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# Punished, Dead Or Alive: Empirical Perspectives on Awarding Punitive Damages Against Deceased Defendants

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## Abstract

Punitive damages are a tool for punishing defendants who engage in reckless and wanton behaviors that cause injury to others. As with criminal punishment, goals of punitive damages include retribution, specific deterrence, and general deterrence. Unlike criminal punishment, however, some courts allow punitive damages to follow the death of defendants. To explore this issue, we first conducted a legal analysis of appellate court decisions concerning punitive damages against deceased defendants. While the majority of courts suggest that punitive damages against deceased individuals are not appropriate, some argue that favorable policy implications of allowing punitive damages to follow the defendant’s death merit their survivability. Next, we conducted a simulation study to investigate the effects of defendant injury severity, including death, on juror decisions in a punitive damages case. Consistent with some judicial reasoning, mock jurors’ liability and damage awards were not influenced by a defendant’s injury severity, but defendant death did influence participants’ self-reported *goals* of their punitive damage awards. We conclude with a discussion of policy and research implications.

**Keywords:** punitive damages, outcome severity, civil law

Nearly every major world religion believes that individuals can face punishment after their deaths. Christian and Islamic denominations believe that humans suffer the consequences of earthly sins in Hell (or some variation). Many Buddhists and Hindus believe in an after-life of temporary suffering for those who commit evil acts during their lifetimes. Another, somewhat parallel, religious and cultural belief is that children will pay for “the sins of their fathers” (e.g., the *Book of Jeremiah* [32:18]). In modern times, and outside of religious contexts, some have argued that descendants of slave-owners should pay reparations to descendants of slaves, and the post-WWII German government has made numerous reparations to victims of Nazi atrocities and their descendants. Thus, ample evidence exists of the popular belief that punishment survives a transgressor’s death; the United States’ legal system, however, *generally* feels otherwise. The present research explores legal policies and assumptions related to punishing deceased defendants in civil contexts.

The traditional view in common law is that “the realm of the dead is not invaded, and punishment (is not) visited upon the dead” (*Mervis v. Wolverson*, 1968). The state is unable to criminally punish a deceased individual, and prosecution of a criminal defendant abates if the defendant passes away during trial. For instance, the South Dakota Supreme Court held that continuing a criminal appeal after a defendant’s death would be moot (*State v. Hoxsie*, 1997).

Although punitive damages result from civil transgressions, they share common attributes with criminal sanctions (e.g., the intent to exact retribution and to deter; Bornstein, Robicheaux, & Thimsen, 2009; Galanter & Luban, 1993). However, criminal and civil punishments differ in important ways. These differences are particularly salient in the case of severe offenses, which are most likely to elicit relatively harsh punishment (in criminal cases, incarceration or execution; in civil cases, punitive damages). Sentencing a deceased defendant to incarceration or execution would be absurd, but in civil cases punishment against the deceased is still obtainable via punitive damages levied against the defendant’s estate. Thus, punishment of dead defendants is a more viable option in civil, rather than in criminal, cases. Such a remedy is also legally permissible in some jurisdictions.

### **Punitive Damages**

Compensatory damages (i.e., financial awards intended to make injured parties whole) are the most common remedy in civil cases in the United States. Compensatory damage awards include economic damages (e.g., medical bills, lost work) and noneconomic damages (e.g., money for pain and suffering) (for a review, see Greene & Bornstein, 2003). In addition to compensatory damages, most states also allow some form of punitive or exemplary damages against defendants who act in a reckless, willful, or wanton manner (*Restatement [Second] of Torts*, 1965, §908). Punitive damages serve both to punish a defendant (i.e., they have a retributive function) and to deter the defendant, and others, from engaging in similar acts in the future (e.g., Dressler, 2007; *Restatement [Second] of Torts*, 1965, §908). While punitive damage awards are often targeted by advocates of tort reform (e.g., the American Tort Reform Association; see [www.atra.org](http://www.atra.org)), jurors award them sparingly (see e.g., Cohen & Smith, 2004; Eisenberg, LaFountain, Ostrom, Rottman, & Wells, 2002; Ostrom, Rottman, & Goerd, 1996; Rustad, 1998) and often reserve such awards for cases approaching, but not reaching, criminal negligence (Galanter & Luban, 1993). Punitive damages are most frequently awarded in cases involving intentional misconduct or immoral behavior on the part of the defendant, while they are less common in typical torts cases (e.g., medical malpractice, products liability, automobile cases) (Eisenberg, Goerd, Ostrom, Rottman, & Wells, 1997).

The punitive damage award “is more about the defendant’s behavior than the plaintiff’s loss” (*Wightman v. Consolidated Rail Corporation*, 1999). Punitive damages typically are not meant to benefit plaintiffs directly but to send a message that the defendant’s behavior was unacceptable (Martin, 2003). When calculating punitive damages, courts focus on elements of the defendant’s conduct (e.g., the recklessness or reprehensibility of the behavior), as well as the financial status of the defendant, to determine a suitable award (Bornstein et al., 2009; Greene & Bornstein, 2003; *Restatement [Second] of Torts*, 1965,

§908). Recent jurisprudence has also identified the degree of harm to the plaintiff as an important consideration when assessing the appropriateness of a punitive damage award (*BMW v. Gore*, 1996; *State Farm v. Campbell*, 2003).

### Primary Goals of Punitive Damages

Punitive damages provide juries with a means of demonstrating societal disapproval of malicious or reckless behaviors through financial punishment (*Doe v. Colligan*, 1988; *Restatement [Second] of Torts*, 1965). Not only can juries levy punitive damage awards against individuals, but they can also award damages against those generally not punishable by the criminal court system (e.g., corporations; government agencies). While punitive damages may serve several purposes, according to many states' statutes the *central* purpose is punishment (i.e., retribution) (*Doe v. Colligan*, 1998; *Thorpe v. Wilson*, 1982; for a review, see Bornstein et al., 2009).

In addition to retribution, however, punitive damages also serve a deterrent purpose (Dressler, 2007; *Restatement [Second] of Torts*, 1965). The message of societal disapproval sent through punitive damage awards serves as a warning to both the wrongdoer and to others who may engage in similar activity. A defendant who engages in reckless and dangerous practices is expected to adjust future behavior following a punitive damage award, and punitive damage awards against one party also send a message to others who are not part of the civil case (e.g., Galanter & Luban, 1993; Sharkey, 2003; *G.J.D. by G.J.D. v. Johnson*, 1998). For instance, a punitive damage award against a corporation engaging in reckless disposal of toxic waste may prompt other corporations to reevaluate their waste disposal practices.<sup>1</sup>

The civil justice system often treats punitive damages and compensatory damages differently. For example, while compensatory damage awards are typically reduced by a plaintiff's share of contributory negligence, punitive damage awards usually are not (*Clark v. Cantrell*, 1998; Schwartz, 1992; Woods & Deere, 1996). While the goal of compensatory damages is to make an injured party whole, the goals of punitive damages are analogous with the (perceived) primary goals of *criminal* sanctions (i.e., retribution and deterrence) (see e.g., Farnworth, Longmire, & West, 1998; Nagin, 1998). In addition, many states require a higher burden of proof to demonstrate liability for punitive damages than to demonstrate liability for compensatory damages (Robbennolt, 2002). Because of both the differential legal treatment of compensatory and punitive damages in the civil justice system, as well as the similarities between punitive damages and criminal sanctions, barring punitive damages to follow the death of a defendant would seem to make legal sense.

On the contrary, some evidence demonstrates that decisions involving punitive damages and compensatory damages are highly interconnected. Though punitive damage awards are intended to be based on the defendant's conduct, they punitive damage awards often correlate with compensatory damage awards (i.e., awards based on the

<sup>1</sup> Some argue that punitive damages may even *over deter* certain favorable behaviors (e.g., Breslo, 1992; Priest, 2002). For instance, after a large punitive award against a pharmaceutical company accused of product liability, other pharmaceutical companies may delay the release of potentially helpful drugs.

plaintiff's injuries) (see e.g., Eisenberg, Hans, & Wells, 2008; Eisenberg et al., 2002; Vidmar et al., 2006). Moreover, two key Supreme Court rulings (i.e., *BMW of North America v. Gore*, 1996; *State Farm v. Campbell*, 2003) suggest that punitive damage awards should be scaled to compensatory damage awards. The Court has held that the ratio of punitive damages to compensatory damages, though not narrowly prescribed, typically should remain a single number (i.e., less than 10:1).

### *Quantifying Punitive Damages*

Although the goals of punitive damages vary somewhat across states, most state laws concerning punitive damages share common themes of retribution and deterrence. Injured parties generally provide evidence of actual damages through medical bills, account statements, written estimates (e.g., car repair estimates), and other proof. Thus, a jury can utilize objective financial information when determining these damages, but when determining punitive damages the jury has little (or no) objective guidance for achieving the goals of retribution and deterrence.

Generally, jurors are instructed to consider several elements when determining punitive damages against a defendant. For instance, juries finding defendants liable for punitive damages in North Dakota receive the following instructions:

*If you decide to use your discretion to award a reasonable sum as exemplary or punitive damages, then you must also find by clear and convincing evidence that:*

1) *the amount awarded bears a reasonable relationship to any harm that is likely to result from the Defendant's conduct and any harm that actually has occurred;*

*and*

2) *the amount awarded is consistent with the degree of reprehensibility of the Defendant's conduct and its duration.*

Further, in considering an award of exemplary or punitive damages, you must also consider:

1) *the extent to which the Defendant was aware of the conduct or concealed it;*

2) *the extent to which the Defendant profited from the conduct and whether or not it would be desirable to remove that profit or have the Defendant also sustain a loss;*

3) *the extent to which the Defendant has already been punished for the same conduct by criminal sanctions.* (State Bar Association of North Dakota, n.d.).

Other states provide jurors with similar guidance, with common themes of basing awards on the reprehensibility of the defendant's actions, the financial resources of the defendant, and the relationship of the award to actual damages (for a review, see Dressler, 2007). When translating these goals to dollar amounts, jurors must determine how to weigh each element of punitive damages and how to quantify those elements. Empirical research demonstrates that jurors consider all of the major elements (repre-

hensibility, deterrence, and degree of harm) in awarding punitive damages (e.g., Cather, Greene, & Durham, 1996; Eisenberg et al., 2008).

### *Punitive Damages and the Death of a Defendant*

Under early English common law, a legal claim did not survive the death of any party in a civil case (Polashuk, 2003). However, under the modern civil justice system in the United States, certain claims do survive the death of a litigant (Polashuk, 2003). Perhaps the most salient example of a modern exception to the early common law rule is the wrongful death claim. Personal representatives of the deceased can file a wrongful death claim against a defendant whose negligent or intentional actions allegedly led to the death of another.

Many states have enacted survival statutes (i.e., laws dictating that certain tort actions survive the death of either or both parties to a case) (for a review, see Polashuk, 2003). These laws provide personal representatives of a deceased plaintiff with the same rights of action as the deceased individual had the death not occurred. A plaintiff may also seek damages against the representatives of a deceased defendant under such laws. The Florida survival statute contains wording typical of most state survival statutes (2008 Florida Statutes §46-021): “No cause of action dies with the person. All causes of action survive and may be commenced, prosecuted, and defended in the name of the person prescribed by the law.”

The types of claims that survive litigants’ deaths are often limited by statute or case-law. Some states’ survival statutes, such as Florida’s, are broadly worded (i.e., they do not contain explicit exceptions of tort claims that do not survive a litigant’ death), while other states’ statutes specify exceptions. For example, claims for specific intentional torts, such as slander, libel, and defamation, abate after a litigant’s death in some states (e.g., Kansas Statutes, §60-1802; Oklahoma Statutes, §12-1502). Thus, while many claims do survive the death of parties, this survivability is not without limits.

Few states have explicit legislation allowing or barring a plaintiff from receiving punitive damages from a deceased defendant. One exception, Georgia, permits tort claims against a deceased defendant through its survival statute, but it explicitly *prohibits* punitive damages following the defendant’s death (Official Code of Georgia Annotated, §9-2-41). In addition, the survival statute of Idaho bars damages for libel, slander, and *any punitive or exemplary damages* after the death of a wrongdoer (Idaho Code, §5-327). On the contrary, Texas (Texas Statutes, §71.008 and §71.009 [for wrongful death claims only]) and Oklahoma (Oklahoma Statutes, §12-1053) explicitly allow plaintiffs to seek punitive damages against a deceased defendant’s estate. Most state codes do not directly specify whether punitive damages survive the death of either litigant, suggesting that opportunities for punitive damages against deceased defendants might be available in a relatively large number of jurisdictions. The issue is important because when defendants behave in a manner reckless and reprehensible enough to warrant punitive damages, they are likely to cause serious harm (and even death) to others besides plaintiffs, including themselves.

### *The Law Concerning Punitive Damages and Defendant Death*

The *Restatement (Second) of Torts* (1965) is one authority stating that punitive damages should not follow the death of a wrongdoer, and the majority of courts considering the issue have provided rulings consistent with this position. In those states where punitive damages against a deceased defendant are explicitly allowed, or barred, by statute, appeals courts are reluctant to reach decisions contrary to the statutory language (see, e.g., *Gordon v. Nathan*, 1974). Other courts have interpreted specific wording in survival statutes as allowing punitive damages to follow a defendant's death. As few survival statutes address the issue specifically, the law in most jurisdictions is derived from decisions in which judges invoke various policy arguments when holding that punitive damages against deceased defendants either are or are not allowed (see Study 1).

### *Determining Damages When the Defendant is Deceased*

Several courts have suggested that the jury may consider the defendant's death when determining the award, but they provide little guidance on *how* the defendant's death should influence the awards (e.g., *Ellis v. Zuck*, 1977, G.J.D. by G.J.D. v. *Johnson*, 1998; *Haralson v. Fisher Surveying, Inc.*, 2001; *Tillett v. Lippert*, 1996). Jurors would be aware that any punitive award would go against the estate (*G.J.D. by G.J.D. v. Johnson*, 1998). They would be expected to balance the costs to the heirs against the benefits of general deterrence (*Schwab v. Bates*, 1991) and to consider "all aspects of fairness and justice in deciding whether, and in what amount, to award punitive damages" (*Haralson v. Fisher Surveying, Inc.*, p. 119). In only one decision (i.e., *Tillett v. Lippert*, 1996) did the court suggest that the trier of fact should compartmentalize the various roles of punitive damages and determine an award adequate *only* to set an example to others. No court suggests or cites specific jury instructions related to punitive damages and defendant death, however.

### *The Current Studies*

We examine the issue of punitive damages and defendant death using an analysis of relevant appellate court decisions, as well as a simulation study to investigate mock juror decision making in defendant death cases. Utilizing multiple methodologies and exploring the issue in both an ecologically valid setting (i.e., actual cases) and in a situation with high internal validity (i.e., a simulation study) lends greater confidence to the conclusions we can draw from the results (see, e.g., Vidmar, 2008).

## **Study 1: Analysis of Appellate Court Decisions**

### *Case Selection and Coding*

For the current analysis, we examined appellate court decisions involving punitive damages against deceased defendants that have been argued since 1960 (i.e., the last 50 years). We chose to examine appellate court decisions because they are consistently published and contain information from a large number of jurisdictions, including both state and

federal courts. Appellate decisions also tend to provide ample information about judicial interpretation of the law, as well as policy arguments undergirding the decision, which was the focus of the current analysis. However, because the grounds for appeals typically are based on a small number of specific facts or points of law, appellate decisions may lack detailed information about a case. In addition, appellate cases are not selected randomly and thus may not represent typical legal decisions. Despite these limitations, because our primary goal was to explore the *rationale* of the courts deciding these cases (i.e., the interpretation of the law), appellate cases are the most appropriate source of data for the current analysis.

We began our search for relevant cases by selecting all cases cited in the *American Law Report's* (ALR) section dedicated to punitive damages and survival statutes (Zitter, 1984). We selected only those cases that involved a deceased defendant (or deceased representative of a business entity). We did not select cases involving a deceased plaintiff unless the defendant also was deceased. We followed all cases cited by the ALR forwards and backwards (i.e., by locating earlier cases cited in a particular decision as well as later cases that cited each particular decision). Finally, we conducted a Westlaw search for any additional and more recent cases and followed these cases forwards and backwards, as well. For each case, we discuss only the decision made by the highest court that heard the case. Our complete database included 49 court decisions (see Table 1) involving punitive damages against deceased defendants.<sup>2</sup>

We coded each case on several parameters. The criterion variable was the court's holding concerning punitive damages following the defendant's death (i.e., allowed or barred). We investigated multiple predictor variables, including the jurisdiction, and the level of appeal. We coded cases by type of claim (i.e., libel/slander; automobile injury; fraud; landlord/tenant; intentional infliction of emotional distress; assault/sexual assault; trespass; false imprisonment; malpractice). We also examined other variables, such as the cause of defendant death (i.e., as a result of his or her own behavior or because of some unrelated cause), whether the plaintiff was alive at the time of trial, and any damage awards levied against the defendant (where applicable). Concerning how the defendant died, some deaths occurred while engaging in the behavior that was the subject of the lawsuit (e.g., died while driving under the influence of alcohol), while others died from causes unrelated to the reckless or wanton behavior (e.g., a plane crash after the suit was followed). Finally, we explored the courts' legal rationale for their decisions. Specifically, we examined whether courts based their decisions on statutory language (i.e., in the punitive damages statutes and the survival statutes), public policy arguments, or *stare decisis*.

## Results

Our statistical analyses involve several predictor variables of the decision to allow or to not allow punitive damages to follow the defendant's death. Where coding permits, we

2. In *Sanchez v. Marquez* (1978), a Colorado court refused to allow punitive damages against deceased plaintiff as part of the defendant's countersuit.



**Table 1.** Decisions Utilized in Study 2 by State, Court Level (i.e., Federal or State Appellate Court), Type of Case (e.g., Fraud, Automobile Negligence), and Decision (i.e., To Allow or Not Allow Punitive Damages to Follow a Defendant's Death) Decisions Utilized in Study 2 by State, Court Level (i.e., Federal or State Appellate Court), Type of Case (e.g., Fraud, Automobile Negligence), and Decision (i.e., To Allow or Not Allow Punitive Damages to Follow a Defendant's Death)

State, Case (year)	Court level	Case type	Decision
Alabama			
<i>Ellis v. Zuck</i> (1977)	Federal	Fraud	Allowed
Alaska			
<i>Doe v. Colligan</i> (1988)	State	Sexual abuse	Not allowed
Arizona			
<i>Braun v. Moreno</i> (1970)	State	Automobile	Not allowed
<i>Haralson v. Fisher Surveying, Inc.</i> (2001)	State	Automobile	Allowed
California			
<i>Holm Timber v. Plywood Corp.</i> (1966)	State	Trespass	Not allowed
Colorado			
<i>Sanchez v. Marquez</i> (1978)		Assault	Not allowed <sup>a</sup>
District of Columbia			
<i>Woodner v. Breeden</i> (1995)	State/district	Landlord	Not allowed
Florida			
<i>Johnson v. Rinesmith</i> (1970)	Automobile	Allowed	
<i>Stephens v. Rohde</i> (1985)	State	Automobile	Allowed
<i>Byrd v. Lohr</i> (1986)	State	Automobile	Not allowed
Hawaii			
<i>Kaopuki v. Kealoha</i> (2003)	State	Automobile	Allowed
Illinois			
<i>Stafford v. Purofied Down Products</i> (1992)	Federal	Automobile	Not allowed
<i>Penberthy v. Price</i> (1996)	State	Illegal firing	Allowed
Indiana			
<i>Crabtree v. Crabtree</i> (2005)	State	Automobile	Not allowed
Iowa			
<i>Rowen v. Le Mars Mut, Ins. Co.</i> (1979)	State	Fraud <sup>b</sup>	Not allowed
<i>Wolder v. Rahm</i> (1977)	State	Malpractice	Not allowed
Kansas			
<i>Elam v. Williams</i> (1990)	Federal	Illegal firing	Not allowed
<i>Fehrenbacher v. Quackenbush</i> (1991)	Federal	Malpractice	Not allowed
Kentucky			
<i>Stewart v. Estate of Cooper</i> (2003)	State	Automobile	Not allowed
Minnesota			
<i>Thompson v. Petroff's Estate</i> (1982)	State	Sexual assault	Not allowed
Mississippi			
<i>Mervis v. Wolverton</i> (1968)	State	Not allowed	
Missouri			
<i>Ford Motor Credit Co. v. Hill</i> (1965)	Federal	Fraud <sup>b</sup>	Not allowed
<i>Tietjens v. General Motors</i> (1967)	State	Fraud <sup>b</sup>	Not allowed

**Table 1. (continued)**

State, Case (year)	Court level	Case type	Decision
<b>Montana</b>			
<i>Tillett v. Lippert</i> (1996)	State	Assault	Allowed
<b>Nevada</b>			
<i>Allen v. Anderson</i> (1977)	State	Automobile	Not allowed
<i>Summa Corp. v. Greenspun</i> (1980)	State	Slander <sup>b</sup>	Not allowed
<b>New Hampshire</b>			
<i>Munson v. Raudonis</i> (1978)	State	Fraud	Allowed
<b>New Mexico</b>			
<i>Barnes v. Smith</i> (1962)	Federal	Automobile	Not allowed
<i>State Farm v. Maidment</i> (1988)	State	Automobile	Not allowed
<i>Jaramillo v. Providence Wash, Ins.</i> (1994)	State	Automobile	Not allowed
<b>New York</b>			
<i>Faulk v. Aware, Inc.</i> (1963)	State	Libel	Not allowed
<i>Gordon v. Nathan</i> (1974)	State	Landlord	Not allowed
<b>North Carolina</b>			
<i>McAdams v. Blue</i> (1968)	State	Automobile	Not allowed
<i>Thorpe v. Wilson</i> (1982)	State	Automobile	Not allowed
<i>Harrell v. Bowen</i> (2006)	State	Automobile	Not allowed
<b>Oregon</b>			
<i>Ashcraft v. Saunders</i> (1968)	State	Trespass	Not allowed
<i>Pearson v. Galvin</i> (1969)	State	Imprisonment	Not allowed
<b>Pennsylvania</b>			
<i>G.J.D. by G.J.D. v. Johnson</i> (1998)	State	IIED <sup>c</sup>	Allowed
<i>Schwab v. Bates</i> (1991)	State	Automobile	Allowed
<i>Morfesi v. Sherman</i> (1991)	State	Malpractice	Not allowed
<b>South Carolina</b>			
<i>In re Thomas</i> (1999)	Federal	IIED	Allowed
<b>South Dakota</b>			
<i>Olson-Roti v. Kilcoin</i> (2002)	State	Other	Not allowed
<b>Tennessee</b>			
<i>Hayes v. Gill</i> (1965)	State	Automobile	Not allowed
<i>Paul v. Milburn</i> (1967)	Federal	Automobile	Not allowed
<b>Texas</b>			
<i>Hoefer v. Lavender</i> (1984)	State	Automobile	Allowed
<b>Virginia</b>			
<i>Dalton v. Johnson</i> (1963)	State	Automobile	Not allowed
<i>Tarbrake v. Sharp</i> (1995)	Federal	Automobile	Not allowed
<b>West Virginia</b>			
<i>Perry v. Melton</i> (1982)	State	Automobile	Allowed
<b>Wyoming</b>			
<i>Parker v. Artery</i> (1995)	State	Automobile	Not allowed

a. Deceased litigant was the plaintiff; defendant filed countersuit.

b. The deceased parties in these cases were representatives of the company.

c. Intentional infliction of emotional distress.

utilize logistic regression or chi-square analyses to predict the courts' decisions. We conclude this section with an analysis of the rationale behind decisions. When describing the rationale, we provide qualitative descriptions of the courts' arguments but conduct no statistical analyses. Instead, we explore issues such as public policy arguments, legislative intent, and interpretations of survivor statutes. We also highlight several cases in which the courts used the same rationale (e.g., the absence of specific language in a survival statute) to reach conflicting decisions.

### *General Findings*

Across all cases, the majority of courts ( $n = 37$ ; 74%) did not allow punitive damages against the deceased defendant. One case was complicated by extraneous factors, however. A California court allowed punitive damages to survive the defendant's death in *Whelan v. Rallo* (1997), but this was because the defendant passed away between the trial court's initial decision and appeal (i.e., punitive damages were levied before the defendant's death). According to the court, had the defendant died *before* the initial trial, punitive damages would not have been permitted. This case was excluded from our subsequent analyses.

### *Decision by State*

Courts in 31 jurisdictions, including the District of Columbia, decided these cases (see Table 1). In seven states, allowing punitive damages against a deceased defendant was deemed permissible, while they are not permissible in 27 states. In addition, courts in four states (Pennsylvania, Florida, Arizona, and Illinois) formed contradictory decisions across cases intra-state. For instance, the most recent decision in Arizona was to allow punitive damages to follow the defendant's death (*Haralson v. Fisher Surveying, Inc.*, 2001), which overturned an earlier decision (*Braun v. Moreno*, 1970). In Pennsylvania, the Common Court of Appeals issued decisions both allowing punitive damages to follow the defendant's death and barring it; these decisions were both made in the *same year* (i.e., *Morfesi v. Sherman*, 1991; *Schwab v. Bates*, 1991). In Florida, two decisions held that punitive damages could follow the death of a defendant (*Johnson v. Rinesmith*, 1970; *Stephens v. Rohde*, 1985), but according to the most recent decision punitive damages do not follow the defendant's death (*Byrd v. Lohr*, 1986).

### *Decisions by Case Type*

We classified cases into three general civil categories: intentional torts, automobile accidents, and other types of cases (e.g., medical malpractice, trespass, wrongful termination). Twenty-four (50%) of the cases involved automobile accidents; many of these involved intoxicated drivers. Further, 17 (35.4%) of the cases involved intentional torts (e.g., libel, assault, sexual assault). The remaining cases (14.6%) fell into some other category. The percentage of tort claims and percentage of cases involving automobile accidents are especially notable, considering punitive damages in automobile accidents overall are relatively rare (Eisenberg et al., 1997, 2002). Punitive damages survived the death of the defendant in 33.3% of the automobile cases, in 29.4% of the intentional tort cases, and in none of the other cases. This pattern was not statistically significant,  $\chi^2(2) = 3.12$ ,  $p = .21$ .

### *Cause of Death*

We were able to discern the cause of the defendant's death in 46 of the cases. We classified the defendant's death as either caused by the reckless act, unrelated to the act, or because of suicide. Suicide was the cause of the defendant's death in two of the cases (*Doe v. Colligan*, 1998; *G.J.D. by G.J.D. v. Johnson*, 1998). The defendant's act caused his or her death in 18 (39.1%) of the cases, while the defendant died of unrelated causes before trial in the remaining 26 (56.5%) of the cases. Most cases ( $n = 16$ ) in which the defendant's act caused his or her death involved automobile accidents.

There was no significant relationship between the cause of the defendant's death and the decision to allow punitive damages,  $\chi^2(1) = 0.56$ ,  $p = .46$ . The court allowed punitive damages in six (33%) of the cases in which the defendant's actions led to his or her death and in six (22%) of the cases in which the defendant died of unrelated causes. When the defendant committed suicide, the courts were split on their decisions to allow punitive damages against the deceased defendant, with one allowing the claim to survive and one ruling against survival.

### *Damage Awards*

Although juries awarded punitive damages in several of the cases before the cases were heard on appeal, these award amounts were seldom reported in the decisions. We were able to determine the initial punitive damage awards in 11 of the cases, and we adjusted these values to today's dollars using the consumer price index. The relative values of these awards ranged from \$5,850 to \$828,885 ( $m = \$138,388$ ; median = \$61,869). The ratio of punitive damages to compensatory damages ranged from 0.04:1 to 3.64:1 ( $m = 0.8:1$ , median = 0.42:1).

### *Decision Rationale*

In many cases, the judges focused on multiple points (e.g., the survival statute, the purpose of punitive damages). In this section, we summarize the general topics of discussion in the decisions. We organize this section by the courts' rationales (e.g., public policy, statutory interpretation) because some courts arrived at disparate decisions utilizing the same rationale.

Several of the courts based their decisions on *stare decisis*. In these cases, consideration of punitive damages against the deceased defendant was typically only a minor issue, among several other issues, in the appeal. Few courts gave much attention to the issue in those cases when they relied on state precedent. For instance, the Iowa Supreme Court (*Dalton v. Johnson*, 1963) wrote a single sentence relevant to this issue when they held that punitive damages do not follow the defendant's death. However, courts did not always follow state precedent (e.g., *Haralson v. Fisher Surveying, Inc.*, 2001).

Most of the courts cited the states' survival statutes in their written decisions. When survival statutes were silent regarding punitive damages following the death of a defendant, courts came to differing conclusions. One policy argument against allowing punitive damages to follow a defendant's death is that the court would be involved in *making* law (i.e., doing the job of the legislature). According to this argument, if lawmakers in-

tended to allow punitive damages against deceased defendants, they would have written the survival statute to reflect that (*Doe v. Colligan*, 1988). Although a statute may not bar punitive damages against a deceased defendant, interpreting this silence as an endorsement would be akin to creating a new cause of action where one did not previously exist (*Tarbrake v. Sharp*, 1995).

The cases analyzed in Study 1 demonstrate different interpretations of statutory silence. For instance, the New Hampshire survival statute does not explicitly mention punitive damages, but the New Hampshire Supreme Court allowed punitive damages to follow the defendant's death because punitive damages are considered "liberal compensating damages" in the state (*Munson v. Raudonis*, 1978). Similarly, in *Ellis v. Zuck* (1977), the court held that punitive damages could follow the death of the defendant because the survival statute did not explicitly restrict them. The court reasoned that if wrongful death claims could follow the death of a defendant, then so could punitive damages claims because in Alabama all damages one can recover under wrongful death claims are considered punitive damages. In contrast to these rulings, the court in *Crabtree ex rel. Kemp v. Estate of Crabtree* (2005, p. 137) argued that the absence of language concerning punitive damages in the Indiana survival statutes "can be viewed as an implicit rejection of punitive damages [surviving a defendant's death]."

Several courts emphasized the punitive (i.e., retributive) intent of punitive damages, arguing that a defendant's death nullified the primary public policy purpose of punitive damages. This purpose cannot be served if a defendant is deceased, and when "the reason for a rule ceases to exist, the rule itself is no longer of value and is extinguished by the disappearance of reason" (*Hayes v. Gill*, 1965, p. 217). Retribution is the primary purposes of punitive damages in most states, and courts recognize the futility of seeking monetary retribution against someone who is already deceased (e.g., "a dead wrongdoer is far beyond our temporal power to penalize" [*Olson-Roti v. Kilcoin*, 2002]) (see also *Thompson v. Petroff's Estate*, 1982 [allowing punitive damages against the dead would ignore the entire purpose of punitive damages]; *Thorpe v. Wilson*, 1982 [sole purpose of punitive damages is retribution against the wrongdoer]).

A number of courts also considered the general deterrent role of punitive damages. Many of the courts agreed that punitive damages levied against a wrongdoer can deter others from engaging in future reckless acts (e.g., *Haralson v. Fisher Surveying, Inc.*, 2001; *Byrd v. Lohr*, 1986). The area of disagreement, however, concerned whether retribution is necessary to accomplish the goal of general deterrence. For instance, in *Byrd v. Lohr* (1986), the court agreed that punitive damages levied against a defendant who was driving while intoxicated would serve as an example to others but *only* if the punitive damages could also serve a retributive role (i.e., if the defendant lived).

The Supreme Court of Alaska reached a similar conclusion when deciding *Doe v. Colligan* (1988). The defendant, who worked for a service organization, was accused of sexually abusing a child. Before the case went to trial, he committed suicide, and the family sought punitive damages from his estate. The court held that the state's survival statute, liberally construed, would allow punitive damages against a deceased defendant, but that deterrence depends on punishment. The court held that the general deterrent role of punitive damages was "speculative at best," thus punitive damages should not follow the death of

a defendant (*Doe v. Colligan*, 1988). Not only did the court in the *Colligan* case reject the deterrent value of punitive damages if levied against a deceased defendant, but it also demonstrated reluctance to accept the deterrent value of such damages in the first place.

However, other courts held that the general deterrent role of punitive damages is a sufficient reason to allow them to follow a defendant's death. The Hawaiian high court, in *Kaopuki v. Kealoha* (2003), argued that allowing punitive damages to follow the death of a drunk driver would send a message to others who may be tempted to engage drive under the influence. The Supreme Court of Arizona followed a similar rationale when deciding *Haralson v. Fisher Surveying, Inc.* (2001). The defendant was driving under the influence of various drugs when he collided with the plaintiff. The decision stated that the court recognized that the defendant was beyond punishment and that his fate was a "far more serious penalty than any court or jury could mete out" (*Haralson v. Fisher Surveying, Inc.*, 2001, p. 117). Nevertheless, the court held that allowing punitive damages against the estate still served as an example to others in the state.

While some have questioned the public policy implications of forcing heirs to pay a defendant's punitive damages, the Supreme Court of Arizona emphasized that jurors could consider the financial hardships that punitive damages may cause the defendant's heirs (*Haralson v. Fisher Surveying, Inc.*, 2001). They illustrated this point by arguing that if the defendant survived an accident but fell into a coma, the plaintiff could seek punitive damages. They questioned how the hardship on the defendant's representatives would differ in such a situation from if the defendant were deceased.

At least one court (*Byrd v. Lohr*, 1986) reasoned that allowing punitive damages against a deceased defendant could actually lead some tortfeasors to be *more likely* to engage in risky behaviors because individuals would be able to diffuse their financial responsibilities for reckless behaviors to others. On the contrary, another court (*Kaopuki v. Kealoha*, 2003) argued that allowing the punitive damages to follow a defendant's death would actually buttress the deterrent role of punitive damages. According to the *Kaopuki* court, individuals may avoid engaging in a reckless activity (e.g., drunk driving) if they realize that it may cost their heirs.

## Study 2: A Jury Simulation

As the review of appellate decisions illustrates, courts consider the various purposes of punitive damages in deciding whether to allow them against deceased defendants, but they are inconsistent in doing so, especially with regard to general versus specific deterrence. Mock jury research suggests that jurors also consider the various purposes of punitive damages when making judgments. They seek both retribution and deterrence in awarding punitive damages, and they weigh these intentions roughly equally (e.g., Greene, Coon, & Bornstein, 2001; Greene, Johns, & Smith, 2001). The studies have not distinguished between specific and general deterrence, but they do demonstrate that mock jurors are sensitive to relevant defendant characteristics, such as defendant conduct (Greene, Johns, & Smith, 2001). Thus, it is reasonable to suppose that they would be sensitive to other features, such as whether the defendant is alive or dead, which arguably per-

tains more to some purposes of punitive damages (i.e., retribution, specific deterrence) than others (i.e., general deterrence). Studying mock jurors also provides an opportunity to compare lay perceptions of awarding punitive damages against deceased defendants to legal assumptions about the issue, as explored in Study 1.

Although the majority of courts do not allow punitive damage awards against deceased defendants, juries have found deceased defendants liable for punitive damages in a number of cases (e.g., *Braun v. Moreno*, 1970; *Ellis v. Zuck*, 1977; *Tillett v. Lippert*, 1996). We employed a simulation study to examine the effects of the severity of a defendant's injuries, including fatal injuries, on mock jurors' punitive damages decisions. The severities of outcomes (e.g., injury severity, property damage), generally, predict mock jurors' decisions to punish others (Robbennolt, 2000). However, such findings concern property damage or injuries suffered by plaintiffs or crime victims and not injuries suffered by the wrongdoers themselves.

When defendants are found liable for punitive damages, the jury must also determine an appropriate punitive damage award. More severely injured civil plaintiffs often receive higher punitive damages awards than less injured plaintiffs (e.g., Bornstein, 1998; for exceptions see Cather et al., 1996; for a general review see Robbennolt, 2000). No prior research, however, has involved a manipulation of a defendant's injury severity.

In addition to studying the effects of a defendant's injury severity on punitive liability and damage award decisions, we also examined other possible predictors of these decisions (e.g., the perceived recklessness of a defendant's behavior). Finally, we examined how a defendant's death influenced individuals' self-reported reasons for awarding punitive damages. We hypothesized that when a defendant was deceased, jurors would award less in punitive damages and would report being less motivated by goals of retribution and specific deterrence than if the defendant survived.

### *Method*

**Participants.** Participants included 128 individuals acting as mock jurors; participants received research credit in undergraduate psychology courses in exchange for their participation. The majority of participants were female (71%) and most were White (83%). Participants' ages ranged from 18 to 48 years ( $m = 20.2$  years).

**Design and procedure.** Mock jurors were assigned to one of three defendant injury severity conditions (i.e., low injury severity, high injury severity, and defendant death). According to a written summary of a civil trial, the defendant suffered fatal injuries, minor injuries (e.g., bruising, a cut on the head), or severe injuries (e.g., a broken back, partial paralysis). The written trial summary, based on *Haralson v. Fisher Surveying, Inc.* (2001), described a truck driver who owned and operated a seafood shopping company. Witnesses testified that the truck driver caused an accident when he crossed the centerline and drove into oncoming traffic before colliding with the plaintiff.

The truck driver had consumed a substantial amount of caffeine supplements before driving to make a nighttime delivery. A witness testified that the driver was really tired before leaving, but he chose to drive anyway because he had an opportunity to make a big sale (i.e., his behavior was motivated by profit). The witness, a former employee, testi-

fied that the defendant seemed almost incoherent and “buzzed” before driving away, and he insisted on driving despite protests by the employee.

Though the deceased in the original case was under the influence of drugs and alcohol, we chose to introduce evidence about caffeine supplementation to avoid introducing a strong criminal element into the case. The concern was that having the defendant drive under the influence of illegal substances could lead to a ceiling effect (i.e., nearly 100% of jurors finding punitive liability). While the defendant’s act was not inherently illegal, an expert witness testified that driving while tired and under the influence of caffeine supplement was an extremely risky behavior associated with many accidents. Further, the evidence from the employee indicated that the defendant’s behavior was inherently reckless. The recklessness of the defendant, as well as the profit motivation, led to punitive damages being a potentially appropriate remedy.

After reading the trial summary, participants were directed to jury instructions. The instructions were derived from Oklahoma’s pattern jury instructions. The first portion of the instructions described issues the participants should consider when evaluating the defendant’s liability for the accident (e.g., a breach of a legal duty, etc.). Those who found the defendant liable for compensatory damages then read instructions concerning the assignment of said damages (e.g., the plaintiff’s medical bills, pain and suffering, etc.). The second portion of the instructions concerned factors the participants should consider when determining *punitive* liability (e.g., recklessness of the defendant’s behavior; profit motivation) and damages (e.g., need for punishment; general deterrence; the defendant’s wealth). Only those mock jurors who found the defendant liable for compensatory damages determined punitive liability; only those who found the defendant liable for punitive damage awarded these damages. The instructions did not mention the defendant’s death; participants received the same instructions across conditions. Thus, nothing in the instructions would make the issue of the defendant’s death salient when the participants awarded damages. However, the instructions were general enough that they applied to all three conditions.

We measured participants’ reported sympathy for the litigants with three related questions (adapted from Haegrich & Bottoms, 2000). Each participant rated the level of agreement with three statements (i.e., “I feel sorry for the [plaintiff/defendant],” “I feel pity for the [plaintiff/defendant],” and “I feel sympathy for the [plaintiff/defendant]”). All participants reported their sympathy for the plaintiff first, then for the defendant. Participants also responded to several items concerning the behaviors of the parties (e.g., the dangerousness of the defendant’s behavior; the likelihood that the defendant was motivated by profit; the likelihood that the plaintiff was partially to blame for the accident). In addition, participants rated the perceived severity of each party’s injury, as well as reported if each party survived the accident. These questions acted both as manipulation checks and as potential predictors of mock juror decisions. Those participants who found the defendant liable for punitive damages rated their intentions in awarding punitive damages (i.e., retribution, specific deterrence, and general deterrence) on a 10-point scale (higher numbers representing a stronger intention). Finally, participants provided standard demographic information.



## Results

Damage awards are commonly positively skewed, which was the case with these data for both compensatory damages and for punitive damages. We normalized values by transforming all awards less than the 5th percentile value to that value, and all awards greater than the 95th percentile value to that value (see e.g., Hart, Evans, Wissler, Feehan, & Saks, 1997). We chose the truncated awards, as opposed to other normalization procedures (e.g., log transformations), to allow the same values (i.e., adjusted dollar awards) to be employed for both the inferential statistics and for calculating descriptive statistics. For each analysis, comparisons across manipulated were conducted across all three injury conditions, as well as across the defendant death and defendant survival conditions (i.e., collapsing the minor and severe injury conditions). We refer to these as separate conditions and collapsed conditions, respectively.

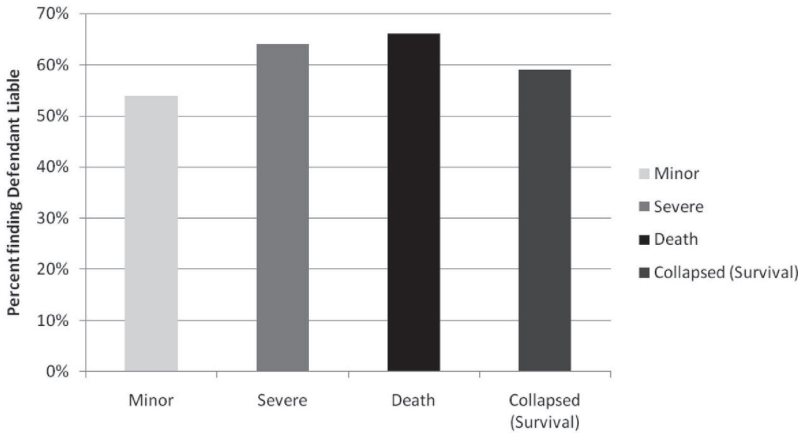
### Manipulation Checks

All participants in the low injury severity and the high injury severity conditions correctly reported that defendant survived the automobile accident. One participant in the defendant death condition incorrectly reported that the defendant survived the accident, while the remaining participants correctly reported that he did not survive. The incorrect participant's data were excluded from the analyses.

In addition to the question of defendant death, we also considered participants' rating of the severity of the defendant's injuries (1 = least severe; 10 = most severe) using a one-way analysis of variance (ANOVA). Participants rated the defendant's injuries as increasingly more severe across injury manipulation conditions (low injury severity,  $m = 1.93$ ; high injury severity,  $m = 6.05$ ; defendant death,  $m = 9.74$ ),  $F(2, 116) = 144.91$ ,  $p < .001$ ,  $r = .85$ ,  $lsd\ mmd = 1.06$ . Ratings of sympathy for the defendant also varied across conditions in a similar fashion.

**Compensatory liability and damages.** Concerning compensatory liability, the facts supported a liability decision in the plaintiff's favor (e.g., the defendant crossed the center line, an officer testified that the defendant was at fault, etc.). As anticipated, most (86%) of the participants found the defendant liable for compensatory damages, and these liability decisions did not vary across experimental conditions,  $\chi^2(1) = 0.85$ ,  $p = .65$  (separate conditions) and  $\chi^2(1) = 0.45$ ,  $p = .50$  (collapsed conditions). The plaintiff's injuries were held constant across defendant conditions. Compensatory damage awards, legally based on the injuries sustained by the *plaintiff*, appropriately did not vary across defendant injury conditions,  $F(2, 113) = 0.78$ ,  $p = .46$ ,  $r = 0.12$  (separate conditions) and  $F = 1.14$ ,  $p = .29$  (collapsed conditions).

**Punitive liability and damages.** Figures 1 and 2 depict the descriptive statistics related to mock jurors' decisions concerning punitive liability and damages decisions. Of the 109 participants who found the defendant liable for compensatory damages, 60.9% found the defendant liable for punitive damages. Liability decisions did not significantly vary across defendant injury severity conditions,  $\chi^2(2) = 1.35$ ,  $p = .51$  (separate conditions) and  $\chi^2(1) = 0.54$ ,  $p = .46$  (collapsed conditions). Despite the apparent trends in the descrip-

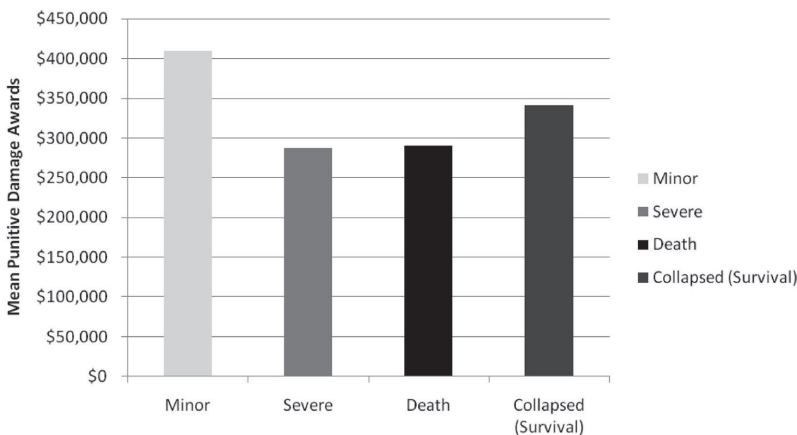


**Figure 1.** Percent of participants finding the defendant liable for punitive damages across injury severity conditions.

tive data (see Figure 2), defendant injury severity did not significantly influence punitive damage awards,  $F(2, 68) = 1.03, p = .36, r = .17$  (separate conditions) and  $F(1, 68) = 0.33, p = .57$  (collapsed data).

Next, we conducted a binary logistic regression analysis to determine which factors, if any, predicted punitive damage liability decisions. Our model included several predictors: (a) ratings of each litigant’s injury severity; (b) participants’ sympathy for each litigant; (c) the perceived seriousness of the defendant’s actions; (d) the perceived dangerousness of the defendant’s actions; and (e) the degree to which participants felt that the defendant’s actions were motivated by profit.

The full model significantly predicted liability decisions ( $\chi^2(7) = 33.94, p < 0.001$ ); reporting of individual predictors assume that other predictors were held constant. Perceptions of the severity of the plaintiff’s injuries significantly predicted liability such that higher rat-



**Figure 2.** Mean punitive damage awards across injury severity conditions.

ings of plaintiff injury severity were associated with a higher likelihood of finding the defendant liable ( $B = .50, p = .006$ ). Perceptions of the severity of the *defendant's* injuries failed to significantly predict liability decisions, though the predictive value did approach significance ( $B = .11, p = .064$ ). The trend was such that those who perceived the defendant's injuries as more serious were *more* likely to find the defendant liable for punitive damages. Sympathy for the defendant was also a significant predictor of liability decisions; higher defendant sympathy was associated with a lower likelihood of liability ( $B = -.13, p = .038$ ). Finally, perceived seriousness of the defendant's actions was a significant predictor of liability decisions (i.e., higher seriousness was associated with a higher likelihood of finding the defendant liable) ( $B = 0.36, p = .033$ ). Sympathy for the plaintiff ( $B = -0.002, p = .98$ ), perceptions of the dangerousness of the defendant's actions ( $B = 0.112, p = .41$ ), and perceptions of profit motivation ( $B = <0.001; p > .99$ ) failed to predict liability decisions.

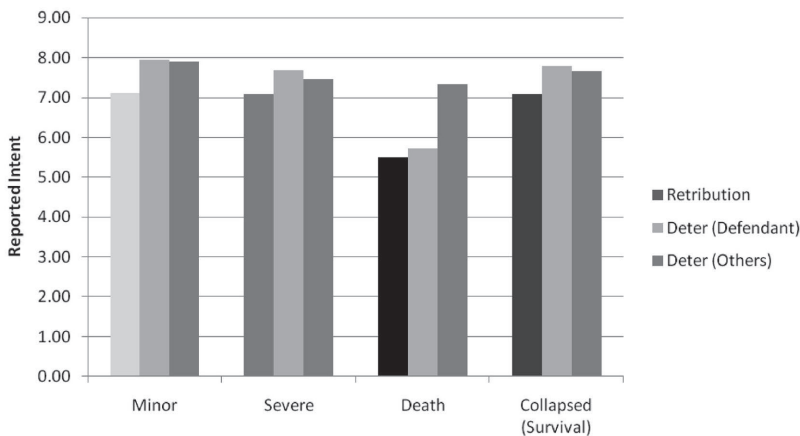
### *Goals of damage awards*

Next, we investigated mock jurors' self-reported goals (i.e., punishment, specific deterrence, and general deterrence) when awarding punitive damages. A punitive damage award can only serve a retributive role and specifically deter a surviving defendant. However, the damage award potentially could have a general deterrent effect regardless of the defendant's injuries. We also explored whether mock jurors would report a lower intent to punish a defendant who suffered a severe or fatal injury. We conducted a 3 (defendant injury severity level)  $\times$  3 (reason for damage award) mixed-groups ANOVA to consider group differences in ratings of participants' intention to punish the defendant, to deter the defendant, and to deter others.  $F(2, 130) = 4.52, p = .013, r = .25$ . The main effect was such that participants intended to deter others more than they intended to punish the defendant intention to deter the defendant was intermediate ( $m = 7.17$ ) and did not differ from either of the other goals ( $lsd\ mmd = 0.48$ ). A similar main effect was evident in the collapsed condition,  $F(2, 132) = 9.06, p < 0.01$ .

This main effect was qualified by a defendant status by goal interaction,  $F(4, 130) = 2.52, p = .045, r = .27$  (separate conditions) and  $F(2, 132) = 5.08, p = .007$  (collapsed conditions). Those in the survival conditions (i.e., minor and severe injuries) reported a higher intention to punish and to deter the defendant than those in the defendant death condition (see Figure 3). Alternatively, when considering the differences between intentions within conditions, the interaction demonstrates no difference in participants' intentions for retribution, specific deterrence, and general deterrence when the defendant suffered minor or serious injuries. However, those ratings did differ within the defendant death condition; specifically, participants reported a higher intention of general deterrence than for retribution or for specific deterrence.

### **General Discussion**

We examined the legal issue of punitive damages against deceased defendants utilizing both an analysis of appellate cases (Study 1) and a simulation study (Study 2). The majority of jurisdictions do not allow punitive damages to follow the death of a defendant ei-



**Figure 3.** Participants' self-reported intent for punitive damages to punish the defendant (i.e., retribution), to deter the defendant (i.e., specific deterrence), and to deter others (i.e., general deterrence) across injury severity conditions.

ther because of statute or case law, but punitive damages against deceased defendants are allowed in some jurisdictions. In addition to the relevance of the issue on its face (i.e., different jurisdictions using similarly worded statutes to arrive at different decisions), both studies also illustrate important issues concerning punitive damages in general, such as lay intentions, juror understanding, and legal assumptions.

### *Legal Judgments and Decisions*

In actual trials where plaintiffs are seeking punitive damages against a deceased defendant, the defendant's heirs may accept a finding of liability without protest, or the deceased defendant may be found not liable for punitive damages (i.e., the punitive damages claim would not be an issue in an appeal). Further, some juries never get to make the decision in the first place because the trial judge forbids the plaintiff to seek punitive damages against the deceased defendant (e.g., *Fehrenbacher v. Quackenbush*, 1991; *Johnson v. Rinsemith*, 1970; *Parker v. Artery*, 1995; *Paul v. Wilburn*, 1967). Thus, it is difficult to estimate the frequency of punitive damage claims filed against deceased defendants and even more difficult to estimate plaintiff win-rates in such cases. However, Study 1 illustrates that juries have awarded punitive damages against deceased defendants when given the option (e.g., *Braun v. Moreno*, 1970; *Ellis v. Zuck*, 1977; *G.J.D. by G.J.D. v. Johnson*, 1998; *Hoefer v. Lavender*, 1984; *Merois v. Wolverton*, 1968; *Woodner v. Breeden*, 1995). In addition, over half (~56%) of participants in the defendant death condition of Study 2 found the defendant liable for punitive damages. These findings suggest that jurors are willing to award punitive damages against deceased defendants under some circumstances.

Eisenberg and colleagues (2002) analyzed 1996 civil court data from a random sample of state courts in 45 of the largest 75 counties in the United States. These data included 6,429 jury trials; juries awarded punitive damages in 121 of the trials. Despite the limited data concerning damages in the appellate court sample (Study 1), the ratio of punitive

damages to compensatory damages did not differ dramatically from the state court data ( $m = 0.8:1$  [Study 1] vs.  $m = 0.945:1$  [Eisenberg et al., 2002]).

### *Severity Differences in Liability and Damages*

The defendant injury severity manipulation utilized in Study 2 allowed us to examine causal effects of defendant death on liability and damages decisions. Individuals are more likely to attribute blame to an actor when the actor's actions result in a more severe outcome than when those actions result in a less severe outcome (Robbennolt, 2000). In addition to attribution of responsibility, individuals are more likely to report that an actor deserves *punishment* (Robbennolt, 2000) and recommend higher penalties (Baldwin & Kleinke, 1994 [fines]; Bornstein, 1998 [punitive damages]) when the outcome of the actor's behavior is more severe. However, these studies were conducted without a manipulation of the harmdoer's own injury severity.

Although participants in Study 2 rated the defendant's injuries as progressively more severe across the three injury severity conditions, the likelihood of the defendant being found liable for punitive damages did not differ across these conditions. Punitive damage awards also did not vary across conditions.

Participant perceptions of plaintiff injury severity did predict liability decisions, however. Stronger perceptions of plaintiff injury severity were associated with a higher likelihood of finding the defendant liable for punitive damages. Although the relationship only approached significance, the trend was such that stronger perceptions of defendant injury severity were also associated with higher findings of punitive liability. These findings lend further support to the positive association between outcome severity and fault attribution or punishment recommendations (Robbennolt, 2000), but they fail to demonstrate a causal relationship between defendant injury severity and punishment decisions. Further, they fail to support a relationship between outcome severity and the degree of punishment; defendant injury severity did not influence punitive damage awards.

If one considers punitive damage awards to be the sum of the monetary values necessary for retribution, specific deterrence, and general deterrence, then mock jurors in the defendant death condition should have awarded less than those in the survival condition because retribution and specific deterrence would be unnecessary. As suggested in *Tillert v. Lippert* (1996), jurors would only need to determine an amount necessary for general deterrence when the defendant is deceased. Not all courts suggest that damage awards should differ as a function of defendant survival, however (e.g., *Haralson v. Fisher Surveying, Inc.*, 2001). Instead, a trier of fact should be aware of and should *consider* the defendant's death, but there is no indication of *how* this should happen.

### *Rationale and Juror Intentions*

Courts discussed their rationale for allowing or barring punitive damages against deceased defendants in their written decisions (Study 1), while mock jurors reported their intentions for the awards across the injury severity conditions (Study 2). Courts that rejected the notion of punitive damages following the death of the defendant mostly argued that such damages were not appropriate because the dead are beyond retribution (e.g.,

*Olson-Roti v. Kilcoin*, 2002) and that allowing punitive damages against the heirs would be punishing the wrong party (e.g., *Stewart v. Estate of Cooper*, 2003). However, several courts that allowed punitive damages to follow the death of the defendant emphasized the value of general deterrence (e.g., *Haralson v. Fisher Surveying, Inc.*, 2001; *Kaopuki v. Kealoha*, 2003). Critics of this viewpoint suggest that general deterrence relies on retribution, thus punitive damages would serve no role if the plaintiff is deceased (e.g., *Byrd v. Lohr*, 1986; *Doe v. Colligan*, 1998).

Consistent with the majority of court decisions, mock jurors' self-reported intentions for punitive damage awards differed across defendant injury severity conditions. Prior research has demonstrated that mock jurors generally intend for punitive damages to serve all three roles and weigh these intentions relatively equally (e.g., Greene, Coon, & Bornstein, 2001; Green, Johns, & Smith, 2001). In contrast, mock jurors in Study 2 reported a stronger intent for retribution and specific deterrence when the defendant survived the accident than when the defendant was deceased. These findings suggest some comprehension of the instructions concerning punitive damages, and some awareness of the potential for punitive damages to serve a role of general deterrence, but not other purposes, when a defendant is deceased.

On the other hand, participants' self-reported intentions to punish and deter the defendant were not negligible in the defendant death condition, which is consistent with arguments that jurors are not entirely rational in awarding punitive damages (e.g., Sunstein et al., 2002). However, mock jurors' decisions concerning punitive damages *were* predictable in Study 2. For example, both perceptions of the severity of the plaintiff's injuries and of the seriousness of the defendant's behaviors predicted punitive liability judgments. The former is associated with decisions to punish (Robbennolt, 2000), and the latter is a factor jurors are expected to consider when assessing punitive damages.

### *Policy Recommendations and Implications*

The majority of jurisdictions that have considered the issues have barred punitive damages against deceased defendants, but courts usually must interpret civil statutes that are silent on the issue. As is evident from Study 1, courts have conflicting interpretations of this statutory silence. However, when provided with explicit statutory language, courts have followed the legislatures' intentions (e.g., *Ellis v. Zuck*, 1977; *Gordon v. Nathan*, 1974; *In Re Thomas*, 1999). Appellate decisions (Study 1) and mock juror judgments (Study 2) indicate that jurors are willing to award punitive damages against deceased defendants. We recommend, as others have suggested (e.g., *Harrell v. Bowen*, 2006), that state legislative bodies utilize explicit language concerning punitive damages and defendant death in their survival statutes. The inclusion of explicit directives in the survival statutes, especially in jurisdictions that have not considered this issue in appellate courts, could minimize appeals. Moreover, explicit language would prevent judicial misinterpretation of legislative intent.

We also recommend greater judicial guidance to jurors who must calculate punitive damages, generally, and especially those who must calculate punitive damages against a deceased defendant. The Supreme Court of Arizona suggested that jurors could consider the toll a punitive damage award may have on the defendant's heirs but did not indicate

whether awards should be lower than if the defendant had survived (*Haralson v. Fisher Surveying, Inc.*, 2001). In only one decision (i.e., *Tillert v. Lippert*, 1996) did the court imply that the jury should determine punitive damage awards meant only to serve as an example. These issues should be made explicit in jury instructions.

### *Limitations and Future Directions*

In Study 1, we relied strictly on appellate cases, which prevented us from a thorough examination of jurors' legal decisions regarding punitive damages against a deceased defendant. To buffer this limitation, we utilized a simulation study (Study 2) with participants acting as mock jurors, allowing us to examine causal effects of defendant injury severity on punitive damage decisions. Study 2 was not without limitations of its own. Simulation studies, generally, are criticized for lacking ecological validity and real-world consequences (Bornstein & McCabe, 2005; Vidmar, 2008). For instance, we examined decisions of individual mock jurors without deliberation; jurors may adjust pre-deliberation decisions during the deliberation process (see e.g., Schkade, Sunstein, & Kahneman, 2000). Reviews of mock jury research have demonstrated few systematic differences as a function of methodological verisimilitude (Bornstein, 1999; Bornstein & McCabe, 2005), but such issues are nonetheless a paramount concern when courts and policy makers evaluate social science research (Monahan & Walker, 2005). Future research on the topic should, therefore, utilize more realistic procedures, such as presenting trial material on video and the inclusion of group deliberation.

Courts were split on whether punitive damages could serve a role of general deterrence without having a retributive effect, and one court questioned whether punitive damages can serve as a general deterrent at all. If retribution is necessary for general deterrence, as some courts suggest (e.g., *Byrd v. Lohr*, 1986; *Doe v. Colligan*, 1988), and especially if there is no general deterrent effect of punitive damages (see *Morfesi v. Sherman*, 1991), then punitive damages should obviously not follow the death of a defendant as a means of general deterrence. Thus, we would encourage further exploration of the interaction between general deterrence and retribution, in terms of both public policy and juror psychology.

Future research on outcome severity and legal decisions could be useful. Specifically, researchers should explore the role of defendant injury severity in these decisions. Although a plaintiff's injuries may be relevant to some legal decisions (e.g., determining compensatory damages), the defendant's injuries have less relevance, especially in cases of pure negligence. Nonetheless, effects of a defendant's injuries, or lack thereof, may help to elucidate the reasons behind the relationship between outcome severity and attribution of responsibility.

The current findings do not enable us to speculate as to how jurors might perceive corporate defendants. Some of the cited cases involved corporate defendants; the deceased wrongdoer being a representative of the company (e.g., *Haralson v. Fisher Surveying Inc.*, 2001; *Rowen v. LeMars Mut. Ins. Co.*, 1979), but extensions to the current research might have more relevance to corporate defendants than these findings. Corporations cannot suffer death or physical injuries, but they can suffer economically. For example, a pharmaceutical company who knowingly releases a potentially dangerous drug might suf-

fer financially if news of the intentional conduct breaks. Mock jurors are not necessarily sympathetic to corporate defendants (see e.g., Bornstein, 1998), but the economic consequences of the company's decision might have a deterrent effect without a lawsuit. If the company changed its behaviors but was nonetheless sued, a corporate analogy of the current research might be that jurors consider the *injuries* already suffered by the corporation. Future research on corporate harm before lawsuits involving punitive damage claims would be an appropriate extension of the current studies.

## Conclusions

Through both an analysis of legal decisions and a simulation study, we examined the relationship between defendant death and punitive damage decisions. While a large majority of appellate courts have held against allowing punitive damages to follow a defendant's death, some jurisdictions do allow them, and mock jurors do not distinguish between a deceased and a surviving defendant. Nonetheless, courts generally argue that punitive damages are a useful tool for achieving general deterrence, and mock jurors rated their intentions in awarding punitive damages differently depending on whether the defendant was dead or alive. These findings suggest some confusion on the part of both courts and jurors about the propriety of awarding punitive damages against deceased defendants. Legislative bodies could clear up this confusion by employing more explicit language in survival statutes, thereby preventing the need for judicial and juridic "mind-reading."

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