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Citation: 72 Va. L. Rev. 139 1986

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A COMMENT ON THE CONSTITUTIONALITY OF PUNITIVE DAMAGES

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AS everyone who reads the newspapers must know, the American civil liability system is approaching a crisis. One prominent aspect of this crisis is the problem of punitive damages. In my view, punitive damages are out of control. Certainly recent awards are unprecedented in both incidence and amount. Moreover, the explosion in punitive judgments has not been accompanied by a reform of the terms of their imposition. Punitive damages may be inflicted without adequate procedural safeguards, in the absence of meaningful substantive standards, and in virtually unlimited amounts. Nowhere is the danger more complete than in products liability and other mass tort cases, where punitive damages may be repetitively invoked against a single course of conduct in unfair and potentially ruinous aggregation.

Not surprisingly, this situation has become a focus of constitutional debate. The main line of attack asserts the inadequacy of procedural protections against unjustified or erroneous punitive awards. This argument starts from the premise that the law of punitive damages should conform, so far as possible, to the law of criminal punishment. Because punitive damages procedures actually fall far short of this model, they may well be thought constitutionally infirm. This argument has been explored in a growing body of academic commentary.¹

* Professor of Law, University of Virginia. This comment grew out of work for a law firm and was, therefore, in origin not disinterested. Nevertheless, the decision to accord these views wider circulation was entirely my own, and they are offered here without reference to any pending litigation.

Thanks go to Kenneth S. Abraham and Daniel R. Ortiz, who read and criticized an earlier draft. Special thanks to Geoff Mearns, Susan Ressel, and Tom Stallings, each of whom individually and in collaboration with one another played an important role in preparing this paper for publication.

¹ For an especially sustained and thoughtful analysis of this issue, see Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269 (1983); see also Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. Chi. L. Rev. 408 (1967).

A second line of attack focuses on the substantive criteria for punitive liability. Under traditional doctrine, the standards are merely epithetical—for example, that the defendant acted “maliciously” or “wilfully or wantonly” or with “flagrant indifference” to the rights of others.² Imposition of criminal liability on such a basis would be void for vagueness, and one is left to wonder why the same defects of lack of notice and arbitrariness of result are not also fatal for punishment in another form. This too has been suggested in the literature.³

The point of this comment is to suggest a third reason for doubting the constitutionality of punitive damages. Repetitive and unrestrained punitive liability for a single course of conduct threatens aggregate punishment that is, by any sensible standard, excessive and unfair. In my view, this result is not merely unfortunate; it is arguably unconstitutional. Specifically, I suggest that repetitive punitive awards for a single course of conduct may amount to an unconstitutionally excessive fine in violation of the eighth amendment and of the more general requirement of due process of law. The balance of this comment explores that idea. I hope to show that punitive damages in mass tort litigation are far more vulnerable to constitutional attack than has commonly been supposed and thus to encourage closer judicial scrutiny of current practice.

I

At the outset, one might ask whether it is not too late in the day to suggest the unconstitutionality of punitive damages. After all, punitive damages have been around for a long time.⁴ Whatever academics may say against them, punitive damages at least have the warrant of past practice, and that in itself suggests constitutional permissibility. In fact, however, the application of traditional punitive damages doctrine to modern mass tort litigation has produced a situation altogether different from past experience. The problem addressed here is therefore surprisingly new.

² See generally Meyers & Barrus, *Punitive Damages in Products Liability Cases: A Survey*, 51 *Ins. Couns. J.* 212 (1984) (providing an encyclopedic description of the standards for awarding punitive damages in products liability cases).

³ See, e.g., Childres, *Remedies*, 1965 *Ann. Surv. Am. L.* 289-93 (1966); Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 *N.Y.U. L. Rev.* 1158, 1178-80 (1966).

⁴ See Morris, *Punitive Damages in Tort Cases*, 44 *Harv. L. Rev.* 1173 (1931).

The destructive synergism between traditional punitive damages doctrine and modern mass tort litigation was first perceived in 1967. Before that time, the typical punitive damages claim arose from an isolated incident involving only two parties. The usual allegation was that defendant's tortious conduct had been motivated by a malicious or spiteful desire to injure the plaintiff.⁵ The jury had only to assess the particular transaction before it and to determine on that basis whether the defendant's conduct warranted a punitive award. The narrow factual boundaries of these disputes seem also to have suggested natural limits on the size of awards. In any event, most punitive judgments were, by today's standards, almost trivial in amount.⁶ Although not constrained by the same procedural requirements as other forms of punishment, punitive damages at least were based on a manageable jury inquiry. In such circumstances, and despite the grave questions raised by the absence of procedural safeguards and the lack of adequate standards, it was possible to view punitive damages as minimally consistent with fundamental fairness.

By 1967 suits involving "MER/29," an anti-cholesterol drug with disastrous side effects, began to reveal the dangers of traditional punitive damages doctrine as applied to modern mass tort situations, especially those involving product liability. The Second Circuit identified and canvassed those dangers in *Roginsky v. Richardson-Merrell, Inc.*⁷ Judge Henry Friendly focused on the special difficulties of allowing punitive damages in mass tort cases. Judge Friendly foresaw that repetitive punitive awards for a single course of conduct could subject a defendant to liability of staggering magnitude. The cumulation of such punishment might far exceed the maximum penalties authorized by the criminal law—indeed might exceed any level of sanction that could rationally be thought necessary to serve any legitimate purpose. No mechanism existed for ef-

⁵ See, e.g., Szuch & Shelley, *Time to Eliminate Punitive Damages?*, Nat'l L.J., Feb. 28, 1983, at 13, 36.

⁶ See, e.g., M. Peterson, *Punitive Damages: Preliminary Empirical Findings* 11 (1985), which reports that the average punitive award in Cook County, Illinois increased from \$4,000 during 1960-1964 to \$489,000 during 1980-1984. Peterson's data show that, although most punitive awards remained modest, business defendants were increasingly subject to the risk of extraordinarily high punitive awards—enough to create a more than one hundred-fold increase in the overall average.

⁷ 378 F.2d 832 (2d Cir. 1967).

fective control of aggregate awards nor for meaningful guidance of jury decisionmaking. The *Roginsky* trial judge had done all he could by instructing the jury that it might "consider the potentially wide effect of the actions of the corporation and, on the other hand, the potential number of actions similar to this one to which that wide effect may render the defendant subject."⁸ But, as Judge Friendly noted, "it is hard to see what even the most intelligent jury would do with this, being inherently unable to know what punitive damages, if any, other juries in other states may award other plaintiffs in actions yet untried."⁹ There was no rule that the first award would exhaust punitive liability, nor did it seem "either fair or practicable to limit punitive recoveries to an indeterminate number of first-comers, leaving it to some unascertained court to cry, 'Hold, enough,' in the hope that others would follow."¹⁰ In short, the Second Circuit saw in repetitive punitive awards for marketing a single defective product a system careening out of control, and it reversed the \$100,000 punitive award made in that case.

In the years immediately following *Roginsky*, Judge Friendly's fears may have seemed overwrought. In 1976 a leading authority wrote that "*Roginsky* appeared . . . to have laid the matter to rest" and could find only three subsequent cases in which punitive awards for defective products had been upheld on appeal.¹¹ The calm, however, did not last. In the mid-1970's, unprecedented numbers of punitive awards in product liability and other mass tort situations began to surface. Many of these awards were also unprecedented in amount. And these trends continued and accelerated into the 1980's.

Today, Judge Friendly's fears have become reality. Thousands of punitive damages claims have been filed against manufacturers of mass-marketed products. These include suits arising from the sale of asbestos, formaldehyde, DES, Agent Orange, automobiles, tampons, and the Dalkon Shield.¹² Typically, the manufacturers of

⁸ Id. at 839.

⁹ Id.

¹⁰ Id. at 839-40.

¹¹ Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1258, 1261 & n.12 (1976).

¹² Full citation to these cases, as well as a thoughtful investigation of possible solutions to the problems they pose, may be found in Seltzer, Punitive Damages in Mass Tort Litigation:

these products have faced not only massive (and presumably justified) compensatory liability but also repetitive and unrestrained punitive awards, sometimes in hundreds of different actions. Similar problems have arisen in other mass tort situations, for example, the collapse of the skywalks in the Kansas City Hyatt Regency.¹³

The sudden upsurge of punitive damages claims can be traced in the secondary literature. Treatises that attempt encyclopedic coverage of these subjects have struggled to keep up with the explosion of litigation in this field.¹⁴ Not surprisingly, the developing crisis has promoted a flood of secondary comment.¹⁵ The nation's trial judges have also been quick to sound the alarm. One knowledgeable trial judge was moved by first-hand experience with punitive claims in modern products liability cases to make a dire prediction:

Recently, and unprecedented in history, state and federal trial judges are being inundated with mass filings of lawsuits by individual plaintiffs, *each* seeking compensation and a share of large punitive damage awards, based on a single catastrophe or the mass production and sale by one defendant of a defective product. . . . [I]t is not an overly pessimistic prediction that, absent some legislative or judicial solution, our attempt to try these virtually identical lawsuits, one-by-one, will bankrupt both the state and federal court systems.¹⁶

Addressing the Problems of Fairness, Efficiency, and Control, 52 *Fordham L. Rev.* 37 (1983).

¹³ *Id.* at 40.

¹⁴ L. Frumer & M. Friedman, *Products Liability* (1984), for example, is a comprehensive treatise on products liability, published in hard-cover binders to allow frequent supplementation and change. It was first published in 1960 and went through 21 copyrights in the years through 1984. A chapter on punitive damages in products liability cases was first added in 1980. It ran 11 pages and reported only 30 cases. The corresponding chapter in the 1984 edition and accompanying supplement entry run 102 pages and cite cases too numerous to count. See 3 *id.*, ch. 10A.

The same lesson may be drawn from K. Redden, *Punitive Damages* (1980), a comprehensive treatise on the subject of punitive damages. As originally published, it contained a five-page section on "Products Liability." See *id.* § 4.2(A)(2). The pocket part issued five years later supplements the original section with an additional 21 pages on "Products Liability: In General" and adds an entirely new discussion of punitive damages in the context of "Mass Products Liability." See *id.* § 4.2(A)(2)(a)-(b) (K. Redden & L. Schlueter eds. Supp. 1985).

¹⁵ K. Redden, *supra* note 14, cites more than 40 recent books and articles on this subject, and more are published every month.

¹⁶ The Hon. Spencer Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 *F.R.D.* 323, 324 (1983).

Also notable is the intellectual migration of a leading authority in this field, Professor David Owen. In 1976 Professor Owen published an important article in which he endorsed awards of punitive damages in products liability cases. He concluded "that punitive damages may be usefully employed in products liability litigation to punish and to deter the marketing of defective products in flagrant disregard of the public safety."¹⁷ Barely six years later, he reconsidered.¹⁸ At the time of the first article, Owen reported, the largest product liability punitive award ever upheld on appeal was \$250,000. By the time of the later work, the California courts had affirmed on appeal a punitive award of \$3.5 million, reduced from an original jury assessment of \$125 million; the Fifth Circuit had just reinstated a \$5 million punitive award against Honda Motor Co.; and a canvass of recent trial court decisions revealed several more multimillion dollar awards in the works.¹⁹ These cases led Owen to a reassessment:

My conclusion in 1976 was that punitive damages awards should be permitted in appropriate products liability cases. After the judicial experience of the ensuing years, I remain convinced of the need to retain this tool of legal control over corporate abuses. . . .

Yet the experience of the past several years has raised questions whether the punitive damages doctrine is being abused in products cases, whether some manufacturers are being punished who should not be, and whether penalties, though appropriately assessed, are sometimes unfairly large.²⁰

More recent cases show that Owen's concern for "unfairly large" punitive awards was, in fact, understated. Several more multimillion dollar judgments against automobile manufacturers²¹ and an even larger Dalkon Shield award²² have been affirmed on appeal.

¹⁷ Owen, *supra* note 11, at 1261.

¹⁸ See Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1 (1982).

¹⁹ *Id.* at 2 n.9.

²⁰ *Id.* at 59.

²¹ *Toyota Motor Co. v. Moll*, 438 So. 2d 192 (Fla. Dist. Ct. App. 1983) (\$3 million punitive judgment for fuel system design defects affirmed); *Wolmer v. Chrysler Corp.* 474 So. 2d 834 (Fla. Dist. Ct. App. 1985) (\$3 million punitive award for fuel system defect reinstated); *Ford Motor Co. v. Nowak*, 638 S.W.2d 582 (Tex. Civ. App. 1982) (\$4 million punitive judgment for transmission design defect affirmed), writ ref. n.r.e. (1983).

²² *Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984) (\$6.2 million punitive judgment affirmed).

Trial court judgments in amounts of \$1 million or larger have become almost commonplace.²³ Insurance sources report that in the years 1983 to 1985, California courts entered thirty-eight punitive awards in excess of \$1 million.²⁴ In fact, in the first half of 1985 five California juries entered punitive awards totalling \$242 million.²⁵ Of course, even this sum is dwarfed by the \$3 billion (yes, billion) punitive assessment in the Texaco-Pennzoil litigation.²⁶ Some of these judgments may be reduced on appeal, but others will not. For most cases, the likelihood is a very large settlement.

Even more disturbing, judgments of this magnitude represent only a small fraction of the total exposure to punitive liability. Most of these awards were for defective product design or manufacture. Every person injured thereby may make an independent claim for punitive damages. The prospect, therefore, is not merely

²³ See, e.g., *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565 (6th Cir. 1985) (\$1.5 million punitive award affirmed in an asbestos case); *Dorsey v. Honda Motor Co.* 655 F.2d 650 (5th Cir. 1981) (\$5 million punitive award for automobile design defect affirmed), modified on other grounds, 670 F.2d 21 (5th Cir.), cert. denied, 459 U.S. 880 (1982); *Maxey v. Freightliner Corp.*, 450 F. Supp. 955 (N.D. Tex. 1978) (\$10 million punitive award for truck design defect set aside), aff'd, 665 F.2d 1367 (5th Cir. 1982); *Hansen v. Johns-Manville Corp.*, No. G-79-124 (S.D. Tex. May 12, 1982) (\$1 million punitive judgment entered in asbestos case), modified, 734 F.2d 1036 (5th Cir. 1984) (reduced to \$300,000); *Sturm, Ruger & Co. v. Day*, 594 P.2d 38 (Alaska 1979) (\$2.9 million punitive award for pistol design defect affirmed), modified on reh'g, 615 P.2d 621 (Alaska 1980) (reduced to \$500,000), cert. denied, 454 U.S. 894 (1981); *Chastain v. Lynndale Int'l*, No. CIV-80-23 (Clebunne Cty. Cir. Ct., Ark. 1981) (\$3 million punitive judgment); *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (\$125 million punitive award for automobile design reduced to \$3.5 million); *Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984) (\$6.2 million punitive award in IUD case affirmed); *Wolmer v. Chrysler Corp.* 474 So. 2d 834 (Fla. Dist. Ct. App. 1985) (\$3 million punitive award for automobile design defect reinstated); *Toyota Motor Co. v. Moll*, 438 So. 2d 192 (Fla. Dist. Ct. App. 1983) (\$3 million punitive award for automobile design defect affirmed); *Stanbaugh v. International Harvester Co.*, 102 Ill. 2d 250, 464 N.E.2d 1011 (1984) (\$15 million punitive award for tractor design defect dismissed for improper venue); *Johnson v. Lederle Laboratories*, No. 81-C-2470 (Sedgewick Cty. Dist. Ct., Kan. 1984) (\$8 million punitive award entered in polio vaccine case); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn.) (\$1 punitive award for flammable pajama affirmed), cert. denied, 449 U.S. 921 (1980); *Leichtamer v. American Motors Corp.*, 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981) (\$1.1 million punitive judgment for automobile design defect entered); *Ford Motor Co. v. Nowak*, 638 S.W.2d 582 (Tex. Civ. App. 1982) (\$4 million punitive award for automobile design defect affirmed), writ ref. n.r.e. (1983); see also Walsh, *Filing of Punitive Damage Claims in Focus of Increasing Controversy*, *Wall St. J.*, Nov. 12, 1984, at 27, col. 4 (reporting \$100 million punitive award against Ford Motor Co. in recent case).

²⁴ Tarnoff, *Leap in Punitive Damages Cited*, *Bus. Ins.*, Dec. 2, 1985, at 58.

²⁵ *Id.*

²⁶ See *Wall St. J.*, Dec. 11, 1985, at 3, col. 3.

that very large punitive awards may be made in isolated cases, but that they may be repetitively imposed for a single course of conduct.²⁷ In this way, the defendant may be punished ten or twenty or a hundred times over, in cumulations so extravagant and destructive as to defy any rational justification and to threaten the civil extinction of major business entities. As Professor Owen correctly noted, these developments "may fairly raise concern for the future stability of American industry."²⁸

Finally, it should be noted that a state-law solution to this problem is not feasible. The court that denies an additional award on the ground that the defendant has been sufficiently punished by previous judgments has no guarantee that other courts will follow suit. Courts in the same jurisdiction perhaps may be made to agree, but courts elsewhere would remain free to contradict that judgment. In reality, therefore, the most that an individual state can do is to adopt a self-denying ordinance that would succeed only in disadvantaging its own citizens relative to claimants in less responsible jurisdictions. The likelihood would be just the opposite—that a kind of competition will develop to show that Texas plaintiffs (and their lawyers) are just as entitled to riches as their California counterparts.

Equally unavailing is the naive suggestion that excessive multiple liability can be avoided by instructing the jury to consider the defendant's wealth in fixing an appropriate punitive award. Theoretically, later juries should moderate their awards by taking into account compensatory and punitive awards imposed in earlier litigation.²⁹ Yet, this supposed protection for the defendant would obviously "backfire" if, as seems inevitable, the jury takes a history of prior awards as evidence of liability in the instant case. Moreover, juries have a natural sympathy for injured persons and not infrequently a corresponding hostility to "big business." The notion that juror consideration of the multimillion, often multibillion, dollar figures on a corporate balance sheet would operate to pro-

²⁷ See Szuch & Shelley, *supra* note 5, at 13 ("The classic example of mass tort litigation is the nationwide asbestos litigation. To date, more than 10,000 actions have been filed in virtually every jurisdiction. In almost all of these cases, plaintiffs seek punitive damages . . .").

²⁸ Owen, *supra* note 18, at 6.

²⁹ See, e.g., L. Frumer & M. Friedman, *supra* note 14, at 46-47 (discussing but not endorsing this suggestion).

tect such defendants against excessive liability is, in context, almost laughable.³⁰

The unfortunate truth is that the evil of repetitive and unconstrained punitive damages cannot be forestalled on such an ad hoc basis, by either court or jury. A realistic solution to this problem must be national in scope and therefore federal in origin. It must come from the United States Congress or from a recognition by the federal courts of a constitutional limitation on punitive damages, a limit that state courts would then be obliged to respect. My suggestion here is that the case for a federal constitutional restraint on punitive damages is far stronger than has commonly been perceived.

II

Two provisions of the Constitution speak to the problem of repetitive punitive awards in mass tort litigation. The eighth amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”³¹ Additionally, the fourteenth amendment forbids any state to “deprive any person of life, liberty, or property, without due process of law.”³² The command of due process has long been understood to incorporate a requirement of “fundamental fairness” in the administration of law—even for large corporations. In my view, neither of these guarantees can comfortably be construed to permit unlimited multiple impositions of punitive liability for a single course of conduct.

A

The eighth amendment to the Constitution of the United States forbids excessive bail, excessive fines, and cruel and unusual punishment. The three are obviously related. In fact, because the guarantee against cruel and unusual punishment has been construed to forbid punishment that is excessive but not otherwise unusual,³³ the last clause has tended to subsume the first two. Nevertheless,

³⁰ See Owen, *supra* note 18, at 20 (including an informed and sensitive discussion of the problems of “juror limitations and attitudes” in this context).

³¹ U.S. Const. amend. VIII.

³² *Id.* amend. XIV, § 1.

³³ *Robinson v. California*, 370 U.S. 660, 667 (1962).

the amendment's text does explicitly record that the constitutional prohibition reaches "excessive fines," as well as unjustified incarceration.

Moreover, there is no apparent reason to doubt that the prohibition against excessive fines applies to the states. The Supreme Court has so held with respect to cruel and unusual punishment³⁴ and has assumed the same result for excessive bail.³⁵ Because the disapproval of excessive fines is logically intertwined with the other two provisions of the eighth amendment, its applicability to the states seems clear.³⁶

That punitive damages are functionally fines also seems clear. They inflict monetary penalties on the basis of particularized assessments of fault. The fact that the penalties are paid to private plaintiffs rather than to the government itself does not matter, for the eighth amendment was plainly designed to forbid excessive punishment, not government self-enrichment.³⁷

More problematic is the question whether the eighth amendment applies to civil or quasi-criminal fines, as well as to distinctively criminal punishments. The Supreme Court has noted that past applications of the eighth amendment ban on cruel and unusual punishment involve criminal sanctions and has suggested that the amendment might be limited to that context.³⁸ The Court, however, has recognized that certain punishments should be treated as criminal for purposes of the eighth amendment, even

³⁴ *Id.* at 666-67; *id.* at 675 (Douglas, J., concurring).

³⁵ See, e.g., *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971).

³⁶ See *Whitney Stores v. Summerford*, 280 F. Supp. 406, 411 (D.S.C.) (three-judge court), *aff'd mem.*, 393 U.S. 9 (1968); J. Nowak, R. Rotunda & J. Young, *Constitutional Law* 413 (2d ed. 1983).

³⁷ My colleague Ken Abraham suggests that this conclusion is not so obvious as I have made it seem. He notes the long-standing formal distinction that the eighth amendment may guard only against governmental abuses that cannot readily be identified in a private tort action. In my view, this intuition is plausible precisely because private tort actions ordinarily seek compensation rather than punishment. I would suppose that no award of compensatory damages, at least if adequately grounded in the evidence, could ever be considered unconstitutionally excessive. Where, however, the private tort plaintiff seeks to exact a penalty, the determination of whether that penalty is excessive should not depend on who gets the money. If, for example, a government were alleged to have authorized unconstitutionally excessive punishment by means of a civil fine, it surely would be no defense that the money went to a good cause. By the same token, it seems to me irrelevant that unconstitutionally excessive punishment imposed by means of punitive damages goes to the benefit of a private plaintiff.

³⁸ See *Ingraham v. Wright*, 430 U.S. 651, 664-68 (1977).

though they are not explicitly so labeled.³⁹ Thus, at least in some circumstances, the applicability of the eighth amendment turns on a functional analysis rather than mere formalism. This is entirely sound, for it is clear that a nominally civil fine may be every bit as "excessive" as a criminal one and should be equally objectionable.

This conclusion is reinforced by the significant textual differences between the eighth amendment and those Bill of Rights guarantees specifically limited to the criminal context. The fifth amendment, for example, provides that no person shall be held to answer "for a capital, or otherwise infamous *crime*" without indictment by grand jury, and that no person shall "for the same *offence* . . . be twice put in jeopardy of life or limb; nor shall be compelled *in any criminal case* to be a witness against himself."⁴⁰ Similarly, the sixth amendment explicitly details rights available "[i]n all *criminal* prosecutions."⁴¹ In contrast, the eighth amendment speaks to the severity of punishment rather than to its characterization. Although criminal punishments are admittedly more likely than civil sanctions to be unconstitutionally excessive under the eighth amendment, this is only a factual generalization, not a limitation of principle.

The critical fact, therefore, is that punitive damages are, as the name implies, a form of punishment. One authority noted that "[t]hese awards are not really damages at all. Rather, they are quasi-criminal sanctions imposed to punish defendants and to deter repetition of the offensive conduct by the defendant and other potential wrongdoers."⁴² Although this conclusion seems obvious, some authorities and a few courts identify compensation for otherwise uncompensated losses as a purpose of punitive damages.⁴³ In large measure, this is mere anachronism. It survives from the days when pain and suffering, mental anguish, and other intangible harms were not permissible elements of an ordinary compensatory

³⁹ Id. at 669 n.37.

⁴⁰ U.S. Const. amend. V (emphasis added).

⁴¹ Id. amend. VI (emphasis added).

⁴² Seltzer, *supra* note 12, at 43.

⁴³ See, e.g., *Doroszka v. Lavine*, 111 Conn. 575, 150 A. 692 (1930); Owen, *Civil Punishment and the Public Good*, 56 S. Cal. L. Rev. 103 (1982). This is very distinctly a minority view. Today, only three states assign any compensatory function to punitive damages, and in only one is it identified as the primary goal. See K. Redden, *supra* note 14, § 2.3(A), at 32 n.38.

award.⁴⁴ Today, of course, such restrictions no longer apply, and there is no good reason to believe that modern punitive damages awards correct any systematic inadequacy in ordinary compensatory remedies.⁴⁵ This is not to say that compensatory damages are always and everywhere sufficient to that purpose or that the goal of compensation is necessarily irrelevant to the law of punitive damages. The point is rather that compensation is, at best, a secondary concern in assessing punitive awards. That compensation may in some jurisdictions play a subsidiary role does not detract from the fact that retribution and deterrence are the main objectives. Punitive damages are therefore correctly treated as a form of punishment.

This conclusion is buttressed by reference to the Supreme Court's announced criteria for determining whether a sanction is punitive in nature. In *Kennedy v. Mendoza-Martinez*,⁴⁶ the Court listed seven factors relevant to that inquiry:

[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.⁴⁷

With the possible exception of the first, each of these factors supports the characterization of punitive damages as punitive. Indeed, the common designation of "punitive" or "exemplary" damages implies that such awards have historically been regarded as punishment, at least in this country.⁴⁸ Like most forms of punishment,

⁴⁴ See K. Redden, *supra* note 14, § 2.2(B)-(C), at 28-29. This development is described in some detail in Note, *supra* note 3, at 1160-61.

⁴⁵ See R. Epstein, *Modern Products Liability Law* 176-84 (1980). Epstein analyzes the possible rationales for punitive damages and concludes that punitive damages are most appropriate "as a kind of substitute punishment for conduct which is, or should be, punishable under the criminal law but which may well escape detection and punishment by the public authorities." *Id.* at 177. Epstein examines and rejects the notion that punitive damages actually serve a compensatory purpose. *Id.* at 177-78.

⁴⁶ 372 U.S. 144 (1963).

⁴⁷ *Id.* at 168-69 (footnotes omitted).

⁴⁸ See K. Redden, *supra* note 14, § 2.3(A), at 31 ("it has been well-settled doctrine in this

punitive damages require a finding of scienter—typically, that the defendant acted maliciously or with callous disregard for the rights of others. Obviously, punitive damages further the traditional aims of punishment, namely retribution and deterrence, and are usually supported on precisely such grounds. The behavior sanctioned by punitive liability is usually also subject to criminal prosecution, at least where it is performed with the requisite culpability. Finally, no alternative purpose can rationally be thought to account for current practice in awarding punitive damages, largely because of the great disparity between the size of the awards entered and any nonpunitive purpose they might be imagined to serve.

Taken together, the *Mendoza-Martinez* factors confirm that punitive damages are in fact, as well as in name, a quasi-criminal form of punishment. They are functionally equivalent to the “fines” addressed by the eighth amendment and should be subject to constitutional scrutiny on that basis.

It remains, therefore, only to determine when a punitive award, or aggregation of awards, should be deemed “excessive,” and hence unconstitutional. One plausible position would be that a punishment is presumptively excessive if duplicative.⁴⁹ Even if this strict limitation were rejected, it should still be clear that punishment is excessive if gratuitous—that is, if it is imposed in amounts so extravagant as to have no rational relation to the legitimate goals of retribution and deterrence. Such an inquiry is hardly self-executing, but absent a stricter rule, courts should be instructed that some such inquiry is constitutionally required.

B

Although the eighth amendment prohibition of “excessive fines” seems directly applicable to punitive damages, that conclusion is not essential to this argument. That protection is in any event subsumed in the more general requirement of due process of law. As the Supreme Court has repeatedly made clear, the content of due process is not limited to the specific provisions of the Bill of

country for over a century that exemplary damages are non-compensatory in character”).

⁴⁹ Cf. *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168-69 (1873) (“In civil cases . . . no man shall be twice vexed for one and the same cause. . . . [In criminal cases n]o one can be twice punished for the same crime . . .”).

Rights.⁵⁰ Nor is due process confined to criminal prosecutions; it applies to any legal proceeding or regime by which any person may be deprived of "life, liberty, or property."⁵¹ Due process requires, in whatever context, that legal procedures be consistent with "fundamental fairness";⁵² that they be consonant with "ordinary notions of fair play and the settled rules of law";⁵³ that they accord with "traditional notions of fair play and substantial justice";⁵⁴ and that they not offend "the community's sense of fair play and decency."⁵⁵ However phrased, the message is clear: due process mandates at all times, in all circumstances, and *for all defendants*, "fundamental fairness" at the hands of the law.⁵⁶

In discovering what "fundamental fairness" requires in the context of punitive damages, one might begin with the precedents. Strictly speaking, there are very few. One reason is that the infliction of repetitive and debilitating punitive awards for a single course of conduct is such a recent phenomenon. Until the last half decade, few courts would have anticipated, much less attempted to solve, the problem of runaway punitive damages in products liability cases. Equally important, these cases are brought under state law. Because the problem arises not from any single judgment, but from the repetitive and cumulative litigation of punitive claims, no

⁵⁰ See, e.g., *In re Winship*, 397 U.S. 358 (1970) (requiring proof beyond a reasonable doubt as the constitutional standard for criminal conviction, despite the absence of any provision specifically addressed to that question).

⁵¹ See, e.g., *Shaffer v. Heitner*, 433 U.S. 186 (1977) (finding constitutional inadequacy in traditional quasi-in-rem jurisdiction).

⁵² *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 25 (1981).

⁵³ *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

⁵⁴ *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945).

⁵⁵ *Rochin v. California*, 342 U.S. 165, 173 (1952).

⁵⁶ Among the several articulations of this principle, one of the most instructive comes from *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981). There the Court summarized the command of due process and outlined the analysis to be followed in determining its application to a particular context:

For all its consequence, "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Id. at 24-25 (citation omitted).

state has either the incentive or the opportunity to take corrective action. All a state court can do is to instruct the jury properly in the case before it, and the current crisis testifies to the inadequacy of that remedy.

Nevertheless, the few courts that have considered the matter agree that the requirement of fundamental fairness does limit multiple punitive recoveries for a single course of conduct. Perhaps the strictest limitation comes from *John Mohr & Sons v. Jahnke*,⁵⁷ in which the Wisconsin Supreme Court disallowed a very modest punitive award (\$500) because the claimant had already recovered treble damages, as authorized by state law. The court said that "to allow treble damages and punitive damages would amount to double recovery of a penalty and thus violate the basic fairness of a judicial proceeding required by the due process clause of the fourteenth amendment to the federal Constitution."⁵⁸ The same basic proposition has been strongly supported by academic lawyers, virtually all of whom agree that some limit on aggregate punitive recovery is needed in mass tort situations.⁵⁹

That few courts have had occasion to consider this issue in its modern context does not mean, however, that recognition of a federal constitutional restraint on aggregate punitive liability lacks

⁵⁷ 55 Wis. 2d 402, 198 N.W.2d 363 (1972).

⁵⁸ *Id.* at 409, 198 N.W.2d at 367; see also *id.* at 412, 198 N.W.2d at 368 ("Two penalties on the same or different theories for the same act violates basic fairness and thus due process of law."); *Hometwne Builders v. Atlantic Nat'l Bank*, 477 F. Supp. 717, 720 (E.D. Va. 1977) ("combination of treble damages and punitive damages is necessarily duplicative").

Note that *John Mohr & Sons* illustrates the eminently sensible action that a state court can take when the matter is entirely within its control. The problem of multiple recovery arose in that case only because there was a state statute authorizing treble damages. The Wisconsin Supreme Court was able, therefore, to solve this problem on a local basis, and it did so. The problem of repetitive punitive awards in the multistate mass tort situation, by contrast, although presenting unfairness incomparably more severe than anything involved in *John Mohr & Sons*, is not capable of local resolution.

⁵⁹ See, e.g., Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 6-7 (1982) (deriving the necessity for a limit on aggregate awards from general theories of punishment); Owen, *supra* note 18, at 44-59 (recognizing "the threat of over-punishment from multiple awards for a single product mistake" and exploring mechanisms for asserting greater judicial control); Seltzer, *supra* note 12, at 61 (endorsing class action device as a means of implementing such a limitation). Indeed, even the commentators, increasingly in the minority, who endorse the general utility and fairness of punitive damages, concede the need for some reform to limit multiple recoveries for a single course of conduct. See, e.g., Riley, *Punitive Damages: The Doctrine of Just Enrichment*, 27 Drake L. Rev. 195, 252 (1977-78).

precedential support. Quite the opposite is true. Limiting aggregate punitive awards is a straightforward application of an ancient and settled principle of Anglo-American justice. That principle condemns excessive monetary penalties, whether civil or criminal. More specifically, it requires, at a minimum, that monetary penalties be limited in amount so as not to threaten the defendant's economic viability.

The story begins in the early days of English justice, before crime and tort were clearly distinct. At a very early date, the tribal blood feud was superseded by money payments in lieu of vengeance. At first such payments were merely customary, but later they became mandatory. These sums included elements that today would be characterized as compensatory and others that would be regarded as punitive. Appropriately, they were owed not only to the victim or his family but also to the king or lord. As the feudal structure grew more complex, the multiplicity of such charges became more onerous, until finally it became "practically impossible" for an offender to "buy back the peace once it had been broken."⁶⁰

At this point the king stepped in with an offer of protection. A wrongdoer could surrender himself and his goods to the king, who would restore him to the protection of the law on payment of a fine. Because all of his goods were technically delivered to the king, the offender was said to be "a mercie" or "at the king's mercy" with respect to their disposition.⁶¹ The fine ultimately imposed thus came to be known as an "amercement,"⁶² and in early Norman England it was the usual penalty for a very broad range of delicts and offenses. Indeed, even after "felony" had come to be separately defined and distinctively punished, amercements continued to be the penalty imposed for the residual category of lesser offenses.⁶³

Unlike the early payments used to forestall blood feuds, amercements were not levied according to any fixed schedule but arbitrar-

⁶⁰ W. McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* 285 (2d rev. ed. 1914).

⁶¹ See 3 W. Blackstone, *Commentaries* *376.

⁶² Black's *Law Dictionary* (4th ed. 1951) defines the term as "[a] pecuniary penalty, in the nature of a fine, imposed upon a person for some fault or misconduct, he being 'in mercy' for his offense." *Id.* at 107.

⁶³ For a general history, see 2 F. Pollock & F. Maitland, *The History of English Law Before the Time of Edward I*, at 510-14 (1895).

ily according to the degree that the king or his officers chose to relax the forfeiture of all the offender's goods.⁶⁴ Thus, the amercement functioned as an ad hoc fine, levied in potentially unlimited amounts as a form of civil punishment for a very wide range of delicts and offenses.⁶⁵

Not surprisingly, this unlimited punitive authority proved easily susceptible to abuse. In *Magna Carta*, therefore, when the polity of the nation rose up to restrain monarchial power and curb executive abuse, amercements were a subject of great concern. Although some provisions of that great document merely vindicate the parochial interests of the baronial class, others have stood through time as early expressions of fundamental principles of liberty and justice.⁶⁶ Into the latter category fall the three separate chapters of *Magna Carta* devoted to the limitation of amercements. In the first of these, Chapter 20 of the Great Charter, the king was made to concede that:

A freeman shall not be amerced for a slight offense, except in accordance with the degree of the offense; and for a grave offense he shall be amerced in accordance with the gravity of the offense, yet saving always his 'contenement'; and a merchant in the same way, saving his 'merchandise'; and a villein shall be amerced in the same way, saving his 'wainage'—if they have fallen into our mercy; and none of the aforesaid amercements shall be imposed except by the oath of honest men of the neighbourhood.⁶⁷

The three specialized words refer to the necessities of economic

⁶⁴ *Id.* at 524.

⁶⁵ The amercement is sometimes loosely described as a criminal sanction. In an anachronistic sense, that is true, for many of the wrongs for which amercements were assessed would today be recognized as crimes. It is equally true, however, that amercements were assessed for misconduct that today would be treated as civil in nature. And then, as now, the two regimes substantially overlapped. See *id.* at 516, 520-21; 2 W. Holdsworth, *A History of English Law* 357-69, 449-57 (1923); 3 *id.* at 276-78.

Whatever retrospective characterization one might choose, at the time amercements were not distinctly criminal in nature. This is made abundantly clear by Blackstone, who asserted that "[t]he reasonableness of fines in criminal cases has also been usually regulated by the determination of magna carta, concerning amercements for misbehaviour in matters of civil right." 4 W. Blackstone, *Commentaries* *372. In this statement, Blackstone consciously distinguished between civil and criminal and correctly identified amercements as a form of civil punishment.

⁶⁶ See *Pleas of the Crown for the County of Gloucester, 1221* at xxxiv (F. Maitland ed., 1884).

⁶⁷ W. McKechnie, *supra* note 60, at 285.

livelihood for a person in the identified station in life—not bare survival, but continued economic viability in a particular position.⁶⁸ Thus, as Blackstone summarized, to the landowner is saved “his contenment, or land; to the trader his merchandize; and to the cōuntryman his wainage, or team and instruments of husbandry.”⁶⁹ As McKechnie elaborated, the “merchandise” to which the merchant was in all events entitled could mean either “the stock-in-trade without which the pursuit of his calling would be impossible” or, more broadly, “his business itself, his position as a merchant[;] . . . in either view the Charter saves to him his means of earning a living.”⁷⁰ The same general principle is applied to nobles and clerks in the next two chapters.⁷¹

From these three provisions of Magna Carta, two related protections emerge. First, there is a requirement of reasonableness, of proportionality, of sensible relation between punishment and offense. Second, the penalty inflicted should not, in any event, destroy the offender’s means of making a living in his particular trade or calling. Magna Carta guaranteed not just bare survival, but continued productive economic viability.

Although this discussion may seem a bit arcane, in fact these principles have direct contemporary application. The Constitution as originally submitted to the states was roundly criticized for failing to include a declaration of rights. Magna Carta and the English Bill of Rights were invoked as models of what was required, and a tacit understanding was reached that some such provisions would be added by way of amendment.⁷² In his first inaugural, President Washington called for a bill of rights, and the first Congress responded by submitting proposals to the states. These were based

⁶⁸ See Tait, *Studies in Magna Carta: Waynagium and Contenmentum*, 27 *Eur. Hist. Rev.* 720, 724-27 (1927). Tait translates chapter 20 as saying that a freeman shall be amerced “saving always his position; and a merchant in the same way, saving his trade; and a villein shall be amerced in the same way, saving his tillage.” *Id.* at 727.

⁶⁹ 4 W. Blackstone, *Commentaries* *372.

⁷⁰ W. McKechnie, *supra* note 60, at 288-89.

⁷¹ Specifically, Chapter 21 provides that “[e]arls and barons shall not be amerced except through their peers, and only in accordance with the degree of the offence.” *Id.* at 295. Chapter 22 adds that “[a] clerk shall not be amerced in respect of his lay holding except after the manner of the others aforesaid; further, he shall not be amerced in accordance with the extent of his ecclesiastical benefice.” *Id.* at 298.

⁷² See A. Howard, *The Road from Runnymede: Magna Carta and Constitutionalism in America* (1968).

in part on proposals drafted by a committee of the Virginia ratifying convention, which had sought to carry forward protections of Magna Carta and the English Bill of Rights. As the Supreme Court has stated, “[t]he law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principle of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors.”⁷³

The vehicle was the due process clause of the fifth amendment. Coke had recognized that “due process of law” and Magna Carta’s guarantee of the “law of the land” meant the same thing.⁷⁴ The Framers, therefore, in requiring “due process of law,” and their successors in extending that guarantee to the states, meant to adopt as components of American constitutionalism the fundamental liberties and protections secured by Magna Carta.

This correspondence has been repeatedly and explicitly noted by the Supreme Court.⁷⁵ Indeed, only recently the Court had occasion to invoke Magna Carta in a context directly relevant to the topic at hand. In *Solem v. Helm*,⁷⁶ the Court held that a life sentence without possibility of parole for a seventh nonviolent felony violated the eighth amendment guarantee against cruel and unusual punishment. The Court traced the lineage of that provision back through the Virginia Declaration of Right to the English Bill of Rights and Magna Carta.⁷⁷ The Court made unmistakably plain that the eighth amendment incorporated the English principle of proportionality, “including the right to be free from excessive punishments.”⁷⁸ In the course of that argument, the Court cited and specifically relied on a case in which disproportionate punishment

⁷³ *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897).

⁷⁴ E. Coke, *Second Institute* 50 (3d ed. 1669).

⁷⁵ See, e.g., *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856) (recognizing that “[t]he words, ‘due process of law,’ were undoubtedly intended to convey the same meaning as the words, ‘by the law of the land,’ in Magna Charta” and examining particular provisions of Magna Carta at some length); *Twining v. New Jersey*, 211 U.S. 78, 100-01 (1908) (extending the same observation to the due process clause of the fourteenth amendment).

⁷⁶ 463 U.S. 277 (1983).

⁷⁷ *Id.* at 285 n.10.

⁷⁸ *Id.* at 286.

resulted from an excessive fine rather than from a sentence of incarceration.⁷⁹

Although the *Solem* Court dealt with criminal sanctions and thus had no need to go beyond the conventional application of the eighth amendment to penalties of that sort, nothing in the opinion or analysis would support such a limitation. Indeed, as has been noted, the modern principle of proportionality derives directly from the Magna Carta provisions on amercements. Neither history nor logic limits the requirement of proportionality to the criminal law; it includes as well a prohibition of excessive punishment by means of civil fine or penalty. Whether that prohibition lies in the eighth amendment ban on "excessive fines" or in the "fundamental fairness" required by due process of law ultimately does not matter. The crucial point is that a historically informed assessment of these guarantees demonstrates the existence in principle of a constitutional restraint on the severity of civil sanctions.

III

I do not claim that the unconstitutionality of punitive damages follows inexorably from what has been said. The aim of this comment has been merely to open the debate. Further analysis may be required to determine at what point such penalties become "excessive" under the eighth amendment or, on a balancing of all the interests, violative of "fundamental fairness" under the due process clause. Under either formulation, there is room for discussion. My purpose is to establish both the need for, and the legitimacy of, an inquiry of this kind.

⁷⁹ *Id.* at 285.