Vicarious Liability for Punitive Damages: Suggested Changes in the Law Through Policy Analysis

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VICARIOUS LIABILITY FOR PUNITIVE DAMAGES: SUGGESTED CHANGES IN THE LAW THROUGH POLICY ANALYSIS

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I. INTRODUCTION

Should an employer or principal be held vicariously liable for punitive damages assessed against an agent? There is no uniform rule throughout the states which governs this issue.1 Vicarious punitive liability poses difficult problems of policy upon which courts are divided into opposing camps.2 It has been stated:

While entrepreneurial liability for compensatory damages has been widely accepted, such liability for punitive damages has engendered considerably more controversy, since many of the justifications offered in support of the former are of dubious applicability to the latter.3 Indeed, the issue of vicarious punitive liability is "chief among the various controversies which have surrounded punitive damages . . . ."4

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2. C. MCCORMICK, HANDBOOK OF THE LAW OF DAMAGES § 80, at 282 (1935). For an examination of the various positions the courts have taken on the issue of vicarious punitive liability and other related issues, see Annot., 93 A.L.R. 3d 826 (1979).

This historical division between the courts has recently shifted. The scope of employment rule, long the majority rule, is now followed in a minority of jurisdictions. See infra note 27 and accompanying text. The Restatement rule, once the minority position, has now become the rule in most jurisdictions. See infra note 49 and accompanying text.


The only way vicarious liability for punitive damages can be justified is through an assessment of whether the purposes for punitive damages are served when punitive liability is imposed vicariously.\(^5\) The purpose of this Article is to set forth the various rules of liability which the courts have formulated in this area. The underlying policy bases for these rules — often unrecognized by many courts — will be identified, explained, and criticized. Finally, changes in the law will be suggested which would ensure that punitive damages are vicariously imposed only when the purposes for punitive damages would be furthered.

First, however, it is necessary to briefly discuss the general policy considerations that underlie both punitive damages and vicarious liability.

II. GENERAL POLICY CONSIDERATIONS

A. Punitive Damages

Although punitive damages have recently received increased attention in the legal literature, the doctrine is deeply ingrained in history.\(^6\) As generally construed, punitive damages may be awarded against a defendant whose conduct in causing harm was "malicious, oppressive, fraudulent, willful, reckless, wantonly indifferent, or opprobrious."\(^7\) "Malice" is the term most commonly used by courts in describing the prerequisites to punitive liability.\(^8\) Hence, even though it is usually stated that punitive damages focus upon the defendant’s conduct,\(^9\) it is probably more accurate to state that they focus on the defendant’s motive or evil intent.

The purposes advanced for punitive damages are many and varied, but four can be singled out.\(^10\) The first is punish-

\(^5\) Comment, supra note 3, at 1297.

\(^6\) As long ago as 1869, it was stated that the doctrine of punitive damages was "too firmly established to be shaken by anything short of legislative enactments." Goddard v. Grand Trunk Ry., 57 Me. 202, 221 (1869).

\(^7\) M. MINZER & J. NATES, supra note 1, § 40.11, at 8.

\(^8\) Id. § 40.22.

\(^9\) See id. § 40.11, at 8.

\(^10\) For a complete discussion of the purposes that have been advanced for punitive damages, see J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE (1983); M. MINZER & J. NATES, supra note 1, § 40.12; Note, Exemplary Damages
Punitive damages are seen as a means of punishing undesirable, antisocial conduct not serious enough to warrant criminal sanctions. Second, and closely related to punishment, is deterrence. Punitive damages serve to prevent the individual from repeating the offense and to make an example of the defendant so that others similarly situated will also be deterred. Third, punitive damages are seen as a means of compensating the plaintiff for litigation costs and attorney fees not otherwise recoverable. And fourth, punitive damages might help preserve the peace by satisfying the impulse for revenge. Indeed, punitive damages have been justified on the basis that, as a matter of moral necessity, a wrongdoer should be forced to atone for the wrong done.

Closer scrutiny, however, limits the validity of the compensatory and revenge purposes. As a general rule, punitive damages should not function to recompense the plaintiff's loss. The compensatory purpose can and should be satisfied not through the doctrine of punitive damages, but through changes in the substantive law of compensatory damages. Therefore, the various economically based justifications for the vicarious imposition of compensatory damages — such as risk allocation, loss distribution, or even the "deep pocket" theory — cannot be used to justify the vicarious imposition of punitive damages. Likewise, revenge is no justification. The revenge purpose is a questionable objective of any civilized legal system. Thus, the compensatory and revenge purposes are of secondary importance, and only punishment and deterrence can justify punitive damages in any meaningful sense. Unlike compensation and

in the Law of Torts, 70 HARV. L. REV. 517, 520-22 (1957). These avowed purposes, of course, have not gone uncriticized. See W. PROSSER, supra note 4, § 2, at 12-14.


13. M. MINZER & J. NATES, supra note 1, § 40.12[1][a].

14. See J. GHIARDI & J. KIRCHER, supra note 10, § 2.04; Comment, supra note 3, at 1304-05.


revenge, punishment and deterrence focus not upon the victim’s injuries but upon the tortfeasor’s conduct and motive.\textsuperscript{17}

\textbf{B. Vicarious Liability}

It is elementary that a master or principal is liable for compensatory damages caused by the wrongful act of a servant or agent acting within the scope of the agency.\textsuperscript{18} Various reasons have been offered to justify this general rule.\textsuperscript{19} The traditional ones include the following:

[T]he master is in “control” of the servant and should bear the responsibility for his conduct; the master has “chosen” the servant and should therefore suffer for his wrongs; since the master will “benefit” from the servant’s acts, he should bear their burden; although the master may be personally innocent so is the person injured, and between two equally innocent parties, the one who initiated the enterprise should bear the loss; and the master should be liable for the simple reason that he has the “deeper pocket.”\textsuperscript{20}

Chief among the modern justifications for vicarious liability, however, are the various economically based risk allocation and loss distribution theories, generally described by Dean Prosser as follows:

The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer’s enterprise, are placed upon that enterprise itself, as a required cost of doing business. They are placed upon the employer because . . . he is better able to absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large.\textsuperscript{21}

Again, it must be reiterated that the economic theories can only be used to justify the vicarious imposition of compensatory, not punitive, damages.\textsuperscript{22} Unfortunately, legal scholars

\begin{itemize}
  \item \textsuperscript{17} See supra text accompanying notes 7-9.
  \item \textsuperscript{18} 3 AM. JUR. 2D Agency § 267 (1962); 22 AM. JUR. 2D Damages § 257 (1965).
  \item \textsuperscript{19} For a general discussion of the purposes which underlie vicarious liability, see J. HYNES, AGENCY AND PARTNERSHIP 37-55 (1974).
  \item \textsuperscript{20} Comment, supra note 3, at 1296.
  \item \textsuperscript{21} W. PROSSER, supra note 4, § 69, at 459.
  \item \textsuperscript{22} See supra text accompanying notes 13-14.
\end{itemize}
have not always made this distinction.\textsuperscript{23}

Because vicarious liability runs counter to the deeply ingrained fault principle in the law of torts, the doctrine has been "viewed with suspicion and accepted with misgivings."\textsuperscript{24} As Justice Holmes stated: "I assume that commonsense is opposed to making one man pay for another man's wrong, unless he actually has brought the wrong to pass according to the ordinary canons of legal responsibility . . . ."\textsuperscript{25}

The vicarious imposition of punitive damages would seem even more suspect, since it runs counter to fundamental moral principles against vicarious punishment.\textsuperscript{26} Nonetheless, the courts have fashioned two major rules by which punitive damages may be vicariously imposed.

III. THE SCOPE OF EMPLOYMENT RULE

A. The Rule Defined

In a considerable minority of jurisdictions, a principal will be held vicariously liable for punitive damages assessed against an agent, without the necessity for any showing that the principal engaged in any wrongful conduct.\textsuperscript{27} In other

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\item \textsuperscript{23} See, for example, \textit{BURDICK, THE LAW OF TORTS}, 245 (4th ed. 1926), in which the author appeared to apply a risk allocation rationale for the vicarious imposition of punitive damages.
\item \textsuperscript{24} J. HYNES, \textit{supra} note 19, at 37.
\item \textsuperscript{25} Holmes, \textit{Agency} (pt. 2), 5 HARV. L. REV. 1, 14 (1891).
\item \textsuperscript{26} Under Mosaic legislation, "[t]he fathers shall not be put to death for the children, neither shall the children be put to death for the fathers: every man shall be put to death for his own sin." \textit{Deuteronomy} 24:16.
\item \textsuperscript{27} D. DOBBS, \textit{HANDBOOK OF THE LAW OF REMEDIES} § 3.9, at 214 (1973); J. GHIARDI & J. KIRCHER, \textit{supra} note 10, § 5.06; W. PROSSER, \textit{supra} note 4, § 2, at 12; Note, \textit{supra} note 10, at 526.
\end{itemize}

words, this rule simply applies the general rule of vicarious liability to punitive damages.\textsuperscript{28} Thus, any principal who may be vicariously liable for compensatory damages may also be vicariously liable for punitive damages.\textsuperscript{29} The agent need only have acted within the scope of the agency at the time of the wrongful conduct; hence this rule has also been called the "scope of employment" rule.\textsuperscript{30} Of course, one might argue that conduct egregious enough to render an employee punitively liable would never be within the scope of employment, as defined by an innocent principal. The courts, however, have apparently not been impressed with this argument, as the cases do not address it.

\textbf{B. The Rule Evaluated}

The scope of employment rule has little basis in policy, does not further the purposes for which punitive damages are imposed, and should be abandoned. Unfortunately, many courts have not formulated public policy reasons behind this rule,\textsuperscript{31} and cases applying it often show little analysis,\textsuperscript{32} despite the fact that courts have been warned to apply

\textsuperscript{28} C. McCormick, \textit{supra} note 2, at 284.
\textsuperscript{29} M. Minzer \& J. Nates, \textit{supra} note 1, § 40.51[3], at 132-33.
\textsuperscript{30} One commentator indicated that "the mere fact that the employee acts with a bad motive does not necessarily take him outside his employment." D. Dobbs, \textit{supra} note 27, at 214. The scope of employment doctrine has been interpreted to include willful wrongs resulting "from an impulse or emotion arising from the employment or in some way incident thereto." Note, 2 WM. \& MARY L. REV. 485, 485 (1960).
\textsuperscript{31} Note, \textit{supra} note 10, at 526.
\textsuperscript{32} J. Ghiardi \& J. Kircher, \textit{supra} note 10, § 5.06. In support of the scope of employment rule, one court offered the dubious rationale that "the doctrine is too deeply implanted in the law to be uprooted for no better reason than that it is illogical." Schmidt v. Minor, 150 Minn. 236, 240, 184 N.W. 964, 966 (1921).
the rule with caution.\textsuperscript{33} The following analysis shows that the deterrence and punishment purposes for punitive damages are ill served when such damages are imposed vicariously.

1. The Deterrence Rationale.

It has been stated that deterrence is the primary purpose which justifies the scope of employment rule.\textsuperscript{34} The deterrent effect is arguably operative in situations where the punishment is meted out to the actual wrongdoer, since it is the wrongdoer who experiences the punishment and is therefore given a reason to change. Under the scope of employment rule, however, a vicarious punitive damage assessment can and often will operate to "punish" an innocent principal. Such punishment would seem to have little deterrent effect upon the actual wrongdoer-agent. Of course, if the agent felt that this vicariously liable principal might seek indemnity,\textsuperscript{35} or terminate the agency, some deterrent effect might be operative. This would seem, however, to be a roundabout and unfair way of accomplishing what could more effectively be accomplished by simply punishing the agent alone.

It has often been stated that the scope of employment rule encourages employers to exercise greater care in selecting, training, or supervising employees.\textsuperscript{36} This "employer diligence" rationale is really a variant on the deterrence rationale, with the emphasis now upon deterring the principal's errant conduct in selecting employees rather than deterring the agent's conduct. The employer diligence rationale lends some support to the scope of employment rule, yet has numerous weakpoints.

First, this rationale has potency only to the extent that the principal has sufficient behavioral control over the agent to warrant holding the former responsible for the latter's acts. Human behavior is notoriously difficult to predict and

\textsuperscript{34} W. Prosser, supra note 4, § 2, at 12.
\textsuperscript{35} A principal can seek indemnity from an agent for damages vicariously imposed, see W. Prosser, supra note 4, § 51, at 311, but it is doubtful that this would occur in the typical employer-employee situation.
\textsuperscript{36} See, e.g., M. Minzer & J. Nates, supra note 1, § 40.51[3]; W. Prosser, supra note 4, § 2, at 12; Comment, supra note 3, at 1301; Note, supra note 10, at 526.
control, especially the type of behavior that leads to punitive damages. No amount of careful supervision and screening of employees or other agents will eliminate all malicious behavior. This fact raises the possibility that a principal might misallocate economic resources in attempting to achieve an unrealistically high degree of agent control.

Second, it is reasonable to conclude that sufficient employer diligence is encouraged by the prospect of compensatory damages alone. Compensatory damages do have a deterrent effect. Moreover, the wide latitude available to juries in awarding such damages — particularly in the intangible areas such as pain and suffering — raises the possibility for compensatory verdicts of truly punitive proportions. Indeed, it has been stated that the theory of punitive damages is "built into the average juror's value system."

A third criticism of the employer diligence rationale is that the existence of liability insurance weakens it considerably. It would appear that if the employer diligence rationale is served by the vicarious imposition of punitive damages, that rationale would be frustrated by permitting a principal to shift the burden of punitive damages to an insurer. There is near unanimity among the courts that an employer or other principal can insure against punitive damages which are vicariously imposed. The courts reason that public policy is not offended by allowing insurance coverage in this situation since the principal is not the actual wrongdoer and therefore deserves no punishment.

38. Morris, Punitive Damages in Tort Cases, 44 HARV. L. REV. 1173, 1187-88 (1931). See also Craker v. Chicago & N.W. Ry., 36 Wis. 657, 676 (1875) ("Responsibility for compensatory damages will be a sufficient admonition to carrier corporations to select competent and trustworthy officers.").
40. Id. An early Wisconsin case provides an interesting illustration of this system. The same case was tried three times before three juries, twice with punitive damages allowed and once without. The verdict in each trial was the same. See Bass v. Chicago & N.W. Ry., 36 Wis. 450 (1874); Bass, 39 Wis. 636 (1876); Bass, 42 Wis. 654 (1877).
41. J. GHIARDI & J. KIRCHER, supra note 10, § 7.15, at 59. See also id. § 7.31 (vicarious liability cases allowing coverage).
42. Morris, supra note 39, at 223. Cases adopting this rationale include: Ohio Cas. Ins. Co. v. Welfare Financing Co., 75 F.2d 58, 60 (8th Cir. 1934), cert. denied, 295
To the extent that a principal has procured insurance to cover punitive loss, there exists that much less of a motivation to exercise due care in an effort to avoid the loss.\textsuperscript{43} Ironically, a principal is able to insure against punitive losses in precisely those circumstances where the scope of employment rule applies, namely, where the principal is solely vicariously liable. This fact constitutes an indictment of the rule itself: The courts seem to recognize that allowing an innocent, vicariously liable principal to "escape" punitive damages through insurance violates no public policy, since the principal deserved no punishment in the first instance.

Numerous other criticisms can be leveled against the employer diligence rationale. Under the scope of employment rule, it would seem just as easy to assume that a sort of "reverse diligence" would occur, since no matter how carefully the principal screens and trains agents, the employer will nonetheless be held punitively liable — without fault — for the agent's transgressions. Also, one might question the entire social worth of this rationale. The employment of potentially malicious individuals might help channel antisocial tendencies into socially useful work outlets. Under the employer diligence rationale, however, the employment of such individuals is discouraged.

2. The Punishment Rationale.

Along with deterrence, punishment is considered a major purpose for the imposition of punitive damages.\textsuperscript{44} Serious practical and ethical problems are raised, however, when attempts are made to justify the scope of employment rule through the punishment rationale.

As discussed earlier, punitive damages are intended to punish the wrongdoer's evil motive or malice.\textsuperscript{45} Actual ill will or malevolence on the part of the wrongdoer is re-

\textsuperscript{43} See Comment, supra note 3, at 1306. Some deterrence might still be operative if the principal's insurance premium increased according to claim frequency. Since by definition insurance is a loss-spreading device, however, this effect is likely to be minimal, if it exists at all.

\textsuperscript{44} See supra notes 10-12 & 16 and accompanying text.

\textsuperscript{45} See supra notes 7-12 and accompanying text.
The obvious problem with vicarious liability under the scope of employment rule is that the principal does not necessarily share the wrongdoer-agent's evil motive. Where the motive is not shared, punishment of the principal is patently irrational and unethical.\(^4\)

One might counter this with the employer diligence rationale, arguing that punitive damages punish the principal for failing to exercise due care in the selection and training of agents. This argument, however, ignores the essence of the scope of employment rule. Under the rule, the principal's liability is absolute, since imputation requires no showing of lack of due care or other personal fault. The employer diligence rationale is based upon a kind of "prospective" punishment — increased diligence is motivated through the threat of imputed punitive sanctions, even though those sanctions will be applied anyway where the principal is totally blameless. Punishment under these circumstances has a clearly irrational character.\(^4\)

IV. *THE RESTATEMENT RULE*

A. *The Rule Defined*

The majority of jurisdictions follow the rule that a principal cannot be held vicariously liable for punitive damages assessed against an agent unless the principal's conduct, in relation to the agent's, was itself somehow wrongful.\(^4\) This

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46. Ghiardi, *supra* note 37, at 754.
47. *See, e.g.*, Craker v. Chicago & N.W. Ry., 36 Wis. 657 (1875).
48. Not surprisingly, the punishment rationale for the scope of employment rule, like the deterrence rationale, has been heavily criticized in the legal literature. As one commentator has stated, "the levy of punitive damages against [a principal] is wholly unjustifiable when the only ground for it is a purely punitive one . . . ." D. Dobbs, *supra* note 27, § 3.9, at 215. *See also* J. Ghiardi & J. Kircher, *supra* note 10, § 2.04, at 10-12.

rule has been codified in the *Restatement (Second) of Torts*, section 909:

Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,

(a) the principal or managerial agent authorized the doing and the manner of the act, or
(b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
(c) the agent was employed in a managerial capacity and was acting in the scope of employment, or


Wisconsin follows the *Restatement* rule. In Garcia v. Sampson's, Inc., 10 Wis. 2d 515, 103 N.W.2d 565 (1960), the Wisconsin Supreme Court cited and affirmed a long history of Wisconsin cases which held that no recovery could be had for the tortious acts of agents without proof that the principal authorized or ratified the agent's acts. See *id.* at 518, 103 N.W.2d at 567. The *Garcia* case was subsequently cited with approval in Jeffers v. Nysse, 98 Wis. 2d 543, 551 n.3, 297 N.W.2d 495, 499 n.3 (1980); D.R.W. Corp. v. Cordes, 65 Wis. 2d 303, 311 n.11, 222 N.W.2d 671, 676 n.11 (1974); and Mid-Continent Refrigerator Co. v. Straka, 47 Wis. 2d 739, 748-49, 178 N.W.2d 28, 33 (1970).

In Wisconsin, the basic legal principles related to this issue were fleshed out in early nineteenth century cases and have not been significantly changed since. Retention of an agent after commission of a malicious tort may be held to be ratification by the principal. See, e.g., Bass v. Chicago & N.W. Ry., 42 Wis. 654, 667 (1877); Craker v. Chicago & N.W. Ry., 36 Wis. 657, 676 (1875). However, retention alone is insufficient to establish ratification, see Robinson v. Superior Rapid Transit Ry., 94 Wis. 345, 350, 68 N.W. 961, 963 (1896), and ratification may not be implied where the agent was arguably retained for other purposes. See Ghiardi, *supra* note 37, at 773.

The Wisconsin cases also hold that ratification requires full knowledge of the agent's acts and malice. See *Bass*, 42 Wis. at 662. This knowledge will not be imputed where the agent's acts are adverse to the principal's interests. See Ghiardi, *supra* note 37, at 773-74.
(d) the principal or a managerial agent of the principal ratified or approved the act. 50

The rationale behind this Restatement section is revealed by its commentary:

The rule stated in this Section results from the reasons for awarding punitive damages, which make it improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously. It is, however, within the general spirit of the rule to make liable an employer who has recklessly employed or retained a servant or employee who was known to be vicious, if the harm resulted from that characteristic. Nor is it unjust that a person on whose account another has acted should be responsible for an outrageous act for which he otherwise would not be if, with full knowledge of the act and the way in which it was done, he ratifies it, or, in cases in which he would be liable for the act but not subject to punitive damages, he expresses approval of it. In these cases, punitive damages are granted primarily because of the principal's own wrongful conduct. 51

The four categories under Restatement section 909 are clearly disjunctive; thus a principal may be found liable for punitive damages if any category can be proven. 52 Categories (a), (b), and (d) involve wrongful conduct on the part of the principal, separate and apart from the agent's conduct. Category (c) does not and is justified primarily by a deterrence rationale. Category (c) represents an anomaly under the Restatement and is discussed later in this Article under the section devoted to corporate vicarious liability. 53

The Restatement rule is partly one of vicarious liability and partly one of direct liability. It is vicarious in the sense that the full punitive assessment against the agent is imputed to the principal, but direct in the sense that such imputation will not occur unless the principal has engaged in related wrongful conduct. It would appear that the principal's wrongful conduct, considered apart from the agent's, may

50. Restatement (Second) of Torts § 909 (1979). This Restatement section is identical to Restatement (Second) of Agency § 217C (1958).

51. Restatement (Second) of Torts § 909 comment b (1979) (references to illustrations omitted).

52. M. Minzer & J. Nates, supra note 1, § 40.51[2], at 126.

53. See infra notes 97-116 and accompanying text.
not itself justify a punitive award. The consequences of this implication are addressed in the evaluation of the Restatement rule undertaken later in this Article.\textsuperscript{54} At this point, however, the specific categories of conduct which will render a principal punitively liable are further discussed.

1. Authorization by the Principal.

Under the Restatement rule, a principal may be held liable for punitive damages assessed against an agent when the principal authorized the agent's wrongful conduct.\textsuperscript{55} Category (a) of Restatement section 909 expresses this rule,\textsuperscript{56} although without explanatory illustrations.

Authorization would appear to refer primarily to situations where the principal ordered or directed an agent to engage in wrongful conduct.\textsuperscript{57} In such situations, the principal clearly acts as a joint malicious tortfeasor\textsuperscript{58} and should not be able to escape liability simply because the agent was the active wrongdoer.\textsuperscript{59} Simply stated, the principal's malicious motive in ordering a heinous tort deserves punishment just as much as the agent's malicious motive in carrying out the tort.

It should be emphasized that authorization must extend to both the performance of the act and the manner purportedly authorized. Thus, if an agent is authorized to perform a certain function but carries it out in an unauthorized manner, the principal will not be held liable for punitive damages. This rule is evident in the various "security guard" cases. For example, in Woodard v. City Stores Co.,\textsuperscript{60} the

\textsuperscript{54} See infra notes 95-96 and accompanying text.

\textsuperscript{55} J. Ghiardi & J. Kircher, supra note 10, § 5.08; M. Minzer & J. Nates, supra note 1, § 40.51[2], at 126; 22 Am. Jur. 2d Damages § 258 (1965); Note, supra note 10, at 526. See also cases cited in Annot., 93 A.L.R.3d 826, § 10 (1979).

\textsuperscript{56} See supra text accompanying note 50.

\textsuperscript{57} See cases cited in Annot., 93 A.L.R.3d 826, § 10 (1979). The term authorize "has a mandatory effect or meaning, implying a direction to act." Black's Law Dictionary 122 (5th ed. 1979).

\textsuperscript{58} Comment, supra note 3, at 1306.

\textsuperscript{59} The principal's role in authorizing a malicious tort is analogous to that of a conspirator or aider and abettor in the criminal law. Such "parties to a crime" are as guilty of the criminal offense as the person who directly committed it. See, e.g., Wis. Stat. § 939.05 (1981-82).

plaintiff was arrested in a department store and allegedly beaten by the security guard. The District of Columbia Court of Appeals stated that the store could not be held liable for punitive damages unless it authorized the actual beating.\(^6^1\) It was clear to the court that although the security guard was authorized to arrest lawbreaking patrons, he was not authorized to beat them.\(^6^2\)

Admittedly, in some situations, authorization will present difficult proof problems. One commentator would solve these difficulties by establishing a presumption of authorization:

> There are such immense difficulties in the way of proving actual authority, that it is necessary to establish a conclusive presumption of it. A word, a gesture, or a tone may be a sufficient indication from a master to his servant that some lapse from the legal standard of care or honesty will be deemed acceptable service. Yet who could prove such a measure of complicity?\(^6^3\)

This evidentiary concern is probably exaggerated, however, for two reasons. First, authorization may be implied from the principal's conduct.\(^6^4\) This situation might occur, for example, where the principal knows that the agent is about to commit a malicious tort, but does nothing to prevent it.\(^6^5\) Second, authorization situations are simply very rare.\(^6^6\) The authorization of a malicious tort will expose the principal to both punitive and compensatory damages and place the business' reputation at risk, which is clearly not in the principal's economic self-interest.\(^6^7\)

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62. Id.
64. 22 Am. Jur. 2d Damages § 259 (1965).
66. Ghiardi, supra note 37, at 772; Comment, supra note 3, at 1301. The Wisconsin case of Gatzow v. Buening, 106 Wis. 1, 81 N.W. 1103 (1900), may present an authorization fact situation.
67. It should also be noted that a conclusive presumption of authorization would be tantamount to a return to the scope of employment rule, with all the weaknesses of that rule discussed earlier in this Article. See supra notes 31-48 and accompanying text.
2. Hiring an Unfit Agent.

Under the Restatement rule, a principal may be held liable for punitive damages assessed against an agent when the principal was reckless in employing or retaining the agent. Category (b) of Restatement section 909 expresses this rule and includes the following illustration:

A employs an ejectment company to dispossess a tenant. A knows that the company has a reputation for using undue force in dealing with tenants. An employee of the company, in accordance with its usual methods, commits an unprovoked battery upon B, the wife of the tenant, in order to induce her to leave. In an action by B against A punitive damages can properly be awarded.

In the vast majority of cases in which a principal is held punitively liable for recklessly hiring an unfit agent, the agent has engaged in conduct warranting punitive damages. This is not a requirement, however, since the focus here is on the principal's reckless conduct. For example, in Wilson N. Jones Memorial Hospital v. Davis, a hospital orderly injured the plaintiff when he negligently attempted to remove a catheter. Although the orderly was merely negligent and hence not himself liable for punitive damages, the Texas hospital was found punitively liable for its conscious indifference to the safety of its patients in failing to check the orderly's references prior to employment. In a factually similar case, punitive damages against a North Carolina hospital were denied where it was shown that the hospital adequately investigated the negligent doctor before hiring him.

In cases like Wilson, the punitive liability of the principal is clearly direct and not vicarious. Great care must be taken in such cases to avoid holding the principal punitively

69. RESTATEMENT (SECOND) OF TORTS § 909(b) illustration 1 (1982).
70. M. Minzer & J. Nates, supra note 1, § 40.51[2], at 128-29.
72. Id. at 180.
73. Id.
75. See D. Dobbs, supra note 27, § 3.9, at 214.
liable for mere negligence in hiring an unfit agent. When the principal's liability is direct, arguably the conduct would have to evince the type of malice or evil motive which forms the basis for a punitive award in the typical nonagency context.\textsuperscript{76} Cases in which a principal has hired an unfit agent with such a motive are probably rare, if only because such conduct is clearly against the principal's economic self-interest.

3. Ratification by the Principal.

Under the \textit{Restatement} rule, a principal can be held liable for punitive damages assessed against an agent when the principal ratifies the conduct which gave rise to the punitive damages.\textsuperscript{77} Category (d) of \textit{Restatement} section 909 expresses this rule and includes the following illustration: "A, the owner of a theatre, employs a special policeman to keep order. In ejecting a small boy from the theatre, the policeman cruelly abuses him. Upon learning the facts, A expresses his approval. Punitive damages can properly be awarded against A in an action for the battery."\textsuperscript{78}

Ratification differs from authorization in that it involves approval after the malicious conduct itself.\textsuperscript{79} A ratifying principal is therefore not a joint malicious tortfeasor, and this liability has a larger vicarious component in comparison to authorization. A ratifying principal is roughly analogous to an accessory after the fact in the criminal law. Such accessories are generally not deemed to be as guilty as the actual perpetrator of the crime.\textsuperscript{80}

The main issue in ratification cases concerns what type of conduct will be deemed ratification. In some cases, evidence might be adduced to show that a principal directly approved

\textsuperscript{76} See supra notes 7-9 and accompanying text.

\textsuperscript{77} J. Ghiardi & J. Kircher, supra note 10, § 5.11; M. Minzer & J. Nates, supra note 1, § 40.51[2], at 131-32; 22 Am. Jur. 2d Damages § 258 (1965); Note, supra note 10, at 526. See also cases cited in Annot., 93 A.L.R.3d 826, § 12 (1979).

\textsuperscript{78} RESTATEMENT (SECOND) OF TORTS § 909 illustration 2 (1982).

\textsuperscript{79} Ratification refers to "confirmation of a previous act done either by the party himself or by another . . . ." BLACK's LAW DICTIONARY 1135 (5th ed. 1979).

\textsuperscript{80} See, e.g., Wis. Stat. § 946.47 (1981-82). Under this statute, an accessory after the fact is guilty of a Class E felony, at maximum.
a wrongful act. These cases are presumably rare, however, since it is obviously not in a principal’s best interest to condone wrongful conduct on the part of agents.

Ratification can be implied from the principal’s actions or inaction. Ratification has been found, for example, where a party asked a principal for a repudiation of an agent’s wrongful act, but received none. Indeed, some courts impose a duty upon a principal with notice to immediately repudiate a wrongful act lest ratification be found.

There is also authority for the rule that ratification will be inferred where a principal retains an agent after a wrongful act is committed. The better view, however, is that such retention cannot alone establish ratification without proof of other implicating facts. It is entirely possible, for example, that an employer might retain an errant agent not out of an intent to ratify the latter’s wrongful acts, but simply because the agent was a loyal and faithful servant for many years. Care must be taken not to infer ratification from acts not necessarily indicative of it.

Fairness and common sense would seem to dictate that a principal should not be deemed to have ratified an agent’s wrongful acts unless the principal had full knowledge of those acts. Of course, when the agent’s conduct is wrongful and adverse to the principal’s interests, the agent’s knowl-

85. See supra note 49.
86. See Woodard v. City Stores Co., 334 A.2d 189 (D.C. App. 1975). See also Restatement (Second) of Agency § 217C comment b (1958) (“Mere failure to dismiss a servant, unaccompanied by conduct indicating approval of the wrongful conduct, is not a sufficient basis on which to impose punitive damages.”).
87. See, e.g., Vassau v. Madison Electric Ry., 106 Wis. 301, 82 N.W. 152 (1900).
88. This appears to be the rule in most jurisdictions. See 22 Am. Jur. 2d Damages § 259 (1965); Annot., 93 A.L.R.3d 826, § 12[b] (1979). But see S.H. Kress & Co. v. Rust, 132 Tex. 89, –––, 120 S.W.2d 425, 428 (1938) (less than full knowledge deemed sufficient for ratification).
edge should not be imputed to the principal.\textsuperscript{89} A contrary view would render the rule requiring full knowledge before ratification nugatory, since the principal could never be without imputed knowledge of an agent’s wrongful conduct.

\textbf{B. The Rule Evaluated}

The gist of the criticism against the scope of employment rule is that the purposes for punitive damages — punishment and deterrence — are ill served when such damages are assessed against someone not an actual wrongdoer.\textsuperscript{90} Insofar as the \textit{Restatement} rule imposes punitive damages against a principal only when the principal has acted wrongfully, the \textit{Restatement} rule would appear to avoid the central defects of the scope of employment rule and particularly the ethical objections to vicarious punishment. A closer examination of the \textit{Restatement} rule, however, reveals that these defects are not completely avoided.

The scope of employment rule is objectionable \textit{simply because} the liability imposed under it is vicarious. Even under the \textit{Restatement} rule, however, at least a portion of the principal’s punitive liability can remain vicarious in certain circumstances. This is because the \textit{Restatement} rule functions both as a measure of liability and as a measure of damages.

Consider the various predicates to a principal’s punitive liability under the \textit{Restatement} rule: authorization, recklessness in hiring a malicious agent, and ratification. A closer examination of these predicates reveals two things. First, they do not entail equivalent degrees of culpability. For example, as discussed earlier, authorization involves joint malicious conduct where the principal acts as a joint tortfeasor,\textsuperscript{91} while ratification involves mere post-factum approval where the principal’s role is more passive.\textsuperscript{92} This mismatch in culpability is evidenced by the differing degrees of punishment which attach to the criminal law counterparts of authorization and ratification.\textsuperscript{93}

\textsuperscript{89} See Ghiardi, \textit{supra} note 37, at 773-74.
\textsuperscript{90} See \textit{supra} notes 31-48 and accompanying text.
\textsuperscript{91} See \textit{supra} notes 55-67 and accompanying text.
\textsuperscript{92} See \textit{supra} notes 77-89 and accompanying text.
\textsuperscript{93} See \textit{supra} notes 59 & 80 and accompanying text.
More importantly, however, none of the three predicates to a principal's liability under the Restatement rule, with the possible exception of authorization, represents conduct which is necessarily as egregious as the agent's punishable conduct. This is particularly the case with ratification. Although approval of wrongful conduct is admittedly reprehensible, it strains reason to claim that such approval is as deserving of punishment as the wrongful conduct itself, particularly where the approval is merely implied from the principal's actions or inaction.\footnote{See supra notes 77-89 and accompanying text.}

Despite the foregoing, so long as the principal satisfies at least one of the stated predicates to liability, the full punitive damage assessment against the agent will be imputed to the principal under the Restatement rule. This is true even though the principal's conduct, although admittedly wrong, is far less culpable than the agent's and may not alone warrant a punitive damage award. In this sense, the principal's liability under the Restatement rule remains in part purely vicarious, and to this portion of liability attaches all the criticisms of the scope of employment rule discussed earlier.

Moreover, since the three predicates to a principal's liability represent different degrees of culpability, two principals facing identical agent misconduct will suffer identical imputed damage awards, even though one principal may have acted much more egregiously than the other. This result would appear to violate two cardinal rules of jurisprudence: that the punishment should fit the crime, and that equally culpable wrongdoers should face equal punishments.

C. Refining the Restatement Rule: A Proposal for Change

A rather simple alteration of the Restatement rule would remove the remaining inequities. The liability and damage aspects of the rule should be bifurcated, and the assessment of punitive damages should be conducted separately for both the principal and agent. Under the liability aspect of the rule, proof that the principal authorized or ratified the
agent's malicious conduct, or recklessly hired the agent, would *ab initio* render the principal liable for punitive damages. Only after this initial liability was established would the jury be allowed to assess an actual punitive amount. Once the liability element was satisfied, the jury would be instructed to *separately assess* punitive damages according to the principal's degree of culpability and the amount necessary to adequately serve the punishment and deterrence rationales. The jury would be explicitly instructed to consider only the principal's conduct in this determination, separate and apart from the agent's conduct and liability for punitive damages.

The requirement that the jury first find the principal liable for punitive damages, prior to affixing the actual amount, is not a mere redundancy. At the outset of the deliberative process, this requirement focuses the jury's attention on the principal's conduct alone and helps ensure that the jury will not later arrive at a partially imputed damage assessment. Under this scheme, it is entirely possible for the jury to initially find the principal liable for punitive damages but later assess no damages. This situation might occur, for example, where the jury determined that although the principal's conduct was wrongful, a punitive award under the deterrence rationale would be pointless because the conduct would probably not recur. The jury might also feel that the principal's conduct was simply not egregious enough to warrant a punitive award or that imputed compensatory damages would be sufficient. Separate punitive assessment will help ensure that the principal's punitive liability bears some rational relationship to the wrongfulness of the principal's conduct. The facts surrounding the principal's involvement will evidence varying degrees of culpability from case to case, and the modified *Restatement* rule will allow this variability to be reflected in actual punitive awards.

Support for these proposed modifications in the *Restatement* rule can be found in the law regarding the punitive liability of joint tortfeasors. It has been stated:

In most jurisdictions punitive damages may be rendered against joint tortfeasors in varying amounts, or rendered

95. *See supra* notes 10-11 and accompanying text.
against some defendants but not against others. This result is logical, since in many instances it can be proven that one joint tortfeasor acted with malice while another did not, or that there was differing degrees of culpability among the co-defendants. A tortfeasor whose individual conduct would not warrant a penalty should not have to suffer for the conduct or evil motive of a co-defendant.96 When a principal and agent act as joint tortfeasors, separate punitive assessments clearly should be made. Even when the principal and agent are not technically joint tortfeasors, however, the inherent logic and fairness of separate assessment still dictates that procedure.

V. SPECIAL PROBLEM AREAS IN THE VICARIOUS LIABILITY FOR PUNITIVE DAMAGES

A. Liability of Corporations

The rules regarding vicarious punitive liability discussed to this point apply to situations where both the principal and agent are individual persons. While it has been suggested that the vicarious liability of corporations for punitive damages is governed by the same rules which apply to individuals,97 closer examination of the issue indicates it cannot be so easily resolved. Very complex problems arise when the principal is an abstract corporate entity, the ownership and management of which are separated.

When the principal is a corporation, some courts follow the rule that vicarious punitive liability is proper where the agent was a corporate officer or other high level managerial employee.98 This position also represents the Restatement view: "Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if . . . the agent was employed in a managerial ca-

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pacity and was acting within the scope of employment . . . ." 99

The above rule probably evolved partly in response to the fictional notion that a corporation is identical to its agents and that therefore no distinction can be made between the acts or guilt of the agent and the acts or guilt of the corporation. One author eloquently expresses this view as follows:

A corporation is an imaginary thing. It has no mind but the mind of its servants. It has no voice but the voice of its servants. . . . All its schemes or mischief as well as schemes of public enterprise are conceived by human minds and executed by human hands. All attempts therefore to distinguish between the guilt of the servant and the guilt of the corporation or the malice of the servant and the punishment of the corporation . . . are sheer nonsense, and only tend to confuse the mind and confound the judgment. 100

Under this view, when an agent of a corporation commits a malicious tort, the resulting corporate punitive liability is not really "vicarious," since no distinction is made between the agent and the corporation. Theoretically at least, the corporate liability is direct, and the result is very similar to what would occur if the scope of employment rule were applied. 101 If one fully accepted the view that a corporation and its agents are equivalent, it would seem irrelevant to distinguish between managerial and nonmanagerial

99. Restatement (Second) of Torts § 909(c) (1979). The Restatement offers this illustration:

A, a corporation owning a series of retail stores, employs B as operations manager to supervise the management of the units. While visiting a unit B discovers facts that lead him to believe erroneously that one of the clerks has been stealing. He directs the local manager to imprison the clerk. In the ensuing interview he permits the local manager to use outrageous means of intimidation. In the clerk's action against the corporation, punitive damages can properly be awarded.

Id. illustration 3. This illustration indicates that corporate punitive liability will also result when an officer or managerial agent authorizes or ratifies a malicious tort.


101. For a discussion of the scope of employment rule, see supra notes 27-48 and accompanying text.
agents when assessing the corporation’s liability, and indeed many of cases adopting the equivalency view do not make that distinction.102

Yet the managerial-nonmanagerial distinction is made. One might argue that corporate officers or high level managerial employees are “more equivalent” to the corporation than lower level agents in that the former are involved in developing and administering corporate policy and therefore “give identity” to the abstract corporate entity. Obviously, however, this argument is artificial to a fault.

The better view is that the entire focus of the managerial-nonmanagerial distinction is misplaced. In determining the vicarious punitive liability of a corporation, the more sensible inquiry is not whether the agent held a managerial position, itself difficult to define103 but rather whether the agent was carrying out corporate policy in committing the malicious acts.104 If such were the case, the corporate punitive liability would again appear more direct than vicarious but not because the corporation and the malicious agent were somehow theoretically “identical.” Rather, the corporate liability would appear direct because the corporate policy itself evidenced a malicious intent and would be the focus of the punitive award. Since corporate punitive liability ac-

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102. See Standard Oil Co. v. Gunn, 234 Ala. 598, 176 So. 332 (1937); Hibschman Pontiac, Inc. v. Batchelor, 266 Ind. 310, 362 N.E.2d 845 (1977); State v. Dried Milk Prods. Coop., 16 Wis. 2d 357, 114 N.W.2d 412 (1962). In declining to make any distinction between corporate agents based on rank, one court stated:

The president of a railway corporation is no more or less its agent than a brakeman on one of its trains. His agency is broader, but it is not boundless, and a matter which lies beyond its limits is as thoroughly beyond his powers as any matter beyond the very much smaller circle of a brakeman’s [sic] duties;

There is just the same and no more reason, in our opinion, for inflicting punishment on the corporation for the willful misconduct of the one as of the other, and such punishment is no more vicarious in the one case than in the other.


104. See J. GHIARDI & J. KIRCHER, supra note 10, § 5.06.
ccording to this approach is predicated upon some fault on the part of the corporate principal, the assessment of liability operates similar to the *Restatement* rule.\(^{105}\)

All of the foregoing approaches to corporate punitive liability suffer from one central defect: they adopt an inadequate and overly abstract definition of the corporate entity. If a corporation is identical to anything, it is identical not to its agents but to the shareholders who own it. “[C]ustomary judicial verbiage about imputing to the corporation the act and intent of the offender is entirely figurative and glosses over a defective analysis. The shareholders in their corporate capacity are treated as convenient hostages.”\(^{106}\)

The punitive liability of a corporation, therefore, “should not be viewed as an abstract ‘corporate’ liability but rather as that of the shareholders.”\(^{107}\) Shareholder punitive liability, however, raises serious ethical questions. In the vast majority of circumstances, shareholders are innocent of any wrongdoing when an agent of a corporation commits a malicious tort, if only because shareholders are far removed from the day-to-day management of the corporation and have no direct opportunity to authorize or ratify malicious acts.\(^{108}\) To the extent that shareholders are innocent, any punitive liability assessed against them is morally repugnant for the same reasons discussed earlier with reference to the scope of employment rule.\(^{109}\) As Dean Prosser said, many courts have stressed “the injustice of a punishment inflicted upon one who has been entirely innocent throughout. This is of course particularly true where the employer is a corporation, and the pocket which is hit is that of the blameless stockholders, whom no one wants to punish.”\(^{110}\)

This “innocent shareholders” viewpoint has not gone uncriticized. The shareholders’ punitive liability does strip

\(^{105}\) For a discussion of the *Restatement* rule, see *supra* notes 49-96 and accompanying text.

\(^{106}\) H. BALLANTINE, CORPORATIONS § 114, at 280 (1946).

\(^{107}\) Comment, *supra* note 3, at 1306.

\(^{108}\) See *infra* notes 113-14 and accompanying text.

\(^{109}\) See *supra* notes 31-48 and accompanying text.

them of illicit profits gained through cost-cutting measures which sacrifice public safety.\textsuperscript{111} It would seem, however, that illicit corporate gains could be just as effectively wrested from shareholders through common-law restitutionary principles, without the additional ethical and evidentiary problems associated with punitive awards. Moreover, this argument simply assumes what it needs to prove: that any given shareholder would in fact countenance the maximization of profits at the expense of public safety. Even if motivated solely by economic considerations, it would seem unlikely that most shareholders would condone unsafe cost-cutting measures, which increase the risk of compensatory-damage exposure and jeopardize corporate goodwill.

Shareholder innocence aside, the Wisconsin Supreme Court has stated that shareholder liability operates to encourage shareholders to exercise closer control over the operation of the entity.\textsuperscript{112} This argument, however, overestimates the degree of managerial control which shareholders possess. In actuality, “the shareholder is definitely made subservient to the will of a controlling group of managers.”\textsuperscript{113} Insofar as shareholders lack actual control over the management of a corporation,\textsuperscript{114} the “closer control” rationale weakens.

Many of the problems associated with corporate liability for punitive damages could be solved with a rule that imposed such damages only upon the individual corporate representatives who actually authorized or ratified the malicious conduct. That representative might be a managerial em-

\textsuperscript{111} Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1257, 1304-05 (1974).

\textsuperscript{112} Wangen v. Ford Motor Co., 97 Wis. 2d 260, 291, 294 N.W.2d 437, 453-54 (1980).

\textsuperscript{113} A. Berle & G. Means, The Modern Corporation and Private Property 227 (1933).

\textsuperscript{114} As one author stated:
Nominal power still resides in the stockholders; actual power in the board of directors.

\ldots

Essentially these stockholders, though politely called “owners,” are passive. They have the right to receive only. The condition of their being is that they do not interfere in management. Neither in law nor, as a rule, in fact do they have that capacity.”

ployee, a rank and file worker, a board director, or even a shareholder or group of shareholders, under proper circumstances. Such a rule would avoid the ethical problems associated with placing punitive liability upon innocent parties, particularly shareholders. It would also provide greater incentive to avoid misconduct, since the liability would be placed directly upon the actual wrongdoer or group of wrongdoers.

Of course, this individual liability rule would result in a shallower "pocket" being available for recovery, since the corporate coffers could not be reached. Indeed, one author has suggested that few lawyers would press punitive damage claims if the corporation itself could not be held liable. It must be remembered, however, that the purposes for punitive damages are to punish and deter, not to compensate the victim. If these purposes are adequately served by holding only the wrongdoer liable for individual misconduct, there exists no valid reason for extending the liability further.

B. Liability of Governmental Entities

1. Governmental Immunity

In the great majority of jurisdictions, states or municipalities are not vicariously liable for punitive damages assessed against its agents. Various reasons have been offered for

116. See supra notes 13-17 and accompanying text.
117. D. Dobbs, supra note 27, at 217; J. Ghiardi & J. Kircher, supra note 10, § 5.13; M. Minzer & J. Nates, supra note 1, § 40.54[2][a]. See also Annot., 19 A.L.R.2d 903 (1951). One court has held that this immunity may be waived by the purchase of liability insurance. See Holda v. County of Kane, 88 Ill. App. 3d 522, 410 N.E.2d 552, 557 (1980).

The following jurisdictions, by the named authority, do not allow punitive damages to be imposed vicariously against its governmental bodies: Alabama, City Council of Montgomery v. Gilmer & Taylor, 33 Ala. 116 (1858); Alaska, ALASKA STAT. § 09.50.280 (1983); Arizona, ARIZ. REV. STAT. ANN. § 41-621 (Supp. 1983); California, CAL. GOV'T CODE § 818 (West 1980); Colorado, COLO. REV. STAT. § 24-10-114 (1973) (but see Frick v. Abell, 198 Colo. 508, 602 P.2d 852 (1979)); District of Columbia, Smith v. District of Columbia, 336 A.2d 831 (D.C. 1975); Florida, Fisher v. City of Miami, 172 So. 2d 455 (Fla. 1965); Georgia, City of Columbus v. Myszka, 246 Ga. 571, 272 S.E.2d 302 (1980); Hawaii, Lauer v. YMCA, 57 Hawaii 390, 557 P.2d 1334 (1976); Idaho, IDAHO CODE § 6-918 (1979); Illinois, George v. Chicago Transit Authority, 58 Ill. App. 3d 692, 374 N.E.2d 679 (1978); Indiana, IND. CODE ANN. § 34-4-
this rule:

(1) a punitive damage award against a governmental entity would operate to punish innocent citizens,\(^{118}\) whose taxes would be raised or services cut back to make up for the award;\(^{119}\)

(2) the deterrence effect is inoperative due to potentially


\(^{119}\) D. Dobbs, supra note 27, at 217.
unlimited governmental wealth and high turnover in leadership;\footnote{120} (3) unlimited governmental resources make it impossible to arrive at a wealth-based verdict which would serve the purposes of punitive damages;\footnote{122} (4) disciplinary action by supervisors against errant employees provides sufficient punishment and deterrence;\footnote{123} (5) public control through the political process provides an adequate remedy;\footnote{124} and (6) the governmental entity is immune from liability for compensatory damages and therefore cannot be held liable for punitive damages.\footnote{125}

It is interesting to note that reasons (1) and (4) above also justify corporate immunity for punitive damages. Just as punitive damages against municipalities punish innocent citizens, such damages against corporations punish innocent shareholders. Similarly, disciplinary action by corporate supervisors provides the same deterrent to errant conduct as disciplinary action by government supervisors. In arguing that the deterrent effect of punitive damages does not apply to municipalities, one court stated that "a huge award against the City would not necessarily deter other employees who generally would be unable to pay a judgment assessed against them personally."\footnote{126} This statement remains largely true if the word "corporation" is put in the place of "city."\footnote{127}

2. Governmental Liability

In a few jurisdictions, a governmental entity may be held vicariously liable for punitive damages assessed against its

\footnote{120}{\textit{See} Ranells v. City of Cleveland, 41 Ohio St. 2d 1, \textemdash, 321 N.E.2d 885, 889 (1975).}
\footnote{121}{D. Dobbs, \textit{supra} note 27, at 218.}
\footnote{122}{\textit{See}, \textit{e.g.}, State v. Sanchez, 119 Ariz. 64, \textemdash, 579 P.2d 568, 571 (Ct. App. 1979); Fischer v. City of Miami, 172 So. 2d 455, 457 (Fla. 1965).}
\footnote{123}{\textit{See}, \textit{e.g.}, State v. Sanchez, 119 Ariz. 64, \textemdash, 579 P.2d 568, 571 (Ct. App. 1979); Fischer v. City of Miami, 172 So. 2d 455, 457 (Fla. 1965).}
\footnote{124}{D. Dobbs, \textit{supra} note 27, at 217.}
\footnote{125}{\textit{Id.}}
\footnote{126}{Fischer v. City of Miami, 172 So. 2d 455, 457 (Fla. 1965).}
\footnote{127}{For a discussion of corporate liability for punitive damages, see \textit{supra} notes 97-116 and accompanying text.}
 Courts adopting this rule typically reject the reasons advanced in favor of immunity and argue that, despite the weaknesses in the employer diligence rationale, governmental punitive liability will promote greater care in the selection and training of employees. It appears that the jurisdictions which follow this rule require some fault on the part of the governmental entity as a predicate to liability, similar to the Restatement rule regarding vicarious punitive liability in the non-governmental context.

The liability rule has little modern support, except perhaps in situations where there has been a serious abuse of governmental power. The United States Supreme Court has expressed clear disapproval of government liability for punitive damages, and the rule should probably be abandoned.

VI. CONCLUSION

Much controversy has surrounded the issue of whether it is proper to impose punitive damages upon defendants in the civil context. That controversy is heightened when attempts are made to vicariously impose punitive damages against a party who was not an active wrongdoer. Great caution must be exercised by our courts to ensure that punitive damages are vicariously imposed only under circumstances where the


129. See, e.g., Young v. City of Des Moines, 262 N.W.2d 612, 621-22 (Iowa 1978). For a discussion of the reasons offered in support of the scope of employment rule, see supra notes 117-27 and accompanying text.

130. Young v. City of Des Moines, 262 N.W.2d 612, 621-22 (Iowa 1978).

131. J. GHIARDI & J. KIRCHER, supra note 10, § 5.15. But see Young v. City of Des Moines, 262 N.W.2d 612, 612 (Iowa 1978), in which the court held that municipal punitive liability will be determined by the same legal principles which apply to corporate liability. In Iowa, a corporation may be held vicariously liable for punitive damages even though the corporation itself was innocent of any wrongdoing. Northrup v. Miles Homes, Inc., 204 N.W.2d 850 (Iowa 1973).

132. J. GHIARDI & J. KIRCHER, supra note 10, § 5.15, at 47.

133. See D. DOBBS, supra note 27, § 3.9, at 218.

purposes for punitive awards — punishment and deterrence — will be served. Toward that end, three changes in the law regarding vicarious punitive liability are proposed: first, that the scope of employment rule regarding such liability be abandoned; second, that courts follow the Restatement rule but that it be modified so that punitive damages are separately assessed against the principal and agent, and only when both have acted wrongfully; and third, that corporate liability for punitive damages be abolished in favor of a rule which would impose punitive damages only upon the individual employees guilty of actual misconduct. These changes in effect abrogate "pure" vicarious liability for punitive damages, a result justified by the fact that such liability is unethical and ill serves the purposes which underlie the punitive damage doctrine.