ESSAY

The Conflict Between American Punitive Damages and German Public Policy—a Reassessment

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German and European tort law and civil procedure currently may be undergoing an important sea change. The question of punitive damages was anathema to most European civil law systems. Classically, damages in European civil law systems have a purely compensatory function. To award anything other than compensation to a plaintiff would be to grant that plaintiff a windfall—the plaintiff would be the better off for having been injured. European civil law traditions—and German law chief among them—rejected such a windfall as violative of fundamental constitutional principles. Unsurprisingly, then, it has been a long-held view that punitive damages awarded by American courts are categorically precluded from recognition and enforcement in Europe. As this Essay will show, this absolute rejection of American punitive damages in European civil law jurisdictions is starting to crack. Noticeable trends towards partial convergence between the German concept of civil liability and the U.S. approach towards punitive damages call for a reassessment of the enforceability of American punitive damages awards in German court proceedings: Instead of categorically rejecting the recognition and enforcement of punitive damages on grounds of German public policy, a case-by-case analysis ought to be carried out, based on the principles of proportionality and legal certainty.

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I. INTRODUCTION

German and European tort law and civil procedure currently may be undergoing an important sea change. The question of punitive damages was anathema to most European civil law systems. Classically, damages in European civil law systems have a purely compensatory function. To award anything other than compensation to a plaintiff would be to grant that plaintiff a windfall—the plaintiff would be the better off for having been injured. European civil law traditions—and German law chief among them—rejected such a windfall as violative of fundamental constitutional principles. Unsurprisingly, then, it has been a long-held view that punitive damages awarded by American courts are categorically precluded from recognition and enforcement in Europe. As this Essay will show, this absolute rejection of American punitive damages in European civil law jurisdictions is starting to crack.

German courts decide whether to recognize and enforce such judgments by applying German federal code of civil procedure—the *Zivilprozessordnung* (ZPO). The most significant obstacle to the recognition and enforcement of American judgments in Germany is the public policy exception, which is spelled out in ZPO § 328(1) No. 4.[1] According to this provision, a foreign judgment will not be recognized if it would lead to a result that is patently irreconcilable with fundamental principles of German law, particularly if its recognition would be irreconcilable with the Basic Rights (i.e. constitutional rights).

This provision, along with similar public policy exceptions in other legal systems, has proven to be a stumbling block when attempting to enforce American monetary judgments in a foreign forum. Such enforcement becomes necessary if the defendant lacks sufficient U.S. assets to satisfy the domestic judgment. Of course, there are powerful incentives to initiate legal action in the United States. These incentives include generous compensatory damage awards, especially for pain and suffering, the availability of punitive damages, and certain procedural idiosyncrasies, such as broad access to evidence through discovery and trials by jury.

However, these features, which tend to favor plaintiffs, may backfire in foreign enforcement proceedings. Foreign public policy concerns may conflict with these substantive and procedural features of

1 Cf. Zivilprozessordnung [ZPO] [Code of Civil Procedure], https://www.gesetze-im-internet.de/zpo/__328.html (Ger.) § 328, para. 1, cl. 4; *see also* ZPO, https://www.gesetze-im-internet.de/zpo/__723.html (Ger.) § 723, para. 2, ("The judgment for enforcement is not to be delivered if the recognition of the judgment is ruled out pursuant to section 328.")

American litigation. That conflict may lead the foreign tribunal to refuse the enforcement of an American judgment.[2]

Despite these public policy concerns, the German Federal Court of Justice (*Bundesgerichtshof*) decided in 1992 that an American default judgment in a child abuse case was to be declared enforceable in Germany to the extent that it had granted the plaintiff damages of $150,260 for past and future medical expenses, as well as $200,000 for anxiety, pain, and suffering.[3] In rendering this decision, the court turned against those opinions which viewed aspects of American procedural law—such as broad discovery and, by German standards, large compensatory damages—to violate fundamental principles of German law.[4] Perhaps most surprisingly, the Court held that the award of costs for future psychological treatment of the plaintiff did not conflict with the public policy reservation of ZPO § 328(1) No. 4, even though this type of claim does not exist under German law.

In contrast to the Court's willingness to accept the American compensatory damages, the Court refused to enforce the American punitive damages award of $400,000. Identifying punishment and deterrence as the driving forces behind the imposition of punitive damages in America, the Court held that German tort law pursues the fundamentally different objective of making the injured plaintiff whole. In other words, because German law provides only for compensation and not for the enrichment of the injured party, punitive damages designed to punish and deter must be categorically rejected. Thus, recognizing and enforcing such awards would deviate from the fundamental purpose of German tort law: to compensate tort victims on the basis of the principle of proportionality. This holding and its reasoning still clearly represents the prevailing view in Germany.[5]

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2 *See, e.g.* Landgericht Berlin [LG Berlin] [Regional Court of Berlin] June 13, 1989, 1989 Recht der internationalen Wirtschaft [RIW] 988 (refusing to enforce a $275,000 compensatory damages award handed down by a Massachusetts jury). The regional court rejected the American verdict arguing, among other things, that the amount of damages was excessive by German standards, and that a jury verdict without a reasoned decision, as well as the use of discovery in the American proceedings prior to trial, would violate the public policy clause of ZPO § 328(1) No. 4. *Id.*; JOACHIM ZEKOLL ET AL., TRANSNATIONAL CIVIL LITIGATION 675-680 (2013).

3 Bundesgerichtshof [BGH] [Federal Court of Justice] June 4, 1992, 1992 Neue Juristische Wochenschrift [NJW] 3096. For a detailed account of this decision see Joachim Zekoll, *The Enforceability of American Money Judgments Abroad: A Landmark Decision by the German Federal Court of Justice*, 30 COLUM. J. TRANSNAT'L L. 641 (1992); *cf.* Peter Hay, *The Recognition and Enforcement of American Money-Judgments in Germany – The 1992 Decision of the German Supreme Court*, 40 AM. J. COMPAR. L. 729, 746 (1992); Gerhard Wegen & James Sherer, *Germany: Federal Court of Justice Decision Concerning the Recognition and Enforcement of U.S. Judgments Awarding Punitive Damages*, 32 I.L.M. 1320, 1322 (1993).

4 Zekoll, *supra* note 2; *e.g.* Rolf A. Schütze, *Probleme der Anerkennung US-amerikanischer Zivilurteile in der Bundesrepublik Deutschland*, 1979 WERTPAPIER-MITTEILUNGEN 174.

5 ADOLF BAUMBACH ET AL., ZIVILPROZESSORDNUNG, § 328 ¶ 44 (77th ed. 2019) (Ger.); Rainer

This paper will examine whether developments have occurred in the 27 years since the decision that would call for abandoning the traditional characterization of liability for torts as a purely compensatory instrument, justifying a reassessment of the acceptability of punitive damages. Because there is no more recent case law in Germany on this question, we will take a look at court decisions in other European legal systems which had to deal with this question on the basis of similar (legal) value regimes in Part II. In Part III, we will examine whether the handling of punitive damages in United States has changed since the 1992 decision in such a way that it would meet the proportionality requirements for the German recognition of American judgments. In the overall picture, discussed in Part IV, noticeable trends towards partial convergence between the German concept of civil liability and the U.S. approach towards punitive damages call for a reassessment of the enforceability of American punitive damages awards in German court proceedings: Instead of categorically rejecting the recognition and enforcement of punitive damages on grounds of German public policy, a case-by-case analysis ought to be carried out, based on the principles of proportionality and legal certainty.

II. RECENT DEVELOPMENTS IN GERMAN AND EUROPEAN TORT LAW AS A STARTING POINT FOR READJUSTMENT

A. Increasing Recognition by Other European States of American Punitive Damages Awards

The courts of other European nations, which have more recently addressed the compatibility of U.S. punitive damages with domestic public policy restrictions, no longer share the German Federal Court's categorical rejection of American punitive damages awards. Overall, these courts have reassessed the functions of their respective domestic tort law regimes and now acknowledge that compensation is but one of several purposes that these regimes are designed to serve. As a result,

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Hüßtege, *§ 328 ¶ 18 in* HEINZ THOMAS & HANS PUTZO, ZIVILPROZESSORDNUNG (36. ed. 2015); Herbert Roth, *§ 328 ¶ 108 in* FRIEDRICH STEIN & MARTIN JONAS, ZIVILPROZESSORDNUNG (23. ed. 2015); JULIANA MÖRSDORF-SCHULTE, FUNKTION UND DOGMATIK US-AMERIKANISCHER PUNITIVE DAMAGES 295 (1999); Rolf A. Schütze, *Überlegungen zur Anerkennung und Vollstreckbarerklärung US-amerikanischer Zivilurteile in Deutschland, in* FESTSCHRIFT FÜR REINHOLD GEIMER, 1025, 1038-41 (2002); Manfred Baumbach & Christoph Henkel, *Anerkennung und Vollstreckung von punitive damages-Entscheidungen amerikanischer Zivilgerichte vor dem Hintergrund des Verfahrens BMW v. Gore*, 1997 RIW 727, 731-33; Manuel Nodoushani, *Die Gefahr der Punitive Damages für deutsche Unternehmen*, 2005 VERSICHERUNGSRECHT [VERSR] 1313, 1314-1316; Wolfgang Wurmnest, *Recognition and Enforcement of US Money Judgements in Germany*, 23 BERKELEY J. INT'L LAW 175, 196 (2005); *cf.* Christos D. Triadafillidis, *Anerkennung und Vollstreckung von "punitive damages"-Urteilen nach kontinentalem und insbesondere nach griechischem Recht*, 2002 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS [IPRAX] 236, 237.

these courts now favor a case-by-case approach to decide whether or not punitive damages can be recognized and enforced.

For example, the Italian Supreme Court (*Corte Suprema di Cassazione*) has recently changed its stance against enforcing punitive damages. In decisions in 2007 and 2012, the *Corte Suprema di Cassazione* had still taken the view that Italian civil liability was purely mono-functional and aimed at compensating economic losses. Appling this reasoning, it had rigorously ruled against the recognition and enforcement of judgments awarding punitive damages on public policy grounds.[6] However, the United Senates of the Italian Supreme Court comprehensively reexamined the functions of Italian tort law in a 2017 "milestone"[7] decision.[8] The Court used an appeal from the *Corte d'appello di Venezia*, which had relied on the traditional rejectionist view, as an opportunity to reevaluate and revise their assessment of the functions of Italian tort law in a comprehensive *obiter dictum*. The High Court examined the compatibility of punitive damages with the principles and purposes of civil liability in Italian law in great detail, concluding that the Italian legal system no longer excluded the notions of punishment and deterrence in the context of civil damages.[9] The Court determined that, through various legislative reforms over the past few decades, a polyfunctional network of objectives had developed. Deterrence and punishment had emerged as purposes of civil liability alongside the primary and still dominant compensatory function.

To support the emergence of such non-compensatory elements, the Court pointed to examples from a variety of legal areas within the Italian system of private law, including labor law, consumer protection law, custody law, and patent and trademark law. The emergence of penal elements in the area of violation of the general right of personality has also been acknowledged.[10] In support of its assessment, the Court also relied on decisions of the Italian Constitutional Court (*Corte costituzionale*), which is competent to settle controversies on genuinely constitutional issues. In 2011 and 2016, the *Corte costituzionale* had already

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6 Cass. civ., sez. III, 19 gennaio 2007, n. 1183, Foro it. 2007, I, 3, 1460 (It.); Cass civ, sez. I, 8 febbraio 2012, n. 1781, in Foro it. 2012, I, c. 1449 (It.), https://www.edizionicafoscari.unive.it/media/pdf/article/ricerche-giuridiche/2012/2/art-10.14277-2281-6100-RG-1-2-12-8.pdf (last accessed Aug. 4, 2020).

7 Mauro Tescaro, *Das „moderate" Revirement des italienischen Kassationshofs bezüglich der US-amerikanischen punitive damages-Urteile*, 2018 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT [ZEuP] 463, 464.

8 Cass. civ., sez. Unite Civili, 5 luglio 2017, n. 16601/2017, *translated in* Letizia Coppo, *The Grand Chamber's Stand on the Punitive Damages Dilemma*, 3 IT. L.J. 593 (2017), http://www.theitalianlawjournal.it/data/uploads/3-italj-2-2017/3%20ItaLJ%202%202017%20-%20Full%20Issue.pdf (last accessed. Aug. 23, 2020). German extracts available with comments in Tescaro, *supra* note 7 at 459-477.

9 Cass. civ., sez. Unite Civili, 5 luglio 2017, n. 16601, *translated in* Coppo, *supra* note 8 at 598.

10 *Id.* at 599-600.

held that several of the aforementioned causes of action for damages were similar to sanctions in nature.[11]

Even though the U.S. doctrine of punitive damages is therefore no longer *per se* contrary to Italian public policy,[12] the recognition of such awards still requires that they satisfy two conditions in order to be held compatible with the fundamental values of the Italian legal system.

The first condition derives from the principle of legality (*riserva di legge*) as set forth in Art. 25(2) of the Italian Constitution[13], which underlies all Italian cases of punitive damages. According to this condition, the foreign judge's decision granting damages with a sanctioning character must be based on a legal or quasi-legal basis and comply with the Italian legal principles of typicality and predictability. This means that the facts subject to punishment must be precisely pre-identified (*tipicità*) and the contours of the punishment must be shaped and limited by a statute or a similar normative source (*prevedibilità*).

The second condition, according to the court, emanates from Article 49 of the EU Charter of Fundamental Rights.[14] The Article establishes the principle of *nulla poene sine lege* and further requires "proportionality in relation to criminal offences and penalties".[15] These principles also apply to penal elements in civil proceedings. In this context, the decisive factors are, first, the proportionality between restorative-compensatory and punitive damages and, second, the proportionality between the latter and the unlawful conduct.

With this landmark decision, the Italian Supreme Court aligned with a 2010 decision by the French Supreme Court (*Cour de cassation*),[16] which held that punitive damages did not fundamentally violate French

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11 Corte cost., 9 novembre 2011, no. 303, https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2011&numero=303 (last accessed Aug. 4, 2020); Corte cost., 1 giugno 2016, no. 152, https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2016&numero=152 (last accessed Aug. 4, 2020).

12 Cass. civ., sez. Unite Civili, 5 luglio 2017, n. 16601, *translated in* Coppo, *supra* note 8 at 598. ("The American doctrine of punitive damages is therefore not ontologically contrary to the Italian legal system.")

13 Art. 25(2) COSTITUZIONE [COST.] ("No one may be punished except on the basis of a law already in force before the offence was committed.")

14 2000 O.J. (C 364) art. 49 (original text); 2010 O.J. (C 83) art. 49, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ:C:2000:364:TOC (as currently in force).

15 2010 O.J. (C 83) art. 49(1), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ:C:2010:083:TOC ("No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable."); *Id.* at art. 49(3) ("The severity of penalties must not be disproportionate to the criminal offence.")

16 Tescaro, *supra* note 7, at 474.

public policy.[17] The French Supreme Court did not agree with the sweeping opinion of the Poitier Court of Appeals which had held that the recognition of punitive damages must be denied in principle because French tort law prohibits enrichment and allegedly had a purely compensatory purpose.[18] However, the French Supreme Court qualified its more liberal stance by holding, among other things, that recognizing punitive damages disproportionate to damages actually suffered would still be precluded. In the case at hand, the Court found that the punitive damages award did not meet this requirement of proportionality.[19]

The Italian Supreme Court decision also echoed an earlier decision of the Spanish *Tribunal Supremo*. In 2012, the Spanish court permitted the recognition and enforcement of a U.S. punitive damages judgment by finding that the sanctioning elements were not entirely alien to Spanish tort law.[20] Although the Court did not allude to specific examples within the Spanish tort law system, it pointed to the difficulty of distinguishing clearly between compensation and punishment. Finding, furthermore, that American punitive damages could be understood to be a less invasive instrument than genuine criminal sanctions, the Court invoked the *ultima ratio* principle of Spanish criminal law, which provides that criminal sanctions should only be established as a last resort.

However, it remains to be seen to what extent other European courts will consider the Italian, French, and Spanish adoption of more lenient approaches towards the recognition of punitive damages in their decision-making practice. Some commentators have already expressed their concern that the conditions for conformity with public policy are so strict that they leave little or no room for the enforcement of American punitive damages judgments, particularly regarding compliance with the principle of proportionality.[21] Whether this pessimistic assessment is accurate will also depend on the future handling of and quantitative restrictions on punitive damages in the

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17 Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 1, 2010, Bull. civ. I, no. 1090 (Fr.), https://www.courdecassation.fr/jurisprudence_2/%20premiere_chambre_civile_568/1090_1_18234.html (last accessed Aug. 4, 2020). The case is discussed in detail in Benjamin West Janke & François-Xavier Licari, *Enforcing Punitive Damages Awards in France after Fountaine Pajot*, 60 AM. J. COMPAR. L. 775, 800 (2012).

18 Cour d'appel [CA] [regional court of appeal] Poitier, Feb. 26, 2009, civ., no. 07/02404, https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000020847388, (last accessed Aug. 4, 2020).

19 Cass. 1e civ., Dec. 1, 2010, Bull. civ. I, no. 1090 (Fr.).

20 A.T.S. Nov. 13, 2001 (ECLI ES:TS:2001:1803A) (Spain), http://www.poderjudicial.es/search/AN/openDocument/e704a4276c163c6d/20060112 (last accessed Aug. 23 2020) (regarding the enforcement of an American judgment for infringement of intellectual property rights).

21 François-Xavier Licari, *La compatibilité de principe des punitive damages avec l'ordre public international: une décision en trompe-l'œil de la Cour de cassation*, RECUEIL DALLOZ 423, 427 (2011) (speaking of a "pseudo-test de proportionnalité"); *see also* Tescaro, *supra* note 7, at 474-477.

United States.[22] That notwithstanding, the three Romanesque legal systems have at least softened the formerly strict public policy limitations by revising their traditional understanding of the purposes of damages in tort law. Their new approach could therefore pave the way towards a more flexible and increasingly liberal handling of individual cases.

B. The Applicability of European Developments to German Law

1. Elements of Deterrence and Punishment in German Tort Law

From a German point of view, the fact that Italian, Spanish and French case-law no longer categorically rule out the recognition of judgments awarding punitive damages can no longer be dismissed as purely individual domestic phenomena, emanating from isolated changes in the respective foreign legal systems. For example, many of the liability rules on which the *Corte Suprema di Cassazione* elaborated to change its view do not represent Italian legal idiosyncrasies. Based on similar values, it is by now widely acknowledged that German liability rules likewise do not exclusively function as means of compensation. That is true, for example, for pain and suffering damages, which German courts reward not only as literally prescribed by statute,[23] but also in the legally not explicitly regulated cases involving violations of the general right of personality (*Allgemeines Persönlichkeitsrecht*).[24] Furthermore, German courts and commentators no longer view the imposition of damages for violations of the right of personality solely as a means of providing compensation for the harm suffered by the victim, contrasting with the position of the 1992 German Federal Court of Justice decision.

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22 For the developments to date, *see infra* at III.

23 *Cf.* BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 253, https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0761 (defining "intangible damage").

24 Following landmark decisions of the German Federal Court of Justice, the German legal doctrine has gradually developed the supplementary protection of personality rights, beyond the fundamental rights explicitly laid down in the German Basic Law. The principle, referred to as the "general right of personality," aims at protecting one's right to self-determination and privacy. It includes, *inter alia*, the interest in privacy, the right to one's own image, to one's own name and to one's own word as well as the right to know of one's own ancestry. *See generally* Udo Di Fabio, *Art. 2 ¶¶ 127-131*, *in* THEODOR MAUNZ & GÜNTER DÜRIG, GRUNDGESETZ-KOMMENTAR (88th update 2019); Heinz-Peter Mansel, *§ 823 ¶¶ C2-C15*, *in* J. VON STAUDINGER, BGB (2017); BGH, May 25, 1954, 13 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 334, 337-339. With regard to awarding damages for pain and suffering in cases involving violations of the general right of personality, *see* BGH, Feb. 14, 1958, 1958 NJW 827, 829-30.

Rather, it is now often acknowledged that damages awarded in these cases also serve deterring,[25] or at times even retributive,[26] purposes.

In light of this changed perception, the approach of the German Federal Court of Justice in its 1992 decision to assess the function of pain and suffering awards as mainly compensatory in nature, and to all but negate the sanctioning/deterring effects of this remedy,[27] appears open to attack. Indeed, already in the *Caroline* cases, the Federal Court of Justice itself explicitly acknowledged the deterrent effects of pain and suffering damages towards violations of personality rights, and indeed deemphasized the idea of compensation.[28]

Of course, that transformation without more would not in and of itself warrant the acceptance of punitive damages in Germany because American courts also regularly award damages for mental and physical pain in comparable cases. Although these awards aim primarily at compensating victims, they inevitably produce deterring effects as well. Adding punitive damages when the defendant's behavior is particularly reprehensible could thus lead to proportionality problems under German law.

However, the parallels between Italian and German law go beyond the shared view that damages for violations of the right of personality serve more than merely compensatory goals. In fact, the reasoning of the *Corte Suprema di Cassazione* is transferable to other areas of tort law as well. This is true for certain causes of action which did not emerge out of Italian legislative initiatives, but are products of legislative acts of the European Union that have impacted and led to changes in the German legal system as well.

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25 Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Mar. 8, 2000, 1 BvR 1127/96, 2000 NJW 2187, 2187-89; BVerfG Apr. 2, 2017, NEUE JURISTISCHE WOCHENSCHRIFT RECHTSPRECHUNGS-REPORT ZIVILRECHT [NJW-RR] 2017, 1 BvR 2194/15, 879 ¶ 10; Roger Mann, *§ 823 BGB ¶ 101*, *in* GERALD SPINDLER & FABIAN SCHUSTER, RECHT DER ELEKTRONISCHEN MEDIEN (4. ed., 2019); CLAUDIA BEUTER, DIE KOMMERZIALISIERUNG DES PERSÖNLICHKEITSRECHTS 40-42 (2000); PETER MÜLLER, PUNITIVE DAMAGES UND DEUTSCHES SCHADENSERSATZRECHT 59-63 (2000); JOACHIM ROSENGARTEN, PUNITIVE DAMAGES UND IHRE ANERKENNUNG UND VOLLSTRECKUNG IN DER BUNDESREPUBLIK DEUTSCHLAND 181-200 (1994); Karsten Gulden & Tjorven Dausend, *Gefahr für das Persönlichkeitsrecht durch mediale Hetzjagd?*, MMR 723, 727 (2017); Joachim Rosengarten, *Der Präventionsgedanke im deutschen Zivilrecht*, 1996 NJW 1935 ff.; Erich Steffen, *Schmerzensgeld bei Persönlichkeitsverletzung durch Medien*, 1997 NJW 10, 12-14. This has already been suggested in the judgment of BGH, Sept. 19, 1961, 1961 NJW 2059, 2060. *But see* THORSTEN FUNKEL, SCHUTZ DER PERSÖNLICHKEIT DURCH ERSATZ IMMATERIELLER SCHÄDEN IN GELD 164-167 (2001); TILMAN HOPPE, PERSÖNLICHKEITSSCHUTZ DURCH HAFTUNGSRECHT 123-125, 133-139 (2001); Walter Seitz, *Prinz und die Prinzessin - Wandlungen des Deliktsrechts durch Zwangskommerzialisierung der Persönlichkeit*, NJW 2848, 2848 (1996).

26 Marita Körner, *Zur Aufgabe des Haftungsrechts – Bedeutungsgewinn präventiver und punitiver Elemente*, NJW 241, 242 (2000).

27 BGH, June 4, 1992, 1992 NJW 3096, 3103.

28 *See* BGH, Dec. 5, 1995, 1996 NJW 984, 985; BGH, Nov. 15, 1994, 1995 NJW 861, 865; BGH, Oct. 5, 2004, 2005 NJW 215, 216; BGH, Dec. 17, 2013, 2014 NJW 2029 ¶ 38. *See generally* Volker Behr, *Punitive Damages in American and German Law – Tendencies Towards Approximation of Apparently Irreconcilable Concepts*, 78 CHI.-KENT L. REV. 105, 130-136 (2003).

For example, both Italian and German labor law are significantly influenced by European equal protection policy, in particular by the Equal Treatment Framework Directive 2000/78/EC and the Equal Treatment Directive 2006/54/EC.[29] As early as 1984, the European Court of Justice (ECJ) rejected the traditional German approach of only providing compensatory reliance damages for discriminatory hiring practices. Specifically, the ECJ held that merely providing compensation for such losses, which are often minor (e.g. the mere reimbursement of application expenses), would not constitute the deterrence necessary to ensure equal opportunities on the employment market as required under EU law.[30] The ECJ likewise struck down the German legislative response providing up to three months' salary for "adequate compensation in money,"[31] finding it an inadequate measure of deterrence.[32] Finally, the German legislature adopted § 15(2) of the German General Equal Treatment Act, which established a private cause of action for certain types of employment discrimination without capping the amount of damages. The provision mirrors the growing emphasis of European Union law on the enforcement of its norms in the Member States by deterring wrongful conduct through private law liability rules.[33]

Similarly instructive is the ECJ holding that Directive 2006/54/EC allows Member States to address sexual discrimination with punitive damages.[34] Although the judgment in the case at bench was concerned with the absence of an obligation to introduce such domestic punitive damages provisions, the decision left no doubt that the *acquis communautaire* does not contain any principle which would limit damages

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29 Council Directive 2000/78, 2000 O.J. (L 303) (establishing a general framework for equal treatment in employment and occupation); Council Directive 2006/54, 2006 O.J. (L 204) of the European Parliament and of the Council of July 5, 2006 on the (replacing the previous Directive 1976/207).

30 Case C-14/83, von Colson and Kamann v. State of North Rhine-Westphalia, 1986 E.C.R 1891, 1907-1909.

31 Overruled legislative response at BGB, §611a.

32 Case C-180/95, Draehmpaehl v. Urania Immobilienservice OHG, 1997 E.C.R. I-2212, 2221-2224.

33 ALLGEMEINE GLEICHBEHANDLUNGSGESETZ [AGG] [GENERAL EQUAL TREATMENT ACT], Aug. 14, 2006 at §15(2) ("Where the damage arising does not constitute economic loss, the employee may demand appropriate compensation in money. This compensation shall not exceed three monthly salaries in the event of non-recruitment, if the employee would not have been recruited if the selection had been made without unequal treatment."); *see* Behr, *supra* note 28, at 144.

34 Case C-407/14, Arjona Camacho v. Securidad España SA, ECLI:EU:C:2015:831, ¶ 40 (Dec. 17, 2015) ("Article 25 of Directive 2006/54 allows . . . Member States to take measures providing for the payment of punitive damages to the person who has suffered discrimination on grounds of sex."). *See also* Coppo, *supra* note 8 at 615.

remedies to compensatory functions,[35] and would exclude sanctioning or deterrent functions.

Also shaped substantially by European directives is intellectual property law, which the Italian Supreme Court presented as evidence of the polyfunctionality of today's domestic tort law regime. Recital 26 of the Directive 2004/48/EC on the enforcement of intellectual property rights states that "when determining the amount of damages to be paid to the right holder, all relevant aspects shall be taken into account, such as . . . undue profits made by the infringer."[36] This concept of absorbing profits cannot be reconciled with the traditional prohibition against enrichment under the law of compensation. Remarkably, American courts invoke the same idea of absorbing profits when assessing the adequacy of punitive damages.[37] The traditional prohibition notwithstanding, the concept of absorbing profits has become an established method of calculating damages in German intellectual property law,[38] in addition to both the traditional compensatory reimbursement of lost profits and the license analogy.[39] And even the calculation according to the license analogy goes beyond merely restoring the damage caused;[40] for this method can be applied regardless of whether a license agreement would actually have been concluded if the damaging event had not occurred.[41]

Considering these developments, is it reasonable to conclude that the German legal system has abandoned its traditional understanding of damages as an exclusively compensatory remedy for a polyfunctional concept of civil liability? Or can it be said, alternatively, that the

35 The *acquis communautaire* is the accumulated body of European Union law, comprised of primary legislation (especially the Treaty of the European Union and the Treaty on the Functioning of the European Union), legal acts (such as directives and regulations) and court decisions of the ECJ and the General Court.

36 Directive 2004/84, of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

37 *Cf. e.g.* BMW of North America, Inc. v. Gore, 517 U.S. 559, 589 (1996).

38 *See e.g.* Gesetz über Urheberrecht und verwandte Schutzrechte [UrhG] [Copyright Act], Sept. 9, 1965, Bundesgesetzblatt, Teil I [BGBL I] at 1273, last amended by Gesetz [G], Nov. 28, 2018, BGBL I at 2014, art. 1, § 97(2) sentences 2-3, https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html; Gesetz über den Schutz von Marken und sonstigen Kennzeichen [MarkenG] [Trademark Act], Oct. 25, 1994, BGBL I at 3082, last amended by G, December 11, 2018, BGBL I at 2357, §14(6) sentences 2-3, §15(5), http://www.gesetze-im-internet.de/englisch_markeng/; Gesetz gegen den unlauteren Wettbewerb [UWG] [Unfair Competition Act], Mar. 3 2010, BGBL I AT 254, last amended by G, Apr. 18, 2019, BGBL I at 466, art. 5, §10(1), https://www.gesetze-im-internet.de/englisch_uwg/englisch_uwg.html.

39 Although license analogy and profit issuance were already recognized in fair trading and intellectual property law at the time of the landmark decision of the German Federal Court of Justice, *see supra* note 3, they have only increasingly detached themselves from the "classical" claim for damages in recent case law. *See generally* Renate Schaub, *Schadensersatz und Gewinnabschöpfung im Lauterkeits- und Immaterialgüterrecht*, 2005 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT [GRUR] 918, 919 (Ger.).

40 *See* Behr*, supra* note 28, at 137.

41 *See, e.g.* BGH, Mar. 19, 1992, I ZR 166/90, 1993 GRUR 53, 58; BGH, June 11, 2015, I ZR 7/14, 2016 GRUR 184, 187.

developments in labor law, in the protection of personality, and in intellectual property law remain stand-alone exceptions?

We lean towards the former conclusion: Even though the transition from mere exceptions to a second—albeit subordinate—pillar of the damages system is necessarily fluid, the successive introduction of non-compensatory elements in such widely diverse areas of law more than suggests a general departure from the strictly monofunctional concept of civil liability.[42] As a consequence, the long-held assumptions that the German tort liability system serves exclusively compensatory functions, and that this limitation constitutes a part of substantive public policy, are no longer tenable. In other words, the allegedly strictly compensatory nature of the German tort liability system can no longer support the rejection of foreign damages awards containing penal or deterrent components.

2. Other Potential Obstacles to the Recognition of Punitive Damages in Germany

Even though penal and deterrent functions can no longer be dismissed as foreign to German tort law, American punitive damages are by no means automatically compatible with German public policy concerns in every individual case. Resting its rejection of punitive damages on their sanctioning character in its 1992 decision, the German Federal Court of Justice did not find it necessary to elaborate on other potential grounds for refusing to enforce such American judgments in Germany.

Two obstacles remain. One is the principle of legality of Article 103(2) of the German Basic Law, which requires that a penalty may only be imposed if a law specifically provides for the sanction. A second obstacle resides in the constitutional prohibition of double jeopardy in the event of simultaneous criminal prosecution for the harmful act through the *ne bis in idem* principle of Article 103(3) of the German Basic Law.[43] Now, however, both questions come to the forefront.

German law will have to address the "considerable doubts about the requirement of certainty under Article 103(2) of the German Basic Law".[44] This is similar to how the Italian *Corte Suprema di Cassazione* scrutinized the impending conflicts with the *riserva di legge*. Just as the Italian Supreme Court held that there must be a normative anchoring for an award of punitive damages,[45] in Germany, punitive damages can only be recognized if they have been awarded on a sufficiently specific

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42 Pillar metaphor taken from Behr, *supra* note 28, at 147-148.
43 BGH 1992 NJW 3104.
44 JOACHIM ZEKOLL, U.S.-AMERIKANISCHES PRODUKTHAFTUNGSRECHT VOR DEUTSCHEN GERICHTEN 152 (1987) (Ger.).
45 *See supra* II.A.

legal basis. In contrast to Article 49 of the EU Charter of Fundamental Rights,[46] the German Basic Law allows for punishments only if they are based on written statutes, thus failing to recognize either judge-made law or customary law as a suitable normative basis for criminal offenses or other punishable conduct.[47] Under German law, the principle of *nulla poene sine lege* is thus understood as *nulla poene sine lege scripta*.

In addition, the German courts must apply the same considerations as the Italian Supreme Court with regard to the proportionality of the amount of punitive damages under Article 49 of the EU Charter of Fundamental Rights.

In the following section, this paper will examine to what extent the current U.S. punitive damages practice actually satisfies these principles of legality and proportionality.

III. CURRENT DEVELOPMENTS IN U.S. LAW

The introduction of non-compensatory elements into tort law by the European lawmaker and the individual assessment of the compatibility of punitive damages and public policy are not the only convergent developments between the U.S. concept of punitive damages and the German perception of tort liability. Recent trends in U.S. jurisprudence and legislation have also minimized the seemingly insurmountable differences between U.S. and German understandings by curtailing the size of punitive damages awards and by defining the notion and limits of punitive damages both in case law and statute.[48]

A. Limitation to the Amount of Punitive Damages—A Proportionality Test?

As early as 1996, the U.S. Supreme Court decision in *BMW of North America, Inc. v. Gore* attempted to limit astronomically high punitive damages. In this ruling, the Supreme Court invoked constitutional requirements for punitive damages awards for the first time: If punitive

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46 Since Article 49(1) of the EU Charter of Fundamental Rights only requires that the act or omission in question constitutes a criminal offence "under national law or international law" (see *supra* at II.A., note 15), the Member States are free to determine the way in which they establish the legal basis for criminal liability. In particular, this allows common law systems to prosecute crimes on the basis of case law, provided that the judge-made law constitutes a continuous, consistent and predictable normative source of law. *Cf.* Albin Eser & Michael Kubiciel, *Art. 49 ¶ 15 in* JÜRGEN MEYER & SVEN HÖLSCHEID, CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION (5th ed. 2019) (Ger.) with further references.

47 *See* Christoph Degenhart, *Art. 103 ¶ 63*, *in* MICHAEL SACHS, GRUNDGESETZ KOMMENTAR (8th ed. 2018); Bernd Hecker, *§ 1 ¶ 8*, *in* ADOLF SCHÖNKE HORST SCHRÖDER, STRAFGESETZBUCH (30th ed. 2019) (Ger.); Barbara Remmert, *Art. 103(2) ¶ 79, in* THEODOR MAUNZ & GÜNTER DÜRIG, GRUNDGESETZ-KOMMENTAR (88th update 2019).

48 *Cf.* Cass. civ., sez. Unite Civili, 5 luglio 2017, n. 16601, *translated in* Coppo, *supra* note 8 at 603; Behr, *supra* note 28, at 115-120.

damages are grossly excessive, they violate the substantive due process requirements of the Fourteenth Amendment.[49] In assessing whether the amount of punitive damages is constitutionally objectionable, the Court required, among other things, that three factors be taken into account: First, the degree of reprehensibility of the damaging conduct, second, the ratio between the compensatory damages and the amount of the punitive damages and, third, the difference between the punitive damages award and the civil or criminal sanctions that could have been imposed for a comparable unlawful conduct.[50]

The U.S. Supreme Court reinforced the relevance of the ratio between punitive and actual damages in *State Farm Auto. Ins. Co. v. Campbell* and in *Exxon Shipping Co. v. Baker*.[51] In *State Farm*, the Court indicated that punitive damages would normally not pass constitutional muster if they exceeded a single-digit ratio to compensatory damages. In *Baker*, the Court went even further and established that punitive damages should not be greater than compensatory damages. To be sure, *Baker* arose under federal maritime jurisdiction and its precedential value is technically limited to this area of law. While subsequent cases in federal courts of appeal have shown that punitive damages may still exceed the amount of compensatory damages,[52] some of the considerations contained in *Baker* on the predictability of punitive damages did find their way into the case-law of lower courts.[53]

Furthermore, the U.S. Supreme Court has established additional boundaries to arbitrary and unpredictable punitive damages judgments. In *Philip Morris USA v. William*, the Court held that harmful conduct towards victims who are not parties to the lawsuit should be disregarded for due process reasons when assessing punitive damages.[54]

Perhaps even more importantly, this increasing trend towards curtailing punitive damages has not been limited to the judiciary. Federal and state legislative acts have also capped the size of punitive damages. For example, Georgia law, Virginia law, and federal labor discrimination

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49 BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1592-604 (1996); *see also* ZEKOLL, *supra* note 2, at 683.

50 *BMW*, 116 S. Ct. at 1599-603.

51 State Farm Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513 (2003); Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008).

52 *See* Martin Davies, *Punitive Damages, in* MANAGING THE RISK OF OFFSHORE OIL AND GAS ACCIDENTS (Günther Hand & Kristoffer Svendsen eds.) 337, 343 (2019).

53 Lompe v. Sunridge Partners, LLC, 818 F.3d 1041 (10th Cir. 2016) (upholding a 1:1 ratio of punitive and compensatory damages); *see* James Crystal Licenses, LLC v. Infinity Radio, Inc., 43 So.3d 68, 79 (Fla. Dist. Ct. App. 2010); Hironari Momioka, *Punitive Damages Revisited: A Statistical Analysis of How Federal Circuit Courts Decide the Constitutionality of Such Awards*, 65 CLEV. ST. L. REV. 379, 390 (2017).

54 *Philip Morris USA v. William*, 127 S. Ct. 1057, 1059 (2007) ("[T]o permit such punishment . . . would add a near standardless dimension to the punitive damages equation. . . . And the fundamental due process concerns to which our punitive damages cases refer—risks of arbitrariness, uncertainty and lack of notice—will be magnified."); *see also* ZEKOLL, *supra* note 2, at 683.

law impose comparatively moderate absolute upper limits on punitive damages.[55] Colorado and Ohio limit punitive damages to a proportion of compensatory damages.[56] Finally, some states use a mix of absolute and proportional limits, including Florida, South Carolina, Tennessee or Arkansas.[57] In addition, several states require that statutes explicitly authorize punitive damages, including Massachusetts, New Hampshire and Washington.[58] As a general trend, it can be said that "in many cases, the award of punitive damages is often actually less than the award of compensatory damages."[59]

In light of these developments, the 1992 German Federal Court of Justice opinion that "there is no measurable general relationship between the sums to be fixed and the damage suffered"[60] is no longer true as a general rule. The ratio between punitive and compensatory damages may not, as such, affect the sanctioning character of punitive damages:[61] At most, potential wrongdoers are able to calculate the maximum costs of an infringing act in advance, which might reduce deterrence.[62] However, this ability to calculate actual damages and link punitive damages to the actual damages suffered is—at least in its basic concept—similar to the proportionality test laid down in Article 49 of the EU Charter of Fundamental Rights.[63] This similarity is further reinforced by the U.S. Supreme Court's focus on the reprehensibility of the wrongful conduct as the crucial factor for determining the amount of punitive damages.[64]

This evolution towards partial congruency does not mean that American judgments granting punitive damages will automatically meet the German/European proportionality requirement. Three factors weigh against such a conclusion. First, American courts have continued to grant exorbitantly high punitive damages in individual cases.[65] In fact, statistical surveys cast some doubt on whether Supreme Court

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55 § 42 U.S.C. § 1981a(b)(3) (establishing a maximum limit of up to $300,000, staggered according to the size of the employer); *see* GA. CODE ANN. § 51-12-5.1(g) (max. $250.000); VA. CODE ANN. §8.01-38.1 (max. $350.000).

56 COLO. REV. STAT. § 13-21-102(1)(A); OHIO REV. CODE ANN. § 2315.21(D)(2)(A).

57 FLA. STAT. § 768.73(1)(A); S.C. CODE ANN. § 15-32-530(A); TENN. CODE ANN. § 29-39-104(A)(5); ARK. CODE ANN. § 16-55-208(A); *see* MONT. CODE ANN. § 27-1-220(3). *See generally* Michael Klode, *Punitive Damages – Ein aktueller Beitrag zum US-amerikanischen Strafschadensersatz,* 2009 NEUE JURISTISCHE ONLINE-ZEITSCHRIFT [NJOZ] 1762, 1768 (Ger.).

58 *See* Davies, *supra* note 52, at 337, 339 (2019).

59 *Id.* at 340 (citing, inter alia, Neil Vidmar & Mary R. Rose, *Punitive Damages by Juries in Florida: In Terrorem and in Reality*, 38 HARV. J. LEGIS. 487, 492 (2001)).

60 BGH, June 4, 1992, 1992 NJW 3104 (translated by the authors).

61 Cooper Indus., Inc. v. Leatherman Tool Grp., Inc 532 U.S. 424, 432 (regarding the quasi-criminal function of punitive damages) (2001); *see* Behr, *supra* note 28, at 120, 125.

62 Behr, *supra* note 28 at 125.

63 *But see* Janke & Licari, *supra* note 17, at 800 (criticizing this linkage).

64 *See* BMW of N. Am. v. Gore, Inc., 116 S. Ct. 1589, 1599.

65 *Cf., e.g. In re* Exxon Valdez, 236 F. Supp. 2d 1043, 1066 (D. Alaska 2002) (granting a $5 billion punitive award).

jurisprudence has actually had any lasting influence on the practice of lower courts.[66] Furthermore, American courts sometimes refuse to apply the legally prescribed maximum limits on the ground that they would infringe the constitutional right to trial by jury.[67] Finally, the maximum rates set out in the statutes are typically subject to exceptions for particularly egregious acts. For example, this applies in cases of intentional misconduct and in instances of reckless conduct driven by reprehensible profit-seeking motives.[68]

These caveats notwithstanding, the regulatory and judicially prescribed requirements for most punitive damages have produced a framework that can safeguard the principle of proportionality and may pave the way towards the recognition and enforcement of punitive damages awards in Germany. And even if the amount of punitive damages should exceed the boundaries of the proportionality test under Article 49 of the EU Charter on Fundamental Rights, German law would not automatically rule out recognizing the award. According to the prevailing view among German scholars, the punitive damages award could instead be recognized and enforced partially to reflect an amount deemed adequate.[69]

B. Regulatory Assessment of Punitive Damages on the Basis of the Principle of Legality

These developments in U.S. tort law are significant in their substantive dimension through the adoption of proportionality considerations. Intensifying legislative activity has also led to increased codification of both the notion and the limits of punitive damages in ways that may favor their recognition under German law.

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66 Momioka, *supra* note 54, at 407-10.

67 Lindenberg v. Jackson National Life Ins. Co., 912 F.3d 348 (6th Cir. 2018) (regarding the maximum amount applicable in Tennessee according to TENN. CODE ANN. § 29-39-104(a)(5)).

68 *See, e.g.* GA. CODE ANN. § 51-12-5.1(F)-(G); COLO. REV. STAT. § 13-21-102(3); FLA. STAT. § 768.73(1)(b)-(c).

69 Heinrich Nagel & Peter Gottwald, *§ 12 ¶ 134 in* HEINRICH NAGEL & PETER GOTTWALD, INTERNATIONALES ZIVILPROZESSRECHT (7th ed. 2013); Zekoll, *supra* note 2, at 123, 156; Hartwin Bungert, *Vollstreckbarkeit US-amerikanischer Schadensersatzurteile in exorbitanter Höhe in der Bundesrepublik*, 1992 ZIP 1707, 1724; Harald Koch & Joachim Zekoll, *Zweimal amerikanische "punitive damages" vor deutschen Gerichten*, 1993 IPRAX 288, 291; Ernst Stiefel & Rolf Stürner, *Die Vollstreckbarkeit US-amerikanischer Schadenersatzurteile exzessiver Höhe*, 1987 VERSR 829, 842-46; Joachim Zekoll, *Recognition And Enforcement of American Products Liability Awards in the Federal Republic of Germany*, 37 AM. J. COMP. L. 301, 330 (1989); *see* Oberlandesgericht Düsseldorf [OLG Düsseldorf] [Higher Regional Court of Düsseldorf], 2001 RIW 303 ¶ 16; Piotr Machnikowski & Martin Margonski, *Anerkennung von punitive damages- und actual damages-Urteilen in Polen*, 2015 IPRAX 453, 457; Rolf Stürner & Astrid Stadler, *Zustellung von "punitive damage" - Klagen an deutsche Beklagte nach dem Haager Zustellungsübereinkommen?*, 1990 IPRAX 157, 159. *Contra LG Berlin, June 13, 1989, 20 O 314/88*, 1989 RIW 988, 990; Herbert Roth, *§ 328 ¶ 108 in* FRIEDRICH STEIN & MARTIN JONAS, ZIVILPROZESSORDNUNG (23d. ed. 2015).

In individual cases, the move away from judge-made common law toward legislative regulation of punitive damages awards may assuage German concerns rooted in the principle of legality, which requires a sufficiently specific legal basis for the imposition of sanctions.[70] From a German perspective, the codification of the concept and boundaries of punitive damages sits well with the German constitutional principle of legal certainty.[71] This maxim requires firstly that punitive sanctions[72] (established by German law) be sufficiently predictable for those potentially exposed to them, and secondly that only the democratically legitimated legislature prescribes such sanctions.[73]

These requirements are easily met in states like New Hampshire, where punitive damages can only be awarded if they are expressly permitted by law.[74] Beyond that, based on the jurisprudence of the German Federal Constitutional Court (*Bundesverfassungsgericht*), it may, in exceptional cases, suffice that "the risk of punishment [i.e. the imposition of punitive damages] is discernible".[75] Even for German criminal cases, the Constitutional Court has held that the predictability requirement may even be met when a pertinent criminal law provision contains broad terms which may have to be further specified and substantiated in judicial practice.[76]

Finally, with a view towards the guarantee against double jeopardy in Article 103(3) of the German Basic Law, it is noteworthy and helpful to plaintiffs in German enforcement proceedings that state law codifications sometimes provide mechanisms to avoid double recourse against the defendant. For instance, under Florida state law, punitive damages may not generally be awarded against a defendant in a civil

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70 Grundgesetz [GG] [Basic Law] art. 103(2) (Ger.), translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html.

71 *Cf.* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 2559/08, June 23, 2010, 126 BVerfGE 170, 194-199(Ger.); BVerfG, 47 BVerfGE 109, 120; Bodo Pieroth, *Art. 103 ¶ 61 in* HANS D. JARASS & BODO PIEROTH, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND (15th ed. 2018); Remmert, *supra* note 47 at ¶¶ 30-32.

72 The fact that the principle of certainty in Article 103(2) of the German Basic Law encompasses not only criminal liability, but also threatened sanctions, is not clearly evident from the wording of the provision. *See* GG art. 103(2) (Ger.). However, in light of the history of the provision it is unanimously accepted that the threatened penalties for legal transgressions must be sufficiently precise and predictable. *See generally* Remmert, *supra* note 47 at ¶¶ 74-76.

73 *See, e.g.,* BVerfG, 20 1992, 1 BvR 698/89, 1993 NJW 1457, 1458; BVerfG, June 23, 2010, 2 BvR 2559/08, 2010 NJW 3209, 3210.

74 N.H. REV. STAT. ANN. § 507:16.

75 BVerfG, Oct. 23, 1985, 1 BvR 1053/82, 1986 NJW 1671, 1672; BVerfG, Jan. 10, 1995 1 BvR 718/89, 1995 NJW 1141, 1141; BVerfG, June 23, 2010, 2 BvR 2559/08, 2010 NJW 3209, 3211.

76 BVerfG, Mar. 15, 1978, 2 BvR 927/76, 1978 NJW 1423, 1423; BVerfG, Jan. 10, 1995 1 BvR 718/89, 1995 NJW 1141, 1141; BVerfG, June 23, 2010, 2 BvR 2559/08, 2010 NJW 3209, 3211-13.

action if such damages have previously been awarded in any state or federal court for the same act or conduct.[77]

IV. OUTLOOK

In the 27 years since the German Federal Court of Justice rendered its landmark decision on the enforceability of American damages awards, there have been noticeable trends towards partial convergence between the German concept of civil liability and the U.S. approach towards punitive damages. These trends call for a reassessment of the enforceability of American punitive damages awards in German court proceedings.

European developments in labor and intellectual property law have accepted deterrence and, to a degree, even punishment as vital, albeit subordinate, components of current German private law. In light of the successive introduction of such liability rules in different areas of German private law, it must be acknowledged that we are no longer dealing with exceptions, but are witnessing instead the emergence of a multifunctional liability system.

While compensation for victims of tortious acts is chief among the goals of this system, it is by no means exclusive. The effective enforcement of its norms by way of deterrence has emerged as an important additional function which is here to stay—and will likely gain strength in the future. Despite remaining differences with the American concept of punitive damages, it can hardly be argued that this remedy is per se incompatible with fundamental, inalienable values and foundations of German law anymore.

Instead of categorically rejecting the recognition and enforcement of punitive damages on grounds of German public policy, it appears imperative to now engage in a case-by-case analysis based on the principles of proportionality and legal certainty. In light of the recent developments in American case law and legislation to limit the amount of punitive damages (often in relation to the compensatory damages awarded) and to increasingly regulate them by statute, this case-by-case examination should improve the prospects of American judgments in German enforcement proceedings not just in theory but in practice. Together, the evolution of German and European tort law and the increasing U.S. regulation and restraint of punitive damages will facilitate the recognition of American punitive damages awards in Germany—be that in whole or in part.

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77 FLA. STAT. § 768.73(2)(a). The *Corte Suprema di Cassazione* also understood this type of regulation as an expression of the *ne bis in idem* principle. *See* Cass. civ., sez. Unite Civili, 5 luglio 2017, n. 16601, *translated in* Coppo, *supra* note 8 at604. *But see* FLA. STAT. § 768.73(2) (b) (providing for exceptions to § 768.73(2)(a)).

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