINER TEIL BAND I, § 12 n.287 (3d ed. 1993).
149. BGHZ 35, 363 (369) (taking into consideration that in a case of violation of the right to personality by the press, a substantial risk should be put on the tortfeasor because the interference with the victim’s rights is generally based on economic motives); see also BVerfGE 34, 269 (286) (taking into consideration that in a case of violation of the right to personality by the press, interference with the victim’s rights is generally based on economic motives); MUELLER, supra note 101, at 277.
tortfeasor is still noncompensatory. Again, this could no longer be called compensatory because the focus of compensation is not strictly restricted to what the victim suffered.

The argument for enlarging section 847 of the Code to encompass the right to personality was that the Federal Supreme Court wanted to protect the defendant’s rights by sanctioning the defendant in order to deter him and others from engaging in similar behavior.\(^{150}\) As it was phrased in a decision a few years later, “without a civil law sanction of this type the legal system would sacrifice the most effective and sometimes the only means to safeguard respect towards the personality of other people.”\(^{151}\)

Highlighting the addition of the noncompensatory function of damages for pain and suffering in the case of violation of the right to personality, the court expressed that such damages were only available in cases where there was aggravated fault of the defendant and an important violation of the right to personality had occurred.\(^{152}\) Because the defendant had violated the plaintiff’s right to personality to derive a profit, the court connected damages with the motives of the defendant’s acts.\(^{153}\)

The technical means for implementing wrong-oriented and tortfeasor-oriented considerations into the law of damages was the notion of satisfaction (Genugtuung). Without abandoning the concept of compensatory damages, satisfaction was generally applied to damages for pain and suffering; however, in cases of infringement of the right to personality, satisfaction became a central inquiry.\(^{154}\) Satisfaction transformed the wrong-oriented and tortfeasor-oriented views into a victim-oriented view.

Reliance on aspects derived from the wrongful act and the wrongdoer was transferred into victim-oriented considerations and was justified by the idea that such a transformation was necessary to adequately satisfy the victim. The idea that an adequate sanction had to placed on the tortfeasor in order to provide a victim with sufficient compensation had already been developed in the nineteenth cen-

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150. BGHZ 35, 363 (368) (relying on the idea that without a sanction of this type a legal system would waive the most effective, and oftentimes only, means to safeguard respect of the right to personality of the victim); see also BVerfGE 34, 269 (274) (accepting this idea).
151. BGHZ 35, 363 (368) (author’s translation).
152. Id. at 369.
153. Id.
154. BGHZ 26, 349 (353); see also MUeller, supra note 101, at 277–81.
tury. In cases of infringement of the right to personality, this became the decisive approach.

Restricting damages to cases of aggravated fault of the defendant is a significant deviation from traditional notions of the law of damages. It addresses the tortfeasor and his behavior, a perspective generally without significance to the law of compensatory damages where the focus has exclusively been on the victim and what the victim lost. Creating a “sanction to safeguard respect” is more punitive than compensatory language.

Meanwhile, the German Federal Supreme Court has advanced one step further, going from compensation to punitive damages. In the famous cases of Princess Caroline of Monaco, the Court multiplied the amount of damages well beyond the pre-existing ceiling in violation of the right to personality cases. The case itself is by no means special as compared with earlier cases: a journal published a fake interview pretending it was a real interview with Princess Caroline of Monaco.

The facts are almost identical to the facts of a case where a journal published a fake interview with former empress Soraya of Iran. But unlike the decision in the empress’ case, the Federal Supreme Court reversed the judgment of the lower court (the Superior Court Hamburg) because the amount of damages awarded was held to be insufficient. The Federal Supreme Court no longer relied on the idea of damages for pain and suffering. Instead, it relied directly on the constitution. Moreover, the Federal Supreme Court expressly stated that the amount had to be determined in such a way that the commission of similar torts would be deterred. To this goal, the profits of the tortfeasor had to be taken from him. Such outcomes are the result of purely punitive damages argumentation.

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155. See Sebok, supra note 2.
156. See, e.g., BGHZ 26, 349 (353); BGHZ 35, 363 (369).
157. BGHZ 128, 1 (1). This case is known as “Caroline I” because it was followed by several other “Caroline” cases. E.g., Supreme Court, 15 NJW 984 (1996) (“Caroline II” decided in 1995); BGHZ 131, 332 (“Caroline III” decided in 1995); 15 NJW 985 (1996) (“Caroline’s son” decided in 1995). For a discussion of these subsequent cases, see Amelung, supra note 139, at 25–27.
158. BVerfGE 34, 269 (269).
159. It is argued that the same result could be reached based on an unjust enrichment approach. See Christiane Siemes, Gewinnabschöpfung bei Zwangs kommerialisierung der Persönlichkeit durch die Presse, 201 ARCHIV FUER DIE CIVILISTISCHE PRAXIS [ACP], Feb. 2001, at 214–24 (2001). But the Supreme Court did not rely on an unjust enrichment approach; instead it relied on damages.

In a line of decisions about intellectual property infringement reaching back to pre-Code times, German courts including the German Imperial Court and the Federal Supreme Court allowed a plaintiff to determine the damages he had suffered in three different ways. Courts started by admitting these three ways of determining damages in copyright cases, applying them in patent infringement cases, and then extending them for protection of registered design and similar intellectual property rights. Finally, after some hesitation, courts now rely on these methods in any case of unfair competition.

According to these methods, a plaintiff may either determine his damages by demonstrating the losses he suffered, or by requesting the amount that the defendant reasonably had to pay had he asked for a license, or by asking for what the defendant had earned by intruding upon the plaintiff's intellectual property rights. In some areas, reasonable license fees are even doubled.

The first method of calculation is based on sections 251 and 252 of the Code, restricted to strictly compensatory damages, and aimed at providing compensation for losses suffered. This method is plaintiff-oriented, loss-oriented, and retroactive. The two other methods, however, are not strictly compensatory. They allow the plaintiff to recover damages even in cases where he had never been willing to grant a license, and even in cases where the defendant's profits are over and above what the plaintiff himself reasonably could have expected to gain by exploring his intellectual property rights. Thus, they do not purely aim at compensating losses suffered; instead,
they are tortfeasor-oriented and profit-erasing as opposed to victim-oriented and loss-oriented.

Although these alternative methods of calculating damages could be based on a theory of unjust enrichment,\textsuperscript{169} courts adhere to a tort damages approach.\textsuperscript{170} Eventually, there is a compensatory damages background. The alternative methods of calculating damages were developed, among other reasons, to avoid the difficulties of establishing actual damages.\textsuperscript{171}

The line of argument taken by the courts in allowing the third method of calculating damages reveals additional noncompensatory aspects.\textsuperscript{172} As embodied by English Lord Chancellor Hatherly's statement, "This Court never allows a man to make profit by a wrong."\textsuperscript{173} Similarly, German courts openly confess that in intellectual property infringement cases, alternative methods of calculating the amount that the tortfeasor has to pay are based on natural justice views that a tortfeasor should not profit from his wrong.\textsuperscript{174}

The Federal Supreme Court directly stated, "[i]n order to sanction the damaging behavior, we presuppose that the owner of the intellectual property right would have earned the same profit the tortfeasor has earned."\textsuperscript{175} Thus, the Court focused more on the tortfeasor than on the victim, and more on the damaging act than on the loss of the victim. Both foci are contrary to pure compensation. Consequently, the literature addressing these methods of calculation describe said methods as being functionally "repressive atonement."\textsuperscript{176}

\textsuperscript{169} This approach is administered by some legal writers. See, e.g., Ernst von Caemmerer, \textit{Bereicherung und unerlaubte Handlung}, FESTSCHRIFT F"UER ERNST RABEL I, 354 (1954); Walter Wilburg, \textit{Zusammenspiel der Kraefte im Aufbau des Schuldrechts}, 163 ACP, Nov. 1963, at 351. For a similar approach in case of infringement to the right to personality, see Siemes, supra note 159, at 214–24.

\textsuperscript{170} At least since the decision of the Imperial Court on October 22, 1930, RGZ 130, 108 (110), courts have characterized all three methods of calculating what the plaintiff is entitled to in intellectual property infringement as "truly damages." Courts are somehow trapped into a damages approach as they do not give the plaintiff the option of all three approaches at the same time, but instead demand that the plaintiff decide in advance which method of calculation he wants to have applied. This restriction is not imposed in an unjust enrichment approach because damages and unjust enrichment under German law can be demanded not only in the alternative, but cumulatively as well.

\textsuperscript{171} As to similar considerations under American law, see Note, supra note 94, at 521 nn. 36–38 (1957).

\textsuperscript{172} MUELLER, supra note 101, at 108.

\textsuperscript{173} Jegon v. Vivian, L.R. 6 Ch. App., 742, 761 (1871). This idea was introduced into the German discussion by Fritz Schulz, \textit{System der Rechte des Eingriffswerbs}, 105 ACP, 1909, at 1.

\textsuperscript{174} See, e.g., RGZ 144, 187 (190); BGHZ 57, 116 (119).

\textsuperscript{175} BGHZ 68, 90 (94) (author's translation).

\textsuperscript{176} Ernst Steindorff, \textit{Abstrakte und konkrete Schadensberechnung}, 158 ACP, 1959, at 455.
or a "socio-psychological efficient instrument to enforce lawful conduct." 177

Meanwhile, some areas of intellectual property law legislation have adopted the third method of calculating damages, relying on differentiations that can no longer be explained under a compensatory damages approach: 178 other intellectual property acts direct that in case the violation of the respective intellectual property right was done negligently instead of purposefully, the court may award an amount in between the damages suffered and the gain achieved. 179 Such differentiation according to defendant's fault goes beyond a compensatory approach. Simultaneous consideration of the damages suffered and the gains achieved shifts the perspective away from the victim and towards the tortfeasor. This is especially true where the profits derived from the wrongful act do not mirror the profits the victim could have made himself but for the tortfeasor's actions.

3. Necessary Compliance With European Community Requirements for Punishment Erasing German Traditional Notions of Compensatory Damages—Noncompensatory Damages For Sex Discrimination in Employment

The most obvious step towards punitive damages has been taken in modern German labor law, where labor and contract law intersect. In contract law neither damages for pain and suffering nor punitive damages were available under the German Civil Code.

However, the situation changed dramatically based on the 1976 enactment of European Community Directive 76/207/EEC ("Directive"). The Directive called for the equal treatment of men and women, 180 and it had to be transformed by member states no later than thirty months after notification. This Directive seemed to have no special impact on the domestic law of damages. It demanded the abolishment of all domestic laws contrary to the principle of equal


178. Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz), v. 9.9.65 (BGBl. I S.1273); see also MUELLER, supra note 101, at 113; HAIMO SCHACK, URHEBER UND URHEBERVERTRAGSRECHT 341 n.691 (2d ed. 2001).


treatment and the introduction of necessary measures to procure judicial recourse for persons wronged by failure to comply with the principle of equal treatment. Member states could choose what types of claims they would hear.

While transforming the Directive into domestic German law in 1980, the German legislation introduced section 611a into the Code prohibiting sex discrimination in employment. In labor contracts, employers were forbidden from discriminating based on sex. This prohibition applied to all types of contractual provisions, including the formation of labor contracts. Additionally, it applied to unilateral measures such as career development, orders to the employee, and cancellation of the contract. In a case of sex discrimination, section 611a(2) authorized employees to bring claims for damages against an actual or prospective employer.

Within a short time, section 611a became famous in cases of discrimination in the job selection procedure. The decisive wording of the 1980 version of section 611a(2) states:

In case a labor relationship has not been entered into due to violation of the prohibition of discrimination for which the employer is responsible, the employer is liable in damages the employee suffered from believing formation of a labor relationship would not fail due to such violation.

This was fully in line with traditional German contract law. Liability of the employer depended on fault, and the sanction was damages.

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181. The decisive sections of Directive 76/207/EEC read:

Article 3
1. Application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy.
2. To this end, Member States shall take the measures necessary to ensure that:
   (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished; . . .

Article 6
Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities.

182. Additionally, in 1994 a statute was enacted prohibiting sexual harassment in the workplace, Gleichberechtigungsgesetz, v. 21.04.94 (BGBl. I S.1406, 1412). Based on this statute, courts are becoming more willing to award damages for pain and suffering. See TOBIAS MAESTLE, DER ZIVILRECHTLICHE SCHUTZ VOR SEXUELLER BELÄSTIGUNG AM ARBEITSPLATZ 90 (2000).

183. Under traditional German notions, responsibility is based on intentional or negligent behavior.

184. Author's translation.
When a contract had not yet been formed, damages were restricted to those that arose from a belief (Vertrauensschaden). Consequently, in applying section 611a, labor courts generally restricted damages to frustrated costs of application.

Such jurisprudence fits into traditional German notions of contract law and damages. Damages for fault in precontractual behavior are restricted to damages arising out of belief and are therefore purely compensatory. They aim at compensating the loss of the victim and are victim-oriented, loss-oriented, and retrospective. A potential employee who is discriminated against during the application procedure suffers minimal actual losses. Consequently, under section 611a and in line with the general principle of compensation, damages for injured potential employees were restricted to nominal amounts.

But this was just the beginning of a long-lasting controversy between German courts and legislation on the one hand, and the European Court of Justice ("European Court") on the other hand. In a famous decision of April 10, 1984, the European Court held that the German transformation of the Directive was inadequate. The European Court argued that the Directive, although it did not explicitly mention a sanction for failure to comply with the equal treatment requirements, demanded such sanction, "as to guarantee real and effective judicial protection" for the employee and as to have a "real deterrent effect on the employer." This meant that "where a member state chooses to penalize breaches that prohibition by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained." Furthermore, the European Court argued that although the Directive gave the member states the freedom to choose between the different solutions suitable for achieving its objectives,

185. Damages arising out of a belief in the other party's contractual obligations are restricted to cases where a contract has not been concluded. See HEINRICHS, supra note 100, at n.17; see also §§ 122, 179 BGB.


187. The plaintiff is to be put in the position he would have been had he not entered into the contract. See Supreme Court, 4 NJW 230 (1990); see also HEINRICHS, supra note 99.


189. Id. 453-54.
it nevertheless requires that if a member state chooses to penalize breaches of that prohibition by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connection with the application.  

Finally, the European Court called on the German courts "to interpret their national law in the light of the wording and the purpose of Directive 76/207/EEC" in order to achieve the result required by article 189(3).

It is vain to discuss whether the European Court overextended the Directive in inventing the requirement of a sanction of this type. Under the well-established doctrine of "effet utile," such interpretation by the European Court is quite common. It is also vain to further discuss the methodologically questionable invention of "compensation," which must have a "deterrent effect." Finally, it is vain to discuss whether the equalization of small amounts of compensatory damages with nominal damages is methodologically sound.

What is most important is that the European Court expressly connected a punitive function of damages to the required sanction (even where given under the heading of compensation), and that the sanction had to cause a deterrent effect. What the European Court asked for by this requirement was not just the deteriorating effect inherent to every obligation to restitute damages, but additional deterrence instead. Hence, the European Court demanded implementation of tortfeasor-oriented, future-oriented elements into the domestic law of damages. The ruling stated that whatever solution a member state chose in order to appropriately transform the Directive, the solution had to be appropriate to penalize infringement of the prohibition of discrimination.  

In order to comply with the European Court, the German Federal Labor Court occasionally took a tort approach, awarding dam-

190. Id.
191. Id. at 453.
ages for infringement of the right to personality. But it was evident that based on this approach damages would be available only in rare cases.

To better comply with requirements of the Directive as interpreted by the European Court, section 611a was altered by legislation. In its final version, section 611a makes available to the actual or prospective employee discriminated against a claim for adequate pecuniary compensation, which has a ceiling of three-months wages. These damages are available even in cases where the employee had not been employed and in cases of nondiscriminatory behavior during the employee selection process.

A precise and conclusive translation of section 611a is almost impossible. One of the interesting alterations of the 1980 version can only be explained. While the original version of the text expressly used the wording “restitution of damages” (“Ersatz des Schadens”), the existing version says only “adequate compensation” (“angemessene Entschädigung”). The drafters seem to have made an effort to avoid the wording “restitution of damages.” Regardless, adequate compensation is the wording already used under section 847 that allows damages for pain and suffering.

Nonetheless, there is a slight distinction between the new section 611a and the traditional section 847. In section 847 the words “adequate compensation” are combined with the words “restitution of damages” while in section 611a the word “damages” is not used at all. The drafters presumably were aware that this was no longer restitution of damages in the traditional compensatory sense.

More interesting and important is that under section 611a(2), damages have to be awarded independent of losses. Thus, they are no longer compensatory, or at least they do not aim at compensation for pecuniary losses. Comparison with section 847 may show the new

195. BAGE 61, 209.
196. See § 611a BGB.
197. § 611a BGB of the German Civil Code reads:
   (2) In case the employer in the course of the application procedure violates the prohibition of discrimination under § 1 the applicant thus discriminated may demand adequate compensation in money; a claim for establishing a labor relationship does not exist.
   (3) In case the applicant had not been employed even in case of non discriminatory treatment, the employer has to pay an adequate compensation not higher than three month prospective wages.... (author's translation).
198. § 611a Nr. 2 BGB.
199. See sources cited supra note 138.
section 611a to be an additional case of damages for pain and suffering. Still, the European Court had demanded a deterrent effect. Therefore, the preparatory documents on the new section 611a state that in measuring damages, courts should take into consideration the gravity of the injury, the cause and motives of the act, and the community law requirement of deterrence.200

In light of this, it is peculiar that many commentaries on section 611a still argue that it is not punitive damages. It is said that punitive damages are a problem from a constitutional law perspective, where punishment is left exclusively to criminal courts.201 Thus, section 611a should not allow punitive damages. This comes pretty close to the absurd argument that nothing can exist that is not allowed to exist.

But this again is not the end of the story. The European Court of Justice held that the new section 611a(2) of the German Civil Code was an inadequate transformation of Directive 76/207/EEC. In a famous decision of April 22, 1997,202 the court again insisted that even civil liability was meant to penalize discrimination, that civil law compensation must guarantee real and effective judicial protection, that it must have a real deterrent effect on the employer, and must be adequate in relation to the damage sustained. Consequently, a ceiling on the amount of damages is not permitted.203 Moreover, the court ruled that Directive 76/207/EEC, particularly articles 2(1) and 3(1), preclude provisions of domestic law, which make reparation of damage suffered as a result of gender discrimination in the making of an appointment subject to the requirement of fault.204 Thus, German courts now have to interpret section 611a(2) of the German Civil Code to allow for damages that adequately deter the defendant and other employers from discriminating based on gender. Courts in member states have to follow the rulings of the European Court of Justice, and courts in Germany traditionally do follow this line of reasoning.

Equal treatment Directive 76/207/EEC and its transformation into section 611a of the German Civil Code was exceptional and

200. Regierungs begruendung, (argument of the government in introducing the alteration to section 611a), BT-Drucks. 12/5468, at 44.
203. Id. at I-2221-23.
204. Id. at I-2219-20; see also Case C-177/88, Dekker v. Stichting Vormingscentrum voor Jong Volwassenen, 1990 E.C.R. I-3941, I-3976.
rather unique. Yet it was but the beginning of a development. In 2000, the European Union enacted two more Directives regarding equal treatment, Directive 2000/78/EEC\textsuperscript{205} prohibiting direct or indirect labor law discrimination and harassment based on religion or belief, disability, age, or sexual orientation,\textsuperscript{206} and Directive 2000/43/EEC\textsuperscript{207} prohibiting discrimination on the basis of racial or ethnic origin.\textsuperscript{208} Again, article 17 of Directive 2000/78/EEC and article 15 of Directive 2000/43/EEC demand "effective, proportional, and deterrent" sanctions. The 2001 German transformation statute, which is meant to transform directive 2000/43/EEC into German law and which, up to now, exists as a draft,\textsuperscript{209} is planning to introduce a claim for damages phrased the same way as new section 611a of the Civil Code ("adequate pecuniary compensation") and even provides for claims for specific performance.\textsuperscript{210} Hence, it can be expected that in the future, punitive aspects will form a permanent element in German labor law, at least as far as discrimination in employment is concerned.

C. Can Exceptions From Noncompensatory Damages be Considered Punitive Damages?

As demonstrated above, under German law there are situations in which damages are awarded that clearly cannot be regarded as purely compensatory.\textsuperscript{211} In order to classify such damages as punitive, they have to comply with the criteria of punitive damages; specifically, they have to aim at punishment and deterrence. Instead of victim-related, loss-related, and retrospective they have to be tortfeasor-related, action-related, and prospective.

\textsuperscript{206} Id. at 18, art. 1.
\textsuperscript{208} Id. at 24, art. 1.
\textsuperscript{209} For a proposed draft of § 319e of the Civil Code, see Diskussionsentwurf eines Gesetzes zur Verhinderung von Diskriminierung im Zivilrecht [Discussion draft of an antidiscrimination law], Department of Justice, 10 December 2001, available at http://www.jura.uniaugsburg.de/altimage/Fakultaet/moellers/mat_frsset_de.html.
\textsuperscript{210} See Thomas M. J. Moellers, Einschraenung der Vertrags- und Gestaltungsfreiheit durch Europaeische Richtlinien, FESTSCHRIFT 30 JAHRE JURISTISCHE FAKULTAET DER UNIVERSITAET AUGSBURG, at II 1 c (forthcoming, on file with the Chicago-Kent Law Review).
\textsuperscript{211} See supra at Part III.B.1–3; see also MUELLER, supra note 101, at 101.
German law has had and still has difficulty openly accepting punitive damages as part of its legal system and explaining how non-compensatory damages can fit into a system presumably restricting the law of damages to compensation. As far as damages for pain and suffering are concerned, courts and legal writers still try to explain the aforementioned deviations from a plain compensatory system by inventing the idea of "satisfaction." But this explanation is no longer persuasive in cases in which courts rely on deterrence as the German Federal Court of Justice did in the Caroline of Monaco cases. Deterrence being among the predominant purposes of punitive damages, the noncompensatory approach of German courts must be classified as punitive.

In intellectual property infringement cases, German law maintains the guise that damage calculations are strictly compensatory. But in reality, damage awards are not proportional to the actual losses incurred. In fact, damages can be awarded without there being any real losses at all. This approach is no longer in accord with traditional notions of compensatory damages that are victim-oriented and loss-oriented. Instead, when damages are calculated by doubling the amount of the estimated loss of a licensing fee, the courts are using a tortfeasor-based approach. This approach is openly justified as necessary to create a substantial deterrent effect beyond the insubstantial deterrence of mere compensatory damage awards. Thus, although damages in intellectual property infringement cases are often classified as traditional compensatory damages, they are in fact at least partially punitive.

Similarly, in employment discrimination cases, there is a requirement that the damages awarded have a deterrent effect. Even though these are also labeled as compensatory damages, it is clear that they serve an expressly punitive function. Thus, it is apparent that under modern German law, damages are awarded that are by their nature at least partially punitive.

D. Have Punitive Damages Changed from an Exception to a Second Pillar of the German System of Damages?

Because punitive damage awards have increased in both frequency and importance, it is no longer clear whether such awards are

212. See supra Part III.B.1.
213. See sources cited at supra note 157.
merely tolerated exceptions to a monistic system, or whether they have become an integral part of a dualistic system of damages. To answer this, we first must realize that punitive damage awards have been applied to such broad areas that they can hardly be considered exceptional. Punitive damages are awarded for pain and suffering in cases involving infringement of the right of personality by the media.\textsuperscript{214} Intellectual property and unfair trade practices cases are frequently governed by the notion of deterrence, which results in damages that are not purely compensatory.\textsuperscript{215} Further, cases that involve employment discrimination based on gender are governed by punitive damages ideas,\textsuperscript{216} along with other types of discrimination. Such broad application of punitive damages suggests that they are no longer an exception, but instead represent a new system of damages.

Although the growth of punitive damages has arisen out of varied factual situations, it is indicative of a systematic attempt to enforce the underlying principle that illegal conduct must not pay. For instance, in some intellectual property infringement actions, damages are doubled in order to prevent the infringer from profiting in the long run. Although compensation for the reasonable cost of a license would restore the victim's actual losses, a repeated infringer may stand to profit where enforcement is uncertain. Similarly, in cases of infringement of the right to personality by the media and employment discrimination cases, pure compensation does not adequately skim off profits from illegal conduct.

If a system of damages were to rely solely on compensation, there are situations where it would be rendered ineffective. If damages from illegal conduct are confined to the victim's losses, the inherent deterrent effect of compensatory damages may be sufficient. However, when illegal conduct gives rise to profits that are greater than the damages incurred by the victim, or when there is a possibility that the illegal conduct will not be caught, a purely compensatory system of damages will fail to provide adequate deterrence. Although there may be occasion to recover these additional profits under an unjust enrichment theory, there is enough uncertainty in such a system that deterrence is inadequate.

The increasing reliance of German law on damages with non-compensatory and punitive elements sacrifices dogmatic purity in

\textsuperscript{214} See sources cited at supra note157; see also supra Part III.A.
\textsuperscript{215} See supra Part III.B.2.
\textsuperscript{216} See supra Part III.B.3.
favor of natural justice. Although the punitive damages pillar does not yet equal the traditional compensatory pillar, at least German law has recognized the need to construct one.

IV. THE GAP BETWEEN AMERICAN AND GERMAN PUNITIVE DAMAGES IS NARROWING

There are still significant differences between the American and German systems of damages, the most important being the fundamental, theoretical attitudes each system holds toward punitive damages. Despite recent developments in American law tending toward restricting punitive damage awards, there is still little doubt that punitive damages are an equal pillar within the American system of damages. The German system, however, despite significant expansion of the applicability of punitive damages, still strictly denies that punitive damages form an integral part of the law of damages. Whereas the American system maintains a dualistic approach with both a victim compensation pillar and a tortfeasor punishment pillar, the German system still pretends to be a monistic system built on a single pillar of victim compensation. Punishment and deterrence are not yet acknowledged as legitimate general functions of damages in the German system, but instead are tolerated exceptions. A further difference is that the amounts awarded for punitive damages in American courts are oftentimes greater than would be permissible under German law—even under the recent rulings of the German Federal Supreme Court.

Despite apparent differences between German and American blackletter doctrine, recent developments suggest that the gap is narrowing for practical purposes. As far as the conceptual differences are concerned, it must not be neglected that punitive damages more than occasionally serve additional compensatory functions. This is not a new development. Compensatory functions of punitive damages exist and have been accepted for some time. And this does not alter the character of punitive damages. Punitive damages do not

217. See supra Part II.
218. See supra Part III.
219. See supra Part II.A.1; see also notes 157–59 and accompanying text.
220. What is changing seems to be that in foreign countries, and notably in Germany, courts either start to be more aware of these additional functions, or, more likely, start to be more willing to realize and focus upon these functions in order to establish sufficient similarities between the systems, allowing them to gradually pass from their former rigid verdict on punitive damages towards a more differentiated and, at least in part, favorable attitude.
become compensatory when they serve additional compensatory functions. However, these additional compensatory functions in practice may narrow the gap between the systems. Moreover, the American system is undergoing some significant changes, making it more akin to the German system. For instance, a number of American states have made punitive damages permissible only where authorized by statute. Although these restrictions still allow for broader applicability of punitive damages in America than in Germany, it is noteworthy that both systems accept the theoretical need for some level of restrictions on punitive damages.

There are also changes occurring in the German system that tend to narrow the gap. The German courts are not only relying more often on punitive arguments, they are even openly awarding damages that are punitive in nature in certain types of cases. Considered together, these developments constitute a significant step toward the implementation of punitive damage awards in Germany. The debate over whether tort law should concern conduct or the consequences of conduct may have cleared the way for further reliance on punitive considerations. The progress toward building a punitive damages pillar in parallel to the traditional purely compensatory damages pillar has not likely reached its peak. While many of the most spectacular alterations have already taken place, the developments of the last several years are not likely to abate. Now that the German courts have accepted punitive arguments in cases of infringement of the right to personality by the media, it should be expected that the courts will also be receptive in other cases to the underlying principle that punitive damages are necessary, not only to compensate for damages, but also to remove the profit motive from the willful infringement of individual rights.

The gap is also narrowing in regard to the amount of damages that can be awarded. Although a cursory analysis may suggest that

221. See supra Part II.
223. See supra Part III.A-C.
224. There is a perennial debate among German jurists regarding whether an act is necessarily illegal because of the presence of damages caused by the act, or whether an act can be illegal by itself, without reference to the damages caused. See STEFAN GRUNDMANN, MÜNZCHENER KOMMENTAR BÜRGERRICHES GESETZBUCH, SCHULDSCHRECHT ALLGEMEINER TEIL, § 276 at n.12 (4th ed. 2001).
the amount of damages awarded is not as important as the conceptual differences between the American and German systems, in fact, the amount of damage awards is a practical measure of whether damages are being used to serve a punitive function, and huge awards may make a punitive damages system even more suspicious to a presumably purely compensatory system. By definition, compensatory damages are limited by the actual losses of the victim. Thus, in theory, for the same fact pattern, the compensatory damages should be the same whether they are awarded in a German or an American court. Punitive damages, however, are subject to the discretion of the court in America, leaving a potential for the gap between these systems to widen if the amount of punitive damages is systematically increased. When American punitive damage awards reach staggering levels, they tend to arouse suspicion from the German perspective on the entire American system of punitive damages. In recent years, however, the permissible amounts of punitive damage awards have been limited in a significant number of American states by either imposing absolute ceilings or by linking punitive damages to actual damages. These restrictions do not negate the punitive function of such damages, but instead help to rationalize the system through foreseeability of liability based on economically calculable factors. At the same time capping the amount of punitive damage awards and linking them to the amounts of actual damages sustained reduces the amount of damages awarded and in a sense makes them more comparable to German developments.

These American limitations parallel developments in the German damages system and indicate that the gap between the systems is narrowing. As the American system has reduced the amounts available for damages that are expressly punitive, the German system has increased damages by recognizing punitive arguments. And linking the amount of punitive damages to the amount of actual damages is not just of old lineage dating back to Roman law, but at least in the field of intellectual property protection, it has survived the many changes the German Civil Code has undergone.


226. See supra Part III.B.2.
V. THE NARROWING GAP MAY AFFECT THE ENFORCEMENT OF AMERICAN PUNITIVE DAMAGES JUDGMENTS IN GERMANY

The narrowing gap between American and German punitive damages systems may affect both the enforcement of American punitive damage awards in Germany, as well as how German courts apply American law as required by private international law. American commentators have written extensively on the recognition and enforcement of American judgments outside America and more specifically on the enforcement of American punitive damages in Germany. Recent developments in the German Federal Supreme Court have fueled this discussion. This Article, however, will be confined to discussion of the likely effect of the narrowing gap on the enforcement of damage awards in German courts.

A hypothetical will show the difficult issues faced by German courts in maintaining consistency in enforcement of American punitive damage judgments. Consider, for instance, that cases arose nearly simultaneously under which the German courts had on the one hand to decide on the case and on the other hand to enforce American judgments. In this example, posit that one case is a gender discrimination suit against an employer, another case is a copyright infringement case, and again another case is a case of the Caroline I type. Under the German system, the cases would be assigned to separate courts, with the discrimination case heard by the German Federal Labor Court, and the copyright case heard by the German Federal Supreme Court. This, however, opens up the possibility of inconsistent treatment between the courts. In the domestic case the panel would award what obviously is punitive damages. In the recognition case these courts must consider whether to follow precedents on recognition and declare the American judgments as being against stated German public policy or to follow the precedent set by other German courts and allow the punitive damages to stand. The similar-


229. See Behr, supra note 9; Brand, supra note 12, at 163–165; Hartwin Bungert, Enforcing U.S. Excessive and Punitive Damages Awards in Germany, 27 INT’L LAW 1075 (1993); Hay, supra note 7; Zekoll, supra note 91.
ity between the American judgment and parallel German judgments would make the argument for enforcement compelling.

A. Public Policy Restrictions as a Safety Valve on the Enforcement of Foreign Judgments and the Application of Foreign Law

To avoid forcing their own national courts to administer the law in a way that is considered to be contrary to public policy, almost every legal system relies on some self-protection mechanism to prevent application of foreign laws or enforcement of foreign judgments that exceed the outer limits of its own legal system. Such restrictions are often seen as necessary to preserve national sovereignty against encroachment by foreign legislation. Many legislatures have enacted a “safety valve” that prevents the application of foreign law or the enforcement of foreign judgments where the outcome would be contrary to domestic public policy. This type of legislation has occasionally been criticized as outdated and as an anachronism. Nevertheless, such restrictions have been incorporated into modern international conventions for the recognition and enforcement of foreign judgments, including recent European

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230. As to unbearable results as a basis for public policy rejection of enforcement, see Jens Drolshammer & Heinz Schaefer, Die Verletzung des materiellen ordre public als Verweigerungsgrund bei der Vollstreckung eines US-amerikanischen punitive damages-Urteils, 1986 SCHWEIZERISCHE JURISTEN-ZEITUNG 309, 312 (relying on Swiss Federal Court decisions).

231. As to member states of the European Union, see Behr, supra note 9, at 221; Alexander Bruns, Der anerkennungsrechtliche ordre public in Europa und den USA, 6 JURISTEN-ZEITUNG 278, 280-87 (1999).


Community regulations on jurisdiction and enforcement. Further, these types of public policy restrictions are likely to be included in the forthcoming Hague Jurisdiction and Enforcement Convention.

B. Public Policy Requirements under German Law

The analysis of whether a foreign judgment is contrary to German public policy requires consideration of several factors. First, foreign judgments are presumed to be enforceable and foreign law is presumed to be applicable. Public policy objections are invoked only in those exceptional cases where the gap between foreign law and German law is considered to be unbearable. This gap must threaten fundamental and indispensable principles of German law, such that recognition of the foreign system would create a result prohibited under German law. Second, public policy objections are based on the result of recognition of a foreign judgment, not on the theoretical foundations of the foreign system or the mere fact that there is a divergence between the two systems. Third, the notion of what is contrary to public policy is a fluid concept that is subject to change as the underlying principles of the German system change. Obviously, if German law develops principles that are similar to those in a foreign system, the application of foreign law can no longer be declared contrary to public policy. Fourth, and finally, public policy restrictions are invoked only where domestic interests are at stake. Thus, there must be a German interest in preventing the foreign judgment from being recognized.

Modern German statutory regulations make clear that public policy objections are meant to have limited reach. The former


237. Minehan, supra note 232, at 795

238. Behr, supra note 9, at 224. As to the extremely restricted use of the public policy exception in the U.S., see Minehan, supra note 232, at 799–808. As to a similar restricted practice within the European Union, see id. at 808–15; see also Bruns, supra note 231, at 279–87.

239. SCHACK, supra note 11, at n.867.

240. BGHZ 118, 312 (348); SCHACK, supra note 11, at n.867; Drolshammer & Schaerer, supra note 230, at 312.

241. SCHACK, supra note 11, at n.861.
article 30 of the Introductory Code declared foreign law inapplicable where its application was contrary to the morals or the purposes of German law. However, the modern article 6 of the Introductory Code establishes more stringently that foreign law is inapplicable only where it leads to results that are manifestly irreconcilable with fundamental principles of German law or with the basic rights granted in the German constitution. As such, article 6 codifies prior judicial interpretation of article 30 that limited restrictions on application of foreign law to cases where "irremovable fundaments of German public and social life" would be violated. A recent amendment to German private international law of torts restricts the application of foreign law only where such law reaches significantly beyond what is necessary to adequately compensate the injured person or to the extent that they pursue goals other than adequately compensating the victim. In line with these developments in private international law, section 328(4) of the German Code of Civil Procedure has been altered to require that public policy arguments be invoked only where the recognition of a foreign judgment would be "manifestly contrary" to "fundamental principles" of German law. This restriction again should be evaluated in the light of new Article 40 of the Introductory Code specifically addressing the role of public policy in tort law.

243. The Introductory Code was significantly changed by Gesetz zur Neuregelung des Internationalen Privatrechts (Private International Law Act), v. 25.7.1986 (BGBl. I S.1142). Subsequently, Article 30 of the Introductory Code was modified and renumbered as Article 6 of the Introductory Code.
244. BGHZ 42, 7 (13).
245. The most recent amendment to the Introductory Code has, among other things, introduced new regulations on the law pertaining to extracontractual relations. Among those regulations, Articles 40 to 42 of the Introductory Code address the private international law of torts.
246. Article 3, subsections (1) and (2) of the Introductory Code states: Claims falling under the law of a foreign state cannot be made as far as they (1) substantially reach beyond what is necessary to the adequate compensation of the damaged (2) evidently serve to purposes other than adequate compensation of the damaged (author's translation).
247. As to new European regulations restricting the public policy exception to cases where recognition and enforcement is manifestly contrary to public policy, see sources cited supra note 235, 236.
C. German Public Policy Versus U.S. Punitive Damages

Based on these presumptions, especially with regard to the dependence of public policy requirements on developments within domestic law, it is necessary to reconsider the German attitude toward enforcement of foreign punitive damages awards. Punitive damages have been considered contrary to German public policy for more than a century. The Introductory Law to the German Civil Code introduced the public policy requirement by citing "unreasonably high and punitive damages" as examples of what would be considered to be contrary to new German civil law and, thus, not be awarded by a German court, even when applying foreign law. It should be noted, however, that, at that stage, a distinction was already made between punitive damages and excessive damages awards. Similarly, sections 723 and 328 of the German Code of Civil Procedure, which prohibit execution of foreign judgments based on public policy, have consistently been understood to exclude the execution of punitive damage awards.

Rather than being the subject of extensive discussion in legislation and legal literature, enforcement of U.S. punitive damages judgments was of no great practical relevance for a long time. Until the famous 1992 Federal Supreme Court Judgment, there were some published judgments on related problems, such as whether

249. See BGHZ 118, 338 (relying on the argument that the legislative procedure at the end of the nineteenth century stated that the only adequate compensation was a theoretically sound and substantially fair reaction to torts).

250. Art. 30 of the Introductory Code (later replaced by Art. 6 of the Introductory Code). But there is a special public policy requirement in tort law, which was stated in former Article 38, which has been revised and renumbered as Article 40, subsection (3) of the Introductory Code.

251. DIE BERATUNG DES BUERGERLICHEN GESETZBUCHS, EINFUEHRUNGSGESETZ ZUM BUERGERLICHEN GESETZBUCH UND NEBENGESETZE 350 (Horst Heinrich Jakobs & Werner Schubert eds. 1990) (noting that the legislative history of the Introductory Code indicates that a provision for the unenforceability of private fines was omitted because such a provision was deemed to be included in the public policy requirement).

252. This is what the new Article 40, subsection (3) of the Introductory Code, dealing with applicable law in torts, now expressly addresses. In its two alternatives, claims in tort under foreign law are not available: first, where such claims reach significantly beyond what is necessary to adequately compensate the victim, and, second, where such claims manifestly pursue goals other than adequate compensation. Hence, only claims of excessiveness or manifest deviation from compensation are inadmissible.

253. See ADOLF BAUMBACH/WOLFGANG LAUTERBACH/IAN ALBERS/PETER HARTMANN, ZIVILPROZESSORDNUNG, 54 ed. 1996, § 328 Nr. 44 ZPO.

254. See generally BGHZ 118, 312. For extensive discussion of this judgment, see Brand, supra note 12, at 163–66; Bungert, supra note 229, at 1076–77; Hay, supra note 7, at 729–50; and Zekoll, supra note 91, at 644–59.
service of process of U.S. punitive damage claims could be denied for public policy reasons255 and whether enforcement of a U.S. judgment awarding damages for pain and suffering over and above comparable German judgments could be denied for public policy reasons.256 Meanwhile, increasing internationalization of personal and economic activities as well as internalization of lawyers' activities has rendered enforcement of foreign money judgments increasingly commonplace.257 Consequently, enforcement of U.S. punitive damages awards abroad is more likely to become a problem of practical relevance, although it should be noted that practical experiences in this area are still relatively limited.

Those few cases related to enforcement of U.S. punitive damages awards incidentally express the prevailing German attitude towards U.S. punitive damages awards as it is expressed in traditional legal literature.258 As a general rule, punitive damages awards are unenforceable because they are deemed a violation of German public policy.259 This basic rule is so widely established and accepted that plaintiffs' attorneys no longer try to seek enforcement of such awards.260 Arguments opposing enforcement rely on different approaches. The Berlin judgment261 provides little guidance in this matter because the court in that case focused its discussion on other issues, namely the fact that the U.S. judgment contained insufficient grounds for enforcement and that any resulting uncertainty had to be

255. Oberlandesgericht [OLGZ] [Court of Appeals] (Munich) Judgment of May 9, 1989, PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS [IPRAX], May/June 1990, at 175 (violation of public policy denied in case of claim for punitive damages under the Hague Service Convention). For a similar decisions, see OLGZ (Munich) Judgment of July 15, 1992, 17 ZEITSCHRIFT FUER WIRTSCHAFTSRECHT [ZIP], 1270, 1271 (1992); OLGZ (Frankfurt) Judgment of March 21, 1991, 5 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 417 (1991) (violation of public policy denied in case of service of process, where it was expected that the claim would be extended to include punitive damages); OLGZ (Duesseldorf) Judgment of February 19, 1992, 10 RIW 846 (1992) (violation of public policy denied in case of service of process, where excessive damages were claimed).


257. See Zekoll, supra note 91, at 641.


259. BGHZ 118, 312 (338-51).

260. See BGHZ 141, 286 (287-88). The plaintiff, a Wisconsin based corporation, successfully sued the defendant in the U.S. District Court for the Eastern District of Wisconsin. The court awarded $2,280,057.30 in damages plus costs. Of that award, $1 million was for punitive damages. The plaintiff then sued to enforce the Wisconsin judgment in Germany, but failed to sue for enforcement of the punitive damages portion of the award.

261. See sources cited supra note 256.
to the detriment of the plaintiff to be actionable. In another case, the Duesseldorf Court of Appeals\(^{262}\) focused on the "exorbitant" amount of punitive damages awarded by the California court as well as on the constitutional law principle of double jeopardy prohibition. Moreover, the Duesseldorf court held that because the California criminal court had already punished the defendant, there was no need to impose additional punishment, nor was there any deterrent value to be gained. Finally, the Federal Supreme Court reviewing the Oberlandesgericht Duesseldorf decision in its famous 1992 decision\(^{263}\) for the first time had the opportunity to decide on enforcement of U.S. punitive damages awards. This decision has become the leading case on enforcement of U.S. punitive damages awards. It has been broadly discussed and deeply analyzed in numerous articles and notes.\(^{264}\) Thus, a discussion pertaining to enforcement of U.S. damages awards must begin with an analysis of this decision.

In its 1992 landmark decision addressing most of the relevant problems in enforcement cases,\(^{265}\) the Federal Supreme Court denied enforcement of a California judgment for public policy reasons, relying on principle as well as on the excessiveness of the amount of damages awarded. The Court first came to the conclusion that punitive damages awards are not penal sanctions in the strict sense.\(^{266}\) Relying on American and European literature on punitive damages, the Court discussed the manner in which punitive damages are administered in American courts as well as the goals served by punitive damages.\(^{267}\) The Court concluded that, from both an American and German perspective, despite their retributive and deterrent functions, punitive damages are a function of civil law rather than criminal law, at least where the award is granted to the plaintiff.\(^{268}\) As

\(^{262}\) See sources cited supra note 255.

\(^{263}\) BGHZ 118, 312.

\(^{264}\) In German legal literature, this decision has incited no less than nineteen notes and articles to date. See also BVefGE 91, 140 (141-46) (holding that service of U.S. punitive damages claims did not violate German constitutional law; however, the decision failed to resolve the question as to the effect of punitive damages awards on the state's monopoly on criminal law); OLGZ (Duesseldorf) Judgment of July 3, 1997, 6 U 67/96 (unpublished opinion) (declaring that disproportionality of damages is not to be considered under public policy).

\(^{265}\) For an in-depth discussion of the different facets of this landmark case, see Hay, supra note 7, at 729-50; Zekoll, supra note 91, at 641-59.


\(^{267}\) BGHZ 118, 312 (334-36).

\(^{268}\) Id. at 336-38.
to the crucial question of whether punitive damages are contrary to German public policy, the court stated, "an American punitive damages judgment of not insignificant amount globally awarded along with damages for material and immaterial losses in so far generally cannot be declared enforceable in Germany."\textsuperscript{269} The court argued that (1) modern German civil law has restricted damages to include only those that compensate the plaintiff and, consequently, has abolished damages that lead to eventual enrichment of the victim and punishment of the defendant;\textsuperscript{270} (2) German law makes a clear-cut distinction between the law of damages and public prosecution in criminal law, the latter being exclusively lodged in the state's monopoly of criminal prosecution and thus safeguarded by special procedural guarantees;\textsuperscript{271} and (3) comparison of American punitive damages and German damages for pain and suffering does not alter the result because German damages for pain and suffering, despite their function of giving satisfaction to the victim, have no immediate penal character and are inseparably connected with the compensatory function of damages.\textsuperscript{272}

Beyond the undisputable fact that this decision seems to be fully in line with traditional rejection of enforcement of punitive damages awards, there are several indications of the emergence of a more favorable attitude in the future. First, we should realize that the German Federal Supreme Court did not categorically reject enforcement of punitive damages, but only rejected it "in general," leaving open the possibility of enforcement under special circumstances. Second, although its argument focused primarily on punitive damages in and of themselves, the Court in its decisive ruling combined punitive damages with a kind of excessiveness verdict, ruling that "punitive damages of not insignificant amount" could not be enforced. Third, the Court in its ruling against enforcement of punitive damages combined punitive damages with damages for material and immaterial losses—the latter being enforced despite being far beyond German standards—because the Court relied on the idea that only significant deviations from German standards are relevant, a principle that was eventually codified in the new article 40 of the Introductory Code. Finally, although not directly related to punitive damages, it

\begin{footnotes}
\footnotetext[269]{Id. at 312–34 (author's translation).}
\footnotetext[270]{Id. at 338.}
\footnotetext[271]{Id. at 339–51.}
\footnotetext[272]{Id.}
\end{footnotes}
should be noted that the Court allowed enforcement of damages for pain and suffering far beyond what, at that time, was acceptable in German courts under similar circumstances. These cautious restrictions on the verdict may be partially explained by the notion that punitive damages awards may be enforced only to the extent that they constitute damages for pain and suffering, which, under German law, are considered to be compensatory, or insofar as they are meant to cover attorneys’ fees. But this does not explain why the Court relied on “punitive damages judgment of not insignificant an amount,” the amount of punitive damages being irrelevant to their noncompensatory nature.

What seems even more questionable and what may eventually lead to a more favorable attitude toward enforcement of foreign punitive damages can be derived from the Court’s efforts to distinguish enforceable damages for pain and suffering from generally unenforceable punitive damages. The court argued that the functions of punishment and deterrence in punitive damages cannot be compared to the function of satisfaction in damages for pain and suffering, the latter having no immediate penal effect and being inseparably connected with the compensatory function of damages. It is highly questionable whether the somehow artificial and dogmatic distinction between direct and indirect penal functions is sufficient to declare a legal instrument against public policy simply because of its direct penal functions. What is more important is that the Federal Supreme Court relied on a stereotypical description of the German law of damages, which no longer reflects modern reality. The Court could not at the time of its decision anticipate that shortly thereafter another panel of the Court would, in its Caroline I decision, adopt an approach openly accepting direct penal functions of damages. In future enforcement decisions, the Court will have to take into consideration this development as well as developments in other areas of the German law of damages. Further, the Court could not foresee the strong pressure from the European Court of Justice in the field of

273. Regarding the enforceability of punitive damages when awarded in conjunction with damages for pain and suffering, see BGHZ 118, 312 (340). As to the importance of recognizing punitive damages to the extent that they serve compensatory purposes, especially where punitive damages are combined with high awards for pain and suffering, see Hay, supra note 7, at 746–50.
274. BGHZ 118, 312 (339–51).
275. Id. at 339.
276. BGHZ 128, 1. This is a case of infringement of the right to personality.
damages for discrimination in employment, nor could it foresee that community legislation would broaden this concept. But the Court will have to take these developments into consideration in future decisions on enforcement. At the moment, any prediction as to where the developments will lead would be pure speculation. But, eventually, modern developments in German courts towards awarding what in substance are punitive damages in line with restrictions on excessiveness of U.S. awards could result in a compromise, which could enable German courts to openly enforce punitive damages awards as long as amounts are not excessive.

CONCLUSION

Throughout the nineteenth century, the controversy as to whether the law of damages should be monistic and purely compensatory or it should be dualistic, allowing both compensatory and punitive damages, was handled in similar ways in the United States and in Germany. Only since the beginning of the twentieth century have the respective laws developed in different directions. In the United States, the dualistic system prevailed, whereas in Germany the process of unification of the civil law established a purely monistic, compensatory law of damages. From a German perspective this gap, from the very beginning, seemed unbridgeable. German legislation, jurisprudence, and legal literature deemed the monistic system of damages as one of the fundamental principles of the German legal system. This is best highlighted by the continuous classification of punitive damages as contrary to German public policy, a classification that can be traced back to the Preparatory Documents to the German Civil Code and that still is evident in the recent German Federal Court's decisions denying enforcement of U.S. punitive damages awards. Up to now, this gap was considered to be fundamental and unbridgeable. But during recent decades signs have emerged that the gap appears to be narrowing. Although under American law, the punitive damages pillar of the dualistic system is preserved, and, in a sense, is even developing additional aspects insofar as part of the punitive award is no longer going to the victim and exorbitant punitive damage awards are still allowed, this pillar is starting to be eroded by ceilings in a significant number of states. Moreover, the punitive damages pillar has some inherent compensatory aspects. On the other hand, the apparently monistic German system is starting to insert punitive elements into its purely compensatory law of damages.
At the same time, the amount of damage awards have increased significantly. Whether the gap already has been sufficiently narrowed to make it bridgeable under public policy considerations is questionable, even taking into consideration that the German public policy concept is undergoing significant changes. But narrowing the gap has at least begun, and this development does not yet seem to have reached its end.