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Punitive Damages: Introduction and Synopsis

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PUNITIVE DAMAGES: INTRODUCTION AND SYNOPSIS

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In April 1989, under the sponsorship of the University of Alabama School of Law and the *Alabama Law Review*, leading scholars on the topic of punitive damages gathered to present the current state of scholarship on the subject. The quality of the roster of scholars speaks for itself. The proceedings of that symposium, with some additions and refinements by the authors, follow this introduction and synopsis. The synopsis is offered for the convenience of the reader. Obviously it cannot do justice to the selections themselves and may contain errors in understanding or interpretation for which I am solely responsible.

The articles have been arranged, as nearly as possible, in the following order. The first three articles principally address the philosophical foundations of punitive damages. The next eight articles address specific perceived shortcomings in punitive damages, and propose reforms. These are followed by four articles that are expressly economic in their analysis. Finally, the symposium closes with an article on the direction we might expect the Supreme Court to take in light of the recent *Browning-Ferris* decision. Within each group of articles, the order of presentation is intended to guide the reader more or less systematically through the subject area. Of course, because each contribution was independently cre-

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ated, there is no single order of presentation that is best for all purposes, so we beg the reader's indulgence.

David G. Owen, *The Moral Foundations of Punitive Damages*, states that punitive damages lie on the border between civil and criminal law and have their roots in the goals of retribution and deterrence. Their legal legitimacy depends on their moral legitimacy; therefore, he considers punishment in the light of moral values. Owen considers two principal moral values, both of which recognize the essential equality of persons. The first moral (and political) value against which he measures punitive damages is freedom. Each individual is special and autonomous, with a right not to be used as the means to another's ends. As such, each person has a "bubble of rights space." To violate another's rights space is to steal that other's freedom. Rectification of an infringement requires (1) return of what was taken, and (2) punishment to deprive the infringer of the usurped "freedom" to infringe the rights space of another. This corrects the imbalance between the wrongdoer and society. The second moral value is utility. Because many violations of liability rules that occur remain undetected or unenforced, punishment may be justified as a corrective. In addition to the moral values of freedom and utility, Owen notes that abuses of power, truth, or trust justify punishment.

In light of the underlying moral justification of punishment, Owen concludes that punitive damages are appropriate only where the intrusion was intentional, and, even then, only to an extent proportionate to the wrong. To violate these principles makes society the wrongdoer, and, if the victim knows the punitive award is undeserved, the victim becomes a wrongdoer. Such a misapplication of punitive damages creates a net disutility for society.

Owen proposes that "[t]he justifications for the use and limits of punitive damages in moral theory provide the foundations for a morally sound system of punitive damages doctrine." The present standard of liability he finds unacceptably vague, diminishing both freedom and utility. He proposes an improvement: "[P]unitive damages are appropriate for conduct that is in conscious or reckless disregard of the rights of others, *and that constitutes an extreme departure from lawful conduct.*"

Owen also finds the present standard for the measurement of punitive damages unacceptably vague. There is moral justification for fully compensatory damages that cover the plaintiff's litigation

costs, but beyond that, compensation for the plaintiff's loss of freedom and restoration to society of its loss, is "incapable of principled measurement." The alternative of "optimal deterrence" he finds "almost as elusive an endeavor." The moral theories "permit and even require that punitive damages be assessed in 'proper' amounts, yet they provide very little help in establishing what amounts are proper." Owen therefore proposes a multiple damages standard (for example, treble damages) and, perhaps, a capped "kicker" to go to the state for particularly egregious behavior. Punitive damages also should be reduced or eliminated in mass tort cases in which bankruptcy is a prospect.

Bruce Chapman and Michael Trebilcock, *Punitive Damages: Divergence in Search of a Rationale*, examine punitive damages in the United Kingdom, Canada and the United States. They identify (1) compensation, (2) retribution and (3) deterrence rationales for punitive damages and explore the implications of each. The compensation rationale for punitive damages derives from the notion that an element of damage may be the loss of dignity resulting from a breach of trust and power, or from intentional targeting of the victim; or that compensation for speculative or immeasurable injury may be appropriate in cases of special culpability (egregious or shocking behavior). The appropriate quantum of damages is that measured by the *ex ante* insurance value.

The retribution rationale is desert-based. The justification for a retributive civil—as opposed to criminal—money award is that there are budgetary constraints on public enforcement. The appropriate quantum of damages is that which would have been imposed publicly as a penalty. Obviously, grossing up an award in order to deter would not be permissible because it would exceed the just desert due the defendant.

The implications of the deterrence rationale depend on whether the behavior being considered is absolutely normatively proscribed, in which case the quantum of damages should at least be grossed-up to reflect any probability of nonenforcement, or is instead intended to occur at some optimal rate, in which case the role of punitive damages to adjust for any probability of nonenforcement is more problematic. And, problems of overdeterrence and underdeterrence must be addressed, especially when the socially optimal level of a behavior is not known. The role of punitive damages in strict product liability cases is also problematic.

Under each rationale, the authors consider the justification, or lack thereof, for vicarious liability, insurability, consideration of the defendant's wealth in assessing damages, and the role of special procedural protections. The implications of the analysis for each of these areas differ depending on the rationale being considered. "[P]unitive damages reflect not one legal regime, but three." The implication is that a rationale should be chosen, and enforcement made consistent with it. For example, practice in the United States is most nearly consistent with the deterrence rationale. With this rationale identified, damages should be designed to deter optimally, and the defendant's wealth should not be a factor in setting the level of damages.

Dan B. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, addresses the problem of identifying the appropriate measure of punitive damages. He proposes that the focus should be on construction of deterrence-measured remedies. This is consistent with the Chapman and Trebilcock analysis and recommendation. Dobbs labels his proposed damages scheme "extracompensatory" rather than punitive, since it is designed to deter through economic disincentive rather than to punish for evil conduct.

Adoption of a deterrence standard provides a measure for punitive damages and avoids both overdeterrence and underdeterrence. The standard of liability no longer is whether punitive damages are deserved ("malice," "reckless disregard"), but *whether deterrence is required.* If it is, then damages are measured by the need for deterrence, *e.g.*, economic gain from the behavior, or demonstrated propensity. Therefore, profit from the act, notwithstanding that there are problems of measurement and apportionment, is a measure for punitive damages, since removal of all profit is required in order to deter. Where the profit measure is not appropriate, in order to encourage the bringing of lawsuits, the reasonable litigation costs of the plaintiff should be recoverable as extracompensatory ("punitive") damages.

Under the present punitive damages scheme, malice or other variously described forms of egregious conduct constitute the "trigger" for the imposition of punitive damages. Although this "trigger" could be retained under a deterrence-measure system, Dobbs recommends that it not be; retention of such a "trigger"

would constitute preserving one of the vaguest elements of the present system.

Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, addresses the explosion of punitive damages awards in product liability cases. He recognizes that the punitive damages doctrine is a creature of common law and suggests a further development in that doctrine. Wheeler notes the deterrence and retribution rationales for punitive damages. He also notes that manufacturers choose the designs for their products, and thus if a defect exists, such conduct is commonly characterized as intentional ("conscious disregard" of the danger), thus warranting punitive damages. The result can be multiple punitive awards for a single product defect. Desired deterrence in such cases requires only that the expected costs slightly exceed the expected gains. Retribution requires that the punishment be proportional to the expected unjustified societal harm. Societal harm, however, can be greater than the expected cost to the manufacturer of compensatory damages, but it is, as a practical matter, impossible to know what additional punitive award is necessary to equate them. Therefore, Wheeler suggests a simpler system that can approximate these results. After reviewing the shortcomings of the present system, Wheeler proposes the following reforms: (1) that trials be bifurcated so that punitive damages issues are heard only after liability is found; (2) that juries be instructed that the purpose of punitive damages is to deter; and (3) that juries be instructed to make the punitive damages computation by calculating the defendant's expected benefits, the number of persons the defendant expected would be injured, and the expected probability of suit by those injured. Based on the jury's findings under these instructions, Wheeler offers a formula that establishes a cap on the punitive damages that may be awarded in a particular case.

Wheeler joins Chapman and Trebilcock, and Dobbs in opposing consideration of the defendant's wealth as a factor in determining the proper quantum of punitive damages. He argues that juries should be instructed that societal cost-benefit analyses by manufacturers are "proper, socially desirable, and required by law," that there should be a rebuttable (by clear and convincing evidence) presumption that punitive damages awards in excess of twice the compensatory award in product liability cases are exces-

sive, and that there should be a cap (a multiple of the manufacturer's expected benefit) on total punitive damages awardable in all cases attributable to a single defect.

Dorsey D. Ellis, Jr., *Punitive Damages, Due Process, and the Jury*, examines the process by which liability and the amount of punitive damages are determined. He finds that current procedures lack fairness, efficiency, and constitutionally required due process; consequently, he suggests procedural changes. The justifications for punitive damages are punishment and deterrence. Yet, the standards for their award "comprise a multiplicity of vague, overlapping terms that . . . are applied inconsistently." The uncertainty regarding liability and quantum of damages is due largely to the extraordinary discretion given the jury. Not only is this unfair, in that there is no particular predictable relation between the act and the desert, but it is inefficient in that it encourages excessive avoidance costs. Also, vicarious liability for, and insurability of, punitive damages are antithetical to the notions of fairness and efficiency.

Ellis points out that the problem is not a problem of average or median awards, but of volatility of awards—of variance and uncertainty. This problem results from the standardlessness of the law of punitive damages. He notes that punitive "damages" are more in the nature of criminal fines than of damages. Therefore, Ellis recommends reforms in punitive damages procedures to bring them into line with constitutional requirements.

First, the rationales for the higher standard of proof in criminal cases apply to punitive damages cases as well. Although in the punitive damages context these rationales may not support the full beyond-a-reasonable-doubt standard, a clear-and-convincing-evidence standard may be appropriate. Second, because of limitations on the ability of a jury to separate issues and to weigh factors differently depending on whether compensatory or punitive liability is being considered, Ellis argues for bifurcation of those issues. Finally, Ellis argues that, because of the relative competencies of the two institutions, the "sentencing" on the quantum of punitive damages is properly a "legal" function of the judge, rather than a "factual" function of the jury.

George L. Priest, *Insurability and Punitive Damages*, focuses on the specific question of the desirability of permitting insurance against the award of punitive damages. The courts are divided on

whether insurance against punitive awards is permitted. The reason to deny coverage is that such coverage conflicts with the deterrence purpose of punitive damages. Some courts, however, have denied the deterrent effect, or found it even in the presence of insurance, or otherwise found the absence of that deterrent effect not dispositive. If insurance is permissible, then the question becomes, under standard contract language, "whether punitive liability implies something other than liability for personal injury," and whether the action giving rise to punitive liability was "intentional" and therefore excluded from coverage.

Priest notes that insurance requires that the loss be probabilistic in nature, having a certain mean and variance. Not only can losses be spread, but by taking advantage of the law of large numbers, risk can be reduced through aggregation of uncorrelated losses, thereby reducing variance. This allows smaller reserves than would be necessary absent insurance. That is, total "premiums" (set aside, or paid to an insurer) can be lower. For insurance to function as just described, the risk pool must be sufficiently narrow not to drive out low-risk members. However, lowered cost in turn tends to increase the level of injury-inducing activity ("moral hazard"). This phenomenon is controlled by the definition of insurance coverage. Thus, exclusion of intentional acts of the insured controls the problem of moral hazard and restricts coverage to the probabilistic events insurance is designed to cover.

Priest states that the standard for punitive liability is variously stated as "reckless," "grossly negligent," "willful and wanton," etc. This type of standard is a form of "moral exclusion of behavior," compelling such persons to bear "the moral burden of their actions," segregating that behavior from the "acceptable moral pool." Priest argues that as moral exclusion is appropriate, exclusion from coverage of losses "generated at the extreme of the risk continuum" is in the public interest. Definition of that which is covered should be an insurance definition based on whether the risk is probabilistic and whether it will reduce moral hazard. If so, then it is consistent with what the dominant population of insureds would want. This argues for exclusion of punitive damages. Curiously, Priest notes, the parties do not expressly exclude punitive damages from policies, perhaps because as punitive damages are awarded today, they have become probabilistic (and in the process lost their moral and economic justification). That is, they are

not in fact closely correlated with intentional behavior. Nonetheless, exclusion of extreme behavior would make insurance less expensive and more generally available and deter extreme behavior.

Peter Huber, *No-Fault Punishment*, examines the evolution of product liability law and punitive damages law. While the punitive damages doctrine is old, it was until recently severely restricted to outrageous conduct, and usually to individual culpability. Product liability law developed as an economic and social experiment. Historically, tort law had been viewed as identifying fault—culpability. But, strict product liability was developed in recognition of the fact that accidents were bound to occur. Strict product liability was intended to spread their costs. It would not be a fault system at all. However, the public perception of culpability has prevailed. Finding manufacturers liable in product liability cases has caused the public to view them as culpable and in turn has spurred vicarious liability and the increase in frequency and quantum of punitive damages awards in such cases. The final step in this evolution has been the bringing of a criminal complaint against Ford Motor Company in a Pinto case—an evolution from no-fault to crime.

E. Donald Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, notes that the "virtually unlimited discretion to award monetary damages" given to juries by the punitive damages doctrine is a "relic." But punitive damages do exist, and appear unlikely to go away anytime soon. Therefore, Elliott asks: "Does it make sense in a modern tort law system committed to creating efficient incentives for safety to give juries unlimited, standardless discretion to punish corporate conduct by awarding monetary damages?"

Elliott's answer is "a qualified 'No.' " Because of their unpredictability, punitive damages offer no guide to the future. Although there is *general predictability* that participating in a certain business exposes one to the risk of punitive damages, there is no *specific predictability* as to what behavior in that business exposes one to greater risk of punitive damages. Therefore, although many may be deterred from the business, the behavior of those in the business remains unaffected. Elliott finds that what little evidence there is suggests that punitive damages have little effect on corporate behavior. The reasons are, first, that the sanction is not swift.

Suits are brought years later, and litigation is slow. Second, the sanction is uncertain, in that verdicts are inconsistent on similar facts. Third, the magnitude of awards is not as large as is popularly believed, and the impact of those awards is greatly diminished by insurance. In light of the "diversified portfolio" of most corporate defendants, punitive damages have little incentive effect.

Elliott also notes that "[l]aw is part of the culture." As such, punitive damages against corporations undermine individual responsibility by providing a buffer between the sanction and the person responsible for the conduct; and they create the impression that corporate misconduct is simply a dollars-and-cents calculation. Criminal sanctions against the individuals involved, or injunctive relief, he argues, would be far more effective.

Michael Wells, *Comments on* Why Punitive Damages Don't Deter Corporate Misconduct Effectively, disagrees with Elliott's proposition that punitive damages do not deter corporate misconduct. First, Elliott offers "little plausible evidence to support the empirical claims." Even if corporate misconduct has increased during the same time period that punitive damages awards have increased, Wells notes, the standard to which corporations are held also has been raised. Moreover, the poll of corporate executives cited by Elliott is poorly designed to reveal the incentive effect of punitive damages. Second, Elliott's complaints that punitive damages are ineffective because of delay and uncertainty in their award is more a complaint against the entire "common law of torts as a mechanism for achieving cost justified precautions," and calls into question not whether punitive damages should be retained, but whether common law torts should be retained. Third, even if Elliott is correct in his assertions, this problem might be corrected by measures short of the abolition of punitive damages. Economic analysis ascribes to punitive damages a role of assuring that actors do not undervalue the cost of negligently caused accidents. Therefore, ways should be sought "to make them more effective." As to uncertainty, punitive damages should be imposed only, and routinely, in cases in which many of those who are injured do not bring suit. If awards are ineffective because they are reduced or because they are covered by insurance, then they should not be reduced, and insurance should not be allowed.

Angela P. Harris, *Rereading Punitive Damages: Beyond the Public/Private Distinction*, attacks the notion of a public/private

law distinction between compensatory tort law and punitive criminal law. A similar idea may be suggested by Ellis's proposal that criminal-type procedural safeguards be added to punitive damages proceedings. Harris notes the general availability, justifications for, and widespread criticism of punitive damages. The conventional criticism is that the private plaintiff should not be awarded the money damages for a public wrong. Moreover, the discretion given court and jury with respect to criminal sanctions imposed is greatly circumscribed, yet in the civil case the jury is left to its caprice. And, double punishment may be imposed.

Historically, the civil/criminal distinction was largely procedural in nature. It did not even appear until 1713, and it is inaccurate in that all law has public and private aspects, affecting both the individual and the community. In recent years, in fact, there has been more attention to the public aspects of tort law, while there simultaneously has been interest in private involvement in criminal law. Nonetheless, the public/private distinction persists. Harris suggests that it owes its endurance to "liberal legalism," which views the individual as presocial and atomistic, bonding together into society by an act of will. (Hence the fundamental split between "private" and "public.") Private law creates "zones of free conduct" free of legal interference, while public law polices behavior to protect individual "rights." The distinction remains important, though Harris finds its foundation shaky.

Harris views the self as socially developed and maintained rather than atomistic. As such, an action to vindicate the individual is both "public" and "private." Early punitive damages awards for injury to "honor" recognize the significance of social status to the individual. But, social status is ascribed by the society, and therefore society also has an interest. Both interests are served by punitive damages. Today the term "honor" is replaced by the term "dignity" ("personal injuries that also involve humiliation or other injuries to the plaintiff's 'social self' "). The wrong is redressed by reducing the defendant's social status by the "badge of disgrace" of a punitive award. It is both punishment and compensation.

Because the rules of social interaction are both collective and internalized, the legal principles of punitive liablity need not be stated clearly and in advance. Fair warning has been given because the legal principles are internalized by all members of the community. The punitive damages award, then, reflects the collective

"outrage" of the community, but not the individual "passions" or "prejudices" of the jurors. The decision of the jury is not left to "whim" or "caprice," but to shared, internalized, and therefore public, rules of deference and demeanor. And, because the defendants are members of the community, they are not deprived of fair notice.

Harris notes two tensions, however. First, monetary punitive awards may not be appropriate, since commodification of dignity may itself be degrading. Second, because it is not clear that corporations themselves are, as persons, part of the deference and demeanor relationships, it is not clear that vicarious awards against corporations are appropriate.

Jerry J. Phillips, *A Comment on Proposals for Determining Amounts of Punitive Awards*, picks up on the theme of the foregoing papers that "some form [of punitive damages] is useful and desirable and should be retained," but that there is a problem of arbitrariness and excessiveness. He finds mechanistic proposals such as fixed multiples or fixed-dollar ceilings excessively rigid, thereby undermining the deterrent effect of punitive damages. Phillips rejects the economics cost-benefit approach that would make punitive damages merely an adjustment for nonenforcement or less-than-full recovery. He argues that one cannot with any reasonable accuracy calculate the shortfall and, moreover, that tortious conduct frequently is not profit-motivated. He further argues that the defendant's wealth is a pertinent deterrence consideration, and that punitive damages are necessary to avoid unjust enrichment when the defendant profits more than the plaintiff is injured.

Phillips agrees with the allegation that punitive damages are uncertain, but he argues that this is desirable in order to allow the penalty to fit the degree of fault and harm. As to the allegation that punitive damages lack proportionality, he responds that this must be addressed on a case-by-case basis. As to the allegation that in mass tort cases multiple punitive awards subject the defendant to a disproportionate penalty, he responds that in such cases there is in fact a continuous or repetitive tort. He notes that the jury, or the judge in a post-trial proceeding, can be informed of prior awards and make appropriate adjustments.

Finally, Phillips rejects the argument that punitive awards that are too large cease to deter. He finds that allegation contrary

to human nature. He rejects the argument against vicarious corporate liability by noting that "the corporation should be liable for [the tortious acts of those who conduct the day-to-day business of the corporation] whether those acts give rise to compensatory or punitive damages."

David Friedman, *An Economic Explanation of Punitive Damages*, addresses the problem of punitive damages and use of the "legal system to prevent inefficient acts." He notes that neither the negligence standard nor the strict liability standard, from an efficiency perspective, should be concerned with the intentionality of the act. And, neither seems to justify punitive awards. Why then do punitive damages exist? It is sometimes argued that they exist to provide full compensation (*e.g.*, to cover costs of litigation), but if so, why aren't they available in all cases? It is also argued that some satisfactions are "illegitimate," even though their benefits outweigh their costs, but this simply *defines* away the inconsistency by creating a special exception. Any problem can be so handled, but it weakens the "analysis" by allowing one to start with one's conclusion, go through the analysis,. and arrive at the very conclusion with which one arbitrarily began.

Starting with the premise of efficiency, Friedman proposes an alternative analysis of punitive damages. He does not attempt to explain the punitive damages of recent times, but rather the more modest punitive damages of the past that were limited to deliberate or reckless acts, were not large multiples of compensatory damages, and were associated with compensatory damages that were narrowly defined. He notes that there is a cost of the legal system itself—a cost of imposing penalties, a cost of litigating, etc. The cost of the system depends greatly on the size of the punishment. The size of the punishment increases the costs spent on litigation, but also reduces the incidence of the behavior. Depending on the elasticity of the supply of offenses, it may be more efficient, taking into account enforcement costs, to set the "damages" above or below the value of the harm done (which would be optimal in the absence of enforcement costs). The more elastic the supply of offenses, the higher the "damages" should be; the more inelastic the supply, the lower the "damages" should be. The higher the damages to be received, the greater the incentive to detect and sue tortfeasors.

Friedman argues that deliberate torts are likely to be more elastic and accidental torts less elastic. Prospective damages probably are not a major component in our calculations of how safely to drive; thus, with respect to damages, driving safety is not likely to be highly elastic. On the other hand, an intentional battery is easily detected and, because intentional, certain to occur. Therefore, it is likely to be highly elastic with respect to damages. In fact, this approach predicts a system in which accidental torts result in less than full recovery (considering litigation costs), but in which intentional torts result in recoveries approaching or exceeding full recovery (including punitive damages).

One last question remains. Why don't courts award punitive damages based on the elasticity of the supply of offenses, rather than on whether the offenses are "willful and wanton"? The answer is that, given the limitations of courts in making such determinations, this approximation by "simple rules" is more effective.

Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, focuses his attention on enforcement error in tort cases and concludes that punitive damages should be set to adjust for this, but that liability for punitive damages should be available only in cases of "gross shortfall from the legal standard . . . that would be profitable if liability were limited to compensatory damages." This would provide incentives for efficient deterrence and would have other consequences.

Profit-oriented businesses will not violate a legal standard unless they can gain by doing so. Enforcement error—the failure to detect or prosecute all violations—can provide such an incentive, but only if it is a large enforcement error. The business will weigh the cost of precautions against the harm done to victims, adjusted by the probability of enforcement. This probability of enforcement (say half of the victims sue) is called enforcement error. The appropriate adjustment is the reciprocal of the enforcement error. (If each victim should be compensated $100, but only ½ the victims sue, then the award should be multiplied by 2 in order to optimally deter.) Where precautions are continuous in nature (*e.g.*, driving speed), costs jump abruptly at the point at which the legal standard is violated—from no liability to full liability, from no litigation expenses to full litigation expenses, etc. Yet some of these accidents would have occurred even had reasonable care been

exercised. Where there is a small enforcement error, precautionary behavior will not be changed, due to the large jump in costs of liability. Only a large enforcement error will reduce precaution, and the reduction in precaution must be substantial to justify the added risk. Moreover, such behavior probably is intentional. Therefore, the liability standard should be that of "a gross shortfall from the legal standard." This is true even if the legal standard is not known with certainty, since precautions probably are increased so that they moderately exceed the standard in order to take account of the uncertainty.

Cooter notes that the existence of punitive damages enhances the bargaining position of the plaintiff in settlement negotiations. Their existence helps overcome enforcement error, but also aggravates certain asymmetries between defendants and plaintiffs. He also notes certain limitations of the model. There are problems with its application in cases involving large or biased error in the standards, strict liability, nonpecuniary harm, malice (or similar idiosyncratic motives), lapses, and victim's precautions.

At a practical level, adoption of Cooter's proposal would change the plaintiff's burden of proof with respect to punitive damages. Defendant's wealth would be irrelevant unless the punitive damages award threatened bankruptcy or substantial economic deterrence (in which cases deterrence can be achieved with a smaller punitive award). Application of the ratio rule by which punitives must bear a reasonable ratio to compensatory damages, if one recognizes the purposes as adjusting for enforcement error, would require a ratio on the magnitude of perhaps two to one, or ten to one, but certainly not sixty to one or more. (Statutory civil and criminal fines can provide evidence of the enforcement error the legislature believes exists.) Vicarious liability should be limited to cases of gross shortfall in the monitoring of agents. Whether the moral hazard effect of insurance outweighs the benefits of insurance company monitoring of insureds is unclear. Similar analysis is required with respect to waivers, disclaimers, etc. Proper calculation of enforcement error solves the problem of excessive multiple punitive damages awards. Cooter notes that the analysis presented above would apply if recovery were for exposure to risk rather than for injury. Finally, Cooter presents a number of examples and applies his model to their analysis.

Mark F. Grady, *Punitive Damages and Subjective States of Mind: A Positive Economic Theory*, disagrees with Cooter's premise of a discontinuity based on liability. The cause-in-fact doctrine renders negligence liability continuous because the defendant is liable only for the accidents caused by violation of the negligence rule, not for accidents that would have occurred notwithstanding the negligence. Thus, enforcement error does not insure that all deliberate wrongs will be gross. Rather than finding an objective standard, Grady maintains that a subjective standard must be applied, as the courts in fact do. Punitive damages ought not be applied to inadvertent negligence, because they are not needed and in fact would encourage overinvestment in precaution. Punitives, however, can offset strategic and risk-preferring behavior.

It is true that in some cases in which cause in fact is incapable of being shown the doctrine is not applied, but these are the exception rather than the rule. These exceptional cases can be handled by recoveries based on the probability that the defendant's negligent conduct was the cause in fact.

Grady notes that in practice small intentional departures from due care are routine (*e.g.*, speeding by five miles per hour), contrary to Cooter's prediction. Similarly, he finds that enforcement error does not necessarily induce negligent behavior for several reasons: some precautions, once taken, extend into other time periods (*e.g.*, a brake job); there may be litigation expenses; punitive damages may be imposed; and one might be held liable for some harm that would have occurred anyway (due to the way the cause-in-fact doctrine is applied). Grady notes that the cost of constant care is too high to make it efficient, but that courts (under the Learned Hand formula) ignore this cost. They adjust, however, with compensating doctrines (*e.g.*, contributory and comparative negligence, proximate cause). These doctrines in turn encourage (intentional) strategic behavior. Similarly, some people will deliberately engage in negligent behavior because of enforcement error or because they are risk preferrers. Courts adjust for this with punitive damages, suspension of the compensating doctrines, and suspension of the cause-in-fact doctrine.

In the United States imposition of punitive damages is based on a subjective standard ("malice," "conscious indifference," "evil motive," or "reckless indifference") that describes risk-preferring,

strategic, or enforcement-error-exploiting, negligence. Subjective negligence may be identified, in some cases, by the degree of departure from the standard of care (one must have known), or by how many times one could have remembered the standard (durability of the precaution), but these are not necessary relationships. The subjective standard is consistent with the case law, but the theory enunciated by Grady generally argues against application of punitive damages to product liability cases. Strategic behavior is less likely in product liability cases. In a corporate context, risk-preferring behavior can be adequately handled by compensatory damages. In any event, the standard should not be whether the product design decision was conscious, but whether it was unreasonable. As for enforcement error, the availability of class actions reduces the need for punitive damages.

Harold See, *Punitive Damages: A Supporting Theory*, concludes that there is little support in the Symposium for damages that are truly punitive in nature. Because the analysis in these articles is largely, and appropriately, economic in nature, he concludes that theoretical support for punitive damages, if any is to be found, must be noneconomic in nature. He considers harm and fault as two such rationales. Harm he rejects as supporting only compensatory awards, or as being undesirably Draconian in its implications. The problem with the fault rationale is that it requires the identification of some fundamental value (other than "fault" itself) for its substance. The fundamental value See suggests is that of the proper functioning of our compensation system. The legal compensation system in conjunction with the market is what generates efficient outcomes. That system, however, can be subverted by fraud, misrepresentation, or suppression of information. Therefore, such conduct, See argues, should give rise to punitive damages.

The final contribution, by Professor Gary T. Schwartz, *Afterword*—Browning-Ferris: *The Supreme Court's Emerging Majorities*, presents an analysis of the Supreme Court opinion in *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.* That case raised the Eighth Amendment Excessive Fines Clause as a challenge to a civil punitive damages award. The Court found no constitutional violation because of the inapplicability of the clause to civil cases. Schwartz disagrees with the sharp civil-criminal distinction mentioned by the majority, but does agree that for the

clause to apply the penalty must be a "fine." On this basis, the majority found no fine because the action was privately initiated, not governmentally initiated. The question thus turns on the purpose of the Excessive Fines Clause, an inquiry Schwartz leaves to others. Rather, he turns to the implications of *Browning-Ferris*.

Schwartz notes that the substantive and procedural due process issues of grossly excessive punitive damages, and of juries, largely unconstrained by statute, assessing punitive damages, remain undecided; however, those issues show promise of placing some restriction on the awarding of punitive damages. Schwartz addresses the proportionality standard Justice O'Connor would use to assess the excessiveness of punitive damages. It appears to be the best effort on the Court to date to implement a substantive due process standard. However, Schwartz finds it inadequate to address the variety of concerns that arise in individual cases involving punitive damages. In contrast, the procedural due process limitation finds ample current constitutional jurisprudential support and shows considerable promise. Schwartz recommends that the Court require States to specify standards for the awarding of punitive damages and in proper cases review the procedural sufficiency of these standards, but he recommends that at this time the Court not undertake the task of substantive review.

A debt of gratitude is owed to the Symposium participants for their willingness to take time from their busy schedules to attend the conference, and to write and revise their papers for publication. Special thanks is due to The University of Alabama School of Law, Dean Nathaniel Hansford, and University of Alabama President Roger Sayers for their support. Special thanks is also due to Professor Kenneth C. Randall who served as Symposium Administrator. Finally, while in no way wishing to detract from the substantial contributions of the foregoing, one would be remiss not to note that none of this would have been possible were it not for the exceptional dedication and commitment of the members of the *Alabama Law Review*. Special recognition is due William R. Corbett and Thomas H. Brinkley, Katharine Anne Weber, Bruce Andrew Pickens, Jr., S. Mark Burr, and Victoria A. Farr for their efforts beyond the call of duty. Also, the members of the 1988-89 editorial board have asked me to express their appreciation to Ruth Todd-Chattin and the members of the 1989-90 *Alabama Law*

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