The Penal Dimensions of Punitive Damages

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Introduction

> It is to be presumed that the state has fully protected its own interests, or as fully at least as they could be protected by laws, when it provides for the punishment of crime in its criminal statutes. . . . [P]unitive damages cannot be allowed on the theory that [they are] for the benefit of society at large, but must logically be allowed on the theory that they are for the sole benefit of the plaintiff . . . a theory which is repugnant to every sense of justice.[1]

The above declaration by the Washington State Supreme Court echos the premise of this Article: the state should not be allowed to circumvent due process by delegating punitive functions to private litigants and civil courts. Punitive damages occupy a unique position in American jurisprudence, a punishment mechanism properly belonging to, but nevertheless evading, the criminal justice system.[2]

Although the concept of private prosecution and punishment through civil procedures raises viable constitutional issues, very little analysis is available on the constitutional dimensions of punitive damages.[3] Courts usually avoid the issue, although it is raised repeatedly in

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1. Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 53-54, 25 P. 1072, 1074 (1891).

2. *See* Greeley, S.L. & P. Ry. Co. v. Yeager, 11 Colo. 345, 350, 18 P.211, 214 (1888) (punitive damages "usurp the powers of the state in the infliction of punishment").

3. A recent exception to this proposition is Wheeler, *The Constitutional Case for Reforming Punitive Damages*, 69 VA. L. REV. 269 (1983).

Various commentators have addressed the constitutionality of punitive damages. *See* Dubois, *Punitive Damages in Personal Injury, Products Liability and Professional Malpractice Cases: Bonanza or Disaster?*, 43 INS. COUNS. J. 344, 348-49 (1976); Riley, *Punitive Damages: The Doctrine of Unjust Enrichment*, 27 DRAKE L. REV. 195, 243-45 (1978); Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U. L. REV. 1158, 1177-85 (1966); Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408 (1967).

defendants' briefs.[4] When courts do face the issue, they traditionally uphold the punitive damages doctrine with opinions that demonstrate a reluctance to reverse precedent,[5] application of constitutionally unsupported analysis,[6] or deference to legislative labeling.[7] For example, the California Supreme Court has stated that the unconstitutionality of punitive damages is a proposition that frequently has been rejected.[8] Surprisingly, while the United States Supreme Court has never addressed the issue,[9] California courts rely upon a United States Supreme Court opinion that never discussed or mentioned punitive damages as authority for rejecting the proposition.[10]

The punitive damages doctrine is an anomaly in tort law. By punishing defendants rather than compensating plaintiffs,[11] its purpose falls squarely under the ambit of criminal law. Yet only minimal dissertation is available discussing whether punitive damages are, in fact, "criminal" or "penal."[12] Ostensibly, a determination that punitive damages are pe-

4. As an example, the respondent's brief in Hasson v. Ford Motor Co., 32 Cal. 3d 388, 650 P.2d 1171, 185 Cal. Rptr. 654 (1982) raised the issue of vagueness regarding CAL. CIV. CODE § 3294 (West Supp. 1984) (California's punitive damages statute). Brief for Respondent at 21-28. The court dismissed the challenge in a footnote relying on "controlling precedent." *Hasson*, 32 Cal. 3d at 402 n.2, 650 P.2d at 1179 n.2, 185 Cal. Rptr. at 663 n.2. None of the opinions cited as precedent by the court contain more than a passing comment on any vagueness issue.

5. Most blatent is the United States Supreme Court's stance. The Court has stated: "We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument." Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851). The Supreme Court still follows *Day*. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130, 159 (1967).

While stare decisis still controls, it has been questioned. Rosenbloom v. Metromedia, 403 U.S. 29, 84 (1971) (Marshall, J., dissenting); Rosener v. Sears Roebuck & Co., 110 Cal. App. 3d 740, 759, 168 Cal. Rptr. 237, 248 (1980), *appeal denied*, 450 U.S. 1051 (1981) (Elkington, J., concurring) ("Were it not for [precedent] holding punitive damages . . . to be constitutionally flawless, I would entertain doubt as to their due process survivability."). *See also infra* text accompanying notes 87-100.

6. *See infra* text accompanying notes 75-80.

7. *See infra* text accompanying notes 81-86.

8. Egan v. Mutual of Omaha Ins. Co., 24 Cal. 3d 809, 819-20, 598 P.2d 452, 457, 157 Cal. Rptr. 482, 487 (1979), *appeal dismissed*, 445 U.S. 912 (1980).

9. Wheeler, *supra* note 3, at 273.

10. *Egan*, 24 Cal. 3d at 820, 598 P.2d at 457, 157 Cal. Rptr. at 487 (citing United States v. Regan, 232 U.S. 37, 46-49 (1914)). *Regan* involved the question whether "proof beyond a reasonable doubt" was required in an action by the United States to collect a penalty for violation of certain federal laws.

11. *See generally* K. REDDEN, PUNITIVE DAMAGES § 7.6(A) (1980) (the goal of civil law is not punishment).

12. *Id.* ch. 7 (briefly outlining both challenges and defenses to the constitutionality of punitive damages); Wheeler, *supra* note 3, at 333-51 (the only serious examination available on whether punitive damage procedures satisfy due process).

nal would activate procedural safeguards available to defendants in criminal proceedings.[13] Nevertheless, there has been a general failure to raise and pursue the penal dimensions of punitive damages.

While this omission at first seems surprising, it is easily explained. First, constitutional challenges to the punitive damages doctrine are not available until post-judgment proceedings.[14] Even then, a defendant faced with a multi-million dollar judgment is not likely to focus his appeal on the constitutional issue since courts rarely consider the issue when it is presented.[15] Second, many briefs and arguments that do raise the issue focus on due process considerations such as statutory vagueness.[16] Although such arguments are attractive, they are difficult to pos-

13. *See* K. REDDEN, *supra* note 11, at § 7.2(A)(6); Wheeler, *supra* note 3, at 337 (noting that the concept of quasi-criminality is "nebulous"). Criminal procedural safeguards apply only if the sanction is punitive, and in that event, they should all apply. *Id.* In a literal sense, however, due process does not require *every* procedural safeguard in every proceeding. For example, both the right to counsel and the right to trial may be limited. *See, e.g.*, Scott v. Illinois, 440 U.S. 367 (1979) (the right to counsel is not unconstitutionally denied where no actual imprisonment results); Baldwin v. New York, 399 U.S. 66 (1970) (the right to trial by jury does not generally apply to those cases punishable by no more than six months). However, those criminal due process guarantees that would be particularly important to the punitive damages defendant—reasonable doubt, right against self-incrimination, and unanimous jury verdict—have not been restricted in any federal criminal proceeding.

14. Since punitive damages may not apply to a particular case, or may not be awarded at all, the constitutional objections cannot be asserted until post-judgment proceedings. *In re* Related Asbestos Cases, 543 F. Supp. 1152, 1157 (N.D. Cal. 1982). This procedure is in accord with Ashwander v. Tennessee Valley Auth., 297 U.S. 288 (1936) and its progeny, holding the general federal preference is to avoid reaching constitutional issues whenever possible. *See Ashwander*, 543 F. Supp. at 346-48 (Brandeis, J., concurring).

15. In California, the courts rely upon precedent as dispositive of constitutional challenges to the punitive damages doctrine. The seminal case and leading authority is Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967). *Toole* only briefly addressed the constitutional issues presented, deferring instead to the rules of civil procedure governing punitive damages claims. *Id.* at 716-17, 60 Cal. Rptr. at 417-18. Although the case turned on the "label" of the proceeding, it is cited as controlling and dispositive of constitutional challenges. *See, e.g.*, Hasson v. Ford Motor Co., 32 Cal. 3d at 402 n.2, 650 P.2d at 1179-80 n.2, 185 Cal. Rptr. at 663 n.2; Zhadan v. Downtown L.A. Motors, 66 Cal. App. 3d 481, 502, 136 Cal. Rptr. 132, 144 (1976). Other jurisdictions have been equally abrupt in disposing of constitutional challenges to the punitive damages doctrine. *See, e.g.*, Campus Sweater & Sportswear Co. v. M.B. Kahn Constr., 515 F. Supp. 64, 108-09 n.129 (D.S.C. 1979) (multiple constitutional questions addressed in a single footnote); Resource Exploration & Mining, Inc. v. Itel Corp., 492 F. Supp. 515, 517 (D. Colo. 1980); Sturm, Ruger & Co. v. Day, 594 P.2d 38, 46 (Alaska 1979), *cert. denied*, 454 U.S. 894 (1981).

16. *See, e.g.*, Brief for Respondent at 21-28, *Hasson*, 32 Cal. 3d 388, 650 P.2d 1171, 185 Cal. Rptr. 654 (arguing statutory vagueness of punitive damages statute and against retroactive application of expanded punitive damages liability); Opening Brief for Appellant at 99-120, Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (arguing statutory vagueness of punitive damages statute and asserting the right to have punitive damages liability decided by higher standards of proof); Opening Brief for Appellants at 59-67, American-Hawaiian S.S. Co. v. Home Sav. & Loan Ass'n, 38 Cal. App. 3d 73, 112 Cal. Rptr.

tulate given the current scope of review available in the federal courts.[17] Third, most defendants arguing against punitive damages raise the issue of double jeopardy.[18] They contend that assessing punitive damages results in a violation of the Fifth Amendment when the defendant has already been punished or potentially faces a criminal sanction.[19] Such arguments remain unpersuasive because as long as punitive damages are not considered penal, the Fifth Amendment does not apply.[20]

This Article provides an in-depth inquiry into the nature of punitive damages and offers a framework on which to base future considerations of the doctrine. The analysis rests on basic guidelines used for determin-

897 (1974) (arguing statutory vagueness of punitive damages statute, improper delegation of legislative power in allowing jury to assess punitive damages, and need for protection against duplicative claims).

17. Any conceivable basis for finding a rational relationship between the statute and any legitimate government end will save the statute from substantive due process challenge. Thus, unless the law is wholly arbitrary or irrational, the statute will be upheld. Only if the defendant can show that the law affects some fundamental right or suspect class will the government be required to show that the law "is necessary to promote a compelling or overriding interest." J. NOWAK, R. ROTUNDA & J. NELSON, CONSTITUTIONAL LAW 448 (2d ed. 1983).

The punitive damages defendant might make an alternative argument on procedural due process grounds. Since the Fourteenth Amendment protects money as a property interest, Fuentes v. Shevin, 407 U.S. 67, 84-87 (1972), the proceeding for state deprivation of money must meet some minimal level of due process unless the deprivation is characterized as "de minimus." *Id.* at 90 n.21. If only the property interest is at stake, then the relative weight of the interest to be deprived will determine the form of notice and hearing required by due process. *See id.*; *see also* Boddie v. Connecticut, 401 U.S. 371, 378 n.3 (1971) (collection of cases addressing this particular issue).

Where the subject matter involves *punishment*, however, due process dictates higher levels of protection, especially as to the nature of the hearing and the right to have a full and fair adjudication of the issues. *See generally* Wheeler, *supra* note 3, at 273-322 (analyzing punitive damages under procedural due process tests recently elaborated by the Supreme Court in Mathews v. Eldridge, 424 U.S. 319 (1976)). Punitive damages arguably are constitutionally infirm under a procedural due process analysis, given that liability for punitive damages has no defined limits of punishment, jury verdicts often exceed a million dollars, and the jury verdict may be wholly arbitrary, Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

18. The Fifth Amendment provides, in pertinent part, that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST., amend. V.

19. *See, e.g.*, Neal v. Carey Can. Mines, Ltd. 548 F. Supp. 357, 377 (E.D. Pa. 1982); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 812, 174 Cal. Rptr. 348, 383 (1981); E. F. Hutton & Co. v. Anderson, 42 Colo. App. 497, 596 P.2d 413 (1979); *cf. In re* Northern Dist. of Cal. "Dalkon Shield" IUD Prod., 526 F. Supp. 887, 899-900 (N.D. Cal. 1981) (multiple punitive damages punishments do not constitute "double jeopardy," but overlapping awards do violate fundamental fairness assured by due process). *But see* Campus Sweater & Sportswear Co. v. M.B. Kahn Constr., 515 F. Supp. at 108-09 n.129; 111 East 88th St. Partners v. Fine, 110 Misc. 2d 960, 964, 443 N.Y.S.2d 195, 198 (1981) (rejecting similar propositions).

20. The general rule is that the prohibition against double jeopardy applies only to criminal actions. North Carolina v. Pearce, 395 U.S. 711 (1969). The same rule has been held inapplicable to punitive damages proceedings. *See supra* note 19. *Accord* K. REDDEN, *supra* note 11, at § 7.2(A)(1) (defendant must convince the court that punitive damages are penal in nature to institute criminal procedural safeguards).

ing whether a statute is penal. The United States Supreme Court set forth the controlling guidelines in *Kennedy v. Mendoza-Martinez*[21] and recently reaffirmed them in *United States v. Ward*.[22] Although the Court in *Ward* stated that the *Kennedy* considerations[23] were "neither exhaustive nor dispositive,"[24] this Article fleshes out the necessary considerations into an adequate analysis, taking into account current trends in the federal and state courts.[25] The Article concludes that the punitive damages concept is penal and therefore should trigger application of constitutionally mandated criminal safeguards.[26]

I. *Kennedy* and *Ward*

Clearly, punitive damages constitute a penalty or punishment.[27] No court, however, has applied the *Kennedy/Ward* criteria to punitive damage statutes although commentators have noted that such an analysis is

21. 372 U.S. 144 (1963). *Kennedy* enunciated seven basic factors for determining whether a statute is penal. *See infra* text accompanying note 35. The *Kennedy* factors have been utilized by several federal courts to determine whether a statute was penal or remedial. *See, e.g.*, Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 518 F.2d 990, 1000-11 (5th Cir. 1975), *aff'd*, 430 U.S. 442 (1977) (construing the nature of civil penalties assessed under the Occupational Safety and Health Act); United States v. General Motors Corp., 403 F. Supp. 1151 (D. Conn. 1975) (construing penalties assessed under the Federal Water Pollution Control Act). The *Kennedy* inquiries have been utilized in construing state statutes as well. *See, e.g., In re* Garay, 89 N.J. 104, 113, 444 A.2d 1107, 1111-12 (1982) (construing a penalty under a state Medicaid statute).

22. 448 U.S. 242 (1980). *Ward* addressed the alleged criminal nature of a sanction under the Federal Water Pollution Control Act Amendments. *Ward* has been held applicable to state statutes as well. *See* People v. Walsh, 89 Ill. App. 3d 831, 833 n.1, 412 N.E.2d 208, 210 n.1 (1980) (whether civil penalty for contempt should be considered criminal).

23. *See infra* text accompanying note 35.

24. *Ward*, 448 U.S. at 249.

25. Indeed, the Supreme Court already has restricted portions of the doctrine's application on public policy and constitutional grounds. For example, punitive damages may not be assessed against municipalities. City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981). Nor may they be imposed on defendants in defamation actions absent a showing of knowing falsity or reckless disregard for the truth. Gertz v. Robert Welch, Inc., 418 U.S. 323, 342, 350 (1974). Additionally, nonpunitive considerations such as attorneys' fees may not serve as a function of punitive damages. Day v. Woodworth, 54 U.S. (13 How.) 363 (1851). Despite the Court's hostility to punitive damages, however, it has never addressed the penal dimensions of the doctrine. Wheeler, *supra* note 3, at 276.

26. *See* Wheeler, *supra* note 3, at 337 and *supra* note 13.

27. Punitive damages are assessed to punish wrongdoers and to deter further occurrence of wrongful acts. International Bhd. of Elec. Workers v. Foust, 442 U.S. 43, 48 (1979); Evans v. Gibson, 220 Cal. 476, 490, 31 P.2d 389, 395 (1934); Kink v. Combs, 28 Wis. 2d 65, 80, 135 N.W.2d 789, 798 (1965). Punitive damages are not compensatory, "they are private fines . . . ." Gertz v. Robert Welch, Inc., 418 U.S. at 350.

appropriate.[28]

To determine whether to activate criminal safeguards, the Court in *Ward* considered whether a penalty under the Federal Water Pollution Control Act Amendments of 1976[29] was remedial or penal. The Court enunciated a two-part inquiry. First, the Court must determine whether the legislature expressly or impliedly intended to construe the statutory penalty as criminal or civil.[30] If the intention is civil, the Court then determines whether "the statutory scheme [is] so punitive either in purpose or effect as to negate that intention."[31] The latter inquiry is satisfied when the sanction has a punitive end that cannot be justified as having any legitimate remedial purpose.[32]

It is indisputable that legislatures consider punitive damages statutes civil punishments. Punitive damages statutes are not found in criminal or penal codes, and punitive damages are universally awarded in civil proceedings.[33] The most important part of the two-prong *Ward* analysis is therefore the second prong—"purpose and effect" of the punitive damages sanction.

This second inquiry is undertaken by an analysis of seven factors elaborated in *Kennedy*.[34] The *Kennedy* factors were derived from the Court's historic examinations of "penal" statutes. The factors that historically have required institution of criminal procedural safeguards are:

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28. *See* K. REDDEN, *supra* note 11, at § 7.2(A)(1); Wheeler, *supra* note 3, at 333-37. *Ward* and *Kennedy* are proper touchstones of inquiry since they analyze whether the purpose of the sanction is to *punish the defendant. See infra* text accompanying notes 30-37.

29. 33 U.S.C. § 1321 (b) (5) (1976). That provision contains a requirement that any discharge of oil or hazardous substances from an onshore or offshore facility into navigable waters must be reported to the United States by the person in charge of the vessel or the facility. At issue in *Ward* was whether the reporting requirements violated the respondent's Fifth Amendment right against self-incrimination. Following respondent's report of an oil spill from his facility, he was assessed a civil penalty of $500 under 33 U.S.C. § 1321 (b) (6) (1976). The penalty was based upon the statutorily required report. The respondent asserted that the reporting requirement violated his right to be free from self-incrimination since the penalty was effectively criminal. The respondent lost his case in district court and the Tenth Circuit reversed on appeal, holding that the statute was effectively penal when scrutinized under the *Kennedy* tests. *Ward*, 448 U.S. at 247-48. The Supreme Court reversed, finding no "quasi-criminal" penal effect that would trigger the Fifth Amendment's protection against compulsory self-incrimination. 448 U.S. at 251-55.

30. 448 U.S. at 248.

31. *Id.* at 248-49.

32. *See infra* text accompanying notes 443-511. Under the *Kennedy* "alternative purpose test," if a legitimate remedial purpose can be found in the penalty, the statute will not be construed as penal.

33. *See, e.g.*, CAL. CIV. CODE § 3294 (West Supp. 1984); CONN. GEN. STAT. ANN. § 52-240b (West Supp. 1984).

34. 372 U.S. at 168-69. While these considerations were applied to questions of federal law in both *Kennedy* and *Ward*, they apply with equal force to state statutes. *See, e.g., In re*

> Whether, 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 . . . .[35]

Applying each of the traditional factors to the punitive damages doctrine reveals no startling elucidation. When the punitive damages concept is analyzed and juxtaposed with the cases cited in *Kennedy*, the conclusion is inescapable that they are penal in nature, spirit, and jurisprudence, and thus mandate higher standards of procedural protection.[36] Although any single factor can be conclusive,[37] all of them are

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Garay, 89 N.J. 104, 444 A.2d 1107 (1982) (construing a state statute authorizing civil penalties for Medicaid fraud).

The *Kennedy* Court considered whether expatriation statutes could be utilized to divest United States citizens of their citizenship, without affording constitutional protections normally associated with criminal proceedings. In the first of two cases addressed by the Court, respondent Mendoza-Martinez had fled the United States during the Second World War to avoid military service. Following the war, he had returned to the United States, where he was convicted and served a prison term for draft evasion. Thereafter, he lived in the United States until 1953, when he was arrested and ordered deported by the Attorney General under a federal law that stripped the citizenship from anyone who voluntarily remained outside the United States during wartime for purposes of evading military obligations.

In the second case, respondent physician Cort was inducted into the military while living in England. He remained abroad, twice refusing to report for duty in 1953, and was indicted for failure to appear for physical examination. He alleged that the induction was an attempt to bring him to the United States to persecute him for his Communist affiliations. In 1959, Cort applied for a renewal of his passport in Prague. His request was denied by the State Department because his United States citizenship had been forfeited under federal law. *Kennedy*, 372 U.S. at 147-52.

The Court found that the expatriation statutes were punitive in nature. A review of the legislative and judicial history revealed that their only purpose was to punish the wrongdoer. Thus, the statutes were criminal in substance and unconstitutional because they permitted punishment without the procedural protections delineated in the Bill of Rights. *Id.* at 170-85.

35. *Kennedy*, 372 U.S. at 168-69 (footnotes omitted).

36. *See generally* Wheeler, *supra* note 3 (concluding that statutory maximums, bifurcated trials, higher evidentiary standards, all criminal protections of the Fourth and Fifth Amendments, and most criminal protections of the Sixth Amendment are mandated in punitive damages proceedings). *See also* K. REDDEN, *supra* note 11, at § 7.2(A)(2)(a) (in analyzing the punitive damages doctrine, *Kennedy* should be used to determine if the Bill of Rights applies to assessing a penalty in such proceedings).

37. For example, the Court in *Ward* analyzed the effect of the penalty in question solely under the fifth *Kennedy* criterion of "whether 'the behavior to which [the penalty] applies is already a crime.' " *Ward*, 448 U.S. at 249-50 (quoting *Kennedy*, 372 U.S. at 168-69). Justice Rehnquist, writing for the majority, noted that this test was the only *Kennedy* criterion applicable to the facts of the case. The Court went on to state that the *Kennedy* inquiries were "neither exhaustive nor conclusive," *id.* at 250, indicating that the criminal nature of a penalty may be proven by other factors beyond the scope and consideration of *Kennedy*.

considered below because of their importance to this examination of the punitive damages doctrine. In addition, since no commentator previously has elaborated on the authorities relied upon by the *Kennedy* Court, each is considered in order to delineate the acceptable outer boundaries separating civil from criminal law.

II. The *Kennedy* Factors

A. Affirmative Disability or Restraint

The first historical test noted by *Kennedy* is "[w]hether the sanction involves an affirmative disability or restraint . . . ."[38] The Court cited three opinions that formulated and utilized this criterion.[39] The underlying proposition from the cases is that where a civil statute imposes a disability or restraint on an ascertainable group of persons for prior conduct, it constitutes a punishment that courts will not sanction without appropriate procedural safeguards.

In *Ex parte Garland*,[40] a post Civil War oath requiring attorneys to swear that they had not committed certain acts against the Union was held invalid because a presidential pardon had exonerated the proscribed acts.[41] The Court held that the required oath attempted to punish indirectly activities that constitutionally were no longer punishable.[42] Criminal procedural safeguards were thus mandated.

In *United States v. Lovett*,[43] the second opinion cited by *Kennedy*, the Court held a federal statute invalid for denying compensation to certain government employees who allegedly had engaged in subversive conduct.[44] The law was designed to forever bar the employees from government service. This effect, the Court said, constituted punishment without trial.[45] Like *Garland*, the Court held that punishment could not be effectuated in a vacuum of due process.[46] Deprivation of liberty or property as a means of indirect punishment for selected activities could not be inflicted without high standards of procedural protection.[47] The

38. 372 U.S. at 168.

39. *Id.* at n.22. (citing Flemming v. Nestor, 363 U.S. 603 (1960); United States v. Lovett, 328 U.S. 303 (1946); *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866)).

40. 71 U.S. (4 Wall.) 333 (1866).

41. *Id.* at 375.

42. *Id.* at 380-81.

43. 328 U.S. 303 (1946).

44. *Id.* at 308-13.

45. *Id.* at 316.

46. *Id.* at 315. The rights at issue in *Lovett* were the rights against bills of attainder (U.S. CONST. art. I, § 9, cl. 3) and ex post facto laws. *Id.*

47. By providing for duly constituted courts, the Framers of the Constitution intended to safeguard the people of this country from punishment without trial. These constitutional pro-

basic premise of both decisions is that government cannot punish conduct through an unconstitutional procedure.

The third case cited in *Kennedy*, *Flemming v. Nestor*,[48] clarifies this point. Pursuant to federal law, the plaintiff-immigrant lost his Social Security benefits after being deported for having been a communist party member twenty years earlier.[49] The loss of benefits, however, was not triggered by communist affiliation, but by the fact of deportation.[50] The loss was *not* premised on any proscribed conduct. The Court observed that since suspension of Social Security benefits to deportees rationally could relate to a legitimate government interest, such as keeping the dollar in the United States economy, the statute in question was constitutional.[51] Echoing *Garland* and *Lovett*, the Court reasoned that to constitute an affirmative disability, the sanction or loss must be activated by the actor's conduct, and not merely directed to the result of past behavior. If the sanction or loss is nothing other than punishment, it is unconstitutional absent criminal procedural safeguards.[52]

Punitive damages are not awarded as compensation or for any remedial purpose.[53] They do not redress injury; rather, they punish anti-social behavior.[54] Similarly, the statutes in both *Garland* and *Lovett* were designed not to compensate loss, but to punish action. Applying the general proposition that a penalty aimed at conduct rather than effect triggers criminal safeguards, punitive damages would appear to activate those constitutional protections available only to the criminal defendant. Indeed, punitive damages—with the exception of incarceration—are

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tections are mandated where punishment is inflicted. *Lovett*, 328 U.S. at 317. *Contra* Baldwin v. New York, 399 U.S. 66 (1970) (right to jury trial not absolute); *see supra* note 13.

48. 363 U.S. 603 (1960).

49. *Id.* at 605-06.

50. *Id.* at 620.

51. *Id.* The "national purchasing power resulting from taxation of productive elements of the economy to provide payments to the retired and disabled" is increased by keeping transfer payments inside the country. *Id.* at 612.

52. *Id.* at 617. The Court also noted that there was no affirmative disability or restraint "and certainly nothing approaching the 'infamous punishment' of imprisonment." *Id.*

53. The only purpose, with several exceptions, of punitive damages, is to punish and deter. Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 643 (1980); Walther & Plein, *Punitive Damages: A Critical Analysis of* King v. Combs, 49 MARQ. L. REV. 369, 371 (1965). Punitive damages "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974). Several jurisdictions allow punitive damages for nonpunitive ends, in which case they are not really punitive damages at all. *See infra* text accompanying notes 458-61.

54. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. at 350 (punitive damages are not compensation for injury); Rosenbloom v. Metromedia, 403 U.S. 29, 82 (1971) (Marshall, J., dissenting) (punitive damages are to punish and deter).

designed to accomplish the same goals as the criminal justice system.[55] They are exacted in retribution for conduct legislatively determined as socially unacceptable.[56] One federal court made a similar observation, noting that "[p]unitive damages are exacted for the benefit of society with the intended effect of deterring defendant[s] from similar conduct in the future . . . ."[57]

Instead of examining the substance of the punitive damages penalty, however, courts generally focus on the severity of the penalty,[58] form and nature of the proceeding,[59] the sanctions label,[60] or stare decisis[61] to justify result-oriented conclusions that punitive damages lack characteristics that would mandate criminal procedural safeguards. Ironically, several courts have gone so far as to state that punitive damages are in fact penal, but do not merit special procedural safeguards beyond the limits of civil law.[62] One commentator has made comparable observations, but concluded punitive damages do warrant some additional protections such as "an increased burden of persuasion."[63] He attributes this need to their punishment purpose and "frequently large magnitude."[64] However,

55. *See* Note, *supra* note 3, at 1161-62. Punitive damages exact retribution, expressing societal disapproval of the forbidden act. They specifically serve to deter the defendant from repeating his transgression and generally serve to discourage others similarly situated from engaging in the proscribed conduct. *Id. See also* Hazelwood v. Illinois Cent. Gulf R.R., 114 Ill. App. 3d 703, 713, 450 N.E.2d 1199, 1207 (1983) (punitive damages are in the nature of a criminal sanction).

56. *In re* Paris Air Crash, 427 F. Supp. 701, 706 (C.D. Cal. 1977) (punitive damages are awarded on the basis of proscribed conduct), *rev'd*, 622 F.2d 1315 (9th Cir. 1980).

57. *In re* Northern Dist. of Cal. "Dalkon Shield" IUD Prod., 526 F. Supp. 887, 899 (N.D. Cal. 1981).

58. *E.g.*, Curtis Publishing Co. v. Butts, 351 F.2d 702, 728 (5th Cir. 1965) (Rives, J., dissenting), *aff'd*, 388 U.S. 130 (1967) (punitive damages in excess of $400,000 violate due process where safeguards of criminal proceedings are not provided); Campus Sweater & Sportswear Co. v. M.B. Kahn Constr., 515 F. Supp. 64, 108 n.129 (C.D.S.C. 1979); Aretz v. United States, 456 F. Supp. 397, 408 (S.D. Ga. 1978), *aff'd*, 604 F.2d 417 (1979); Unified School Dist. No. 490 v. Celotex Corp., 6 Kan. App. 2d 346, 356, 629 P.2d 196, 206 (1981).

59. *E.g.*, Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 716-17, 60 Cal. Rptr. 398, 417-18 (1967) (deferring to legislative placement of punitive damages claims in civil proceedings).

60. *Id.*

61. *E.g.*, Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851). One lower federal court even held that the due process constitutionality of punitive damages was strongly evidenced by the mere fact that no opinions existed to the contrary. Vollert v. Summa Corp., 389 F. Supp. 1348, 1350 (D. Hawaii 1975).

62. *See, e.g.*, Campus Sweater & Sportswear Co. v. M.D. Kahn Constr., 515 F. Supp. at 108 n.129 (criminal-type procedural protections not mandated since punitive damages are not as acrimonious as criminal condemnations); Unified School Dist. No. 490 v. Celotex Corp., 6 Kan. App. 2d at 356, 629 P.2d at 206 (since punitive damages are not as severe as criminal sanctions, safeguards of criminal prosecutions are not warranted).

63. Comment, *supra* note 3, at 411.

64. *Id.* at 434.

he offers little else in the way of procedural protection, asserting that an award of punitive damages does not carry the stigma of a criminal sanction or the "social disapprobation" of conviction.[65]

In scrutinizing why courts have failed to treat punitive damages as criminal, the dictates of the cases relied upon in *Kennedy* form the touchstone of analysis. Those cases recognized that the *substance* of the statute determines its nature.[66] Courts, however, consistently err on this axiomatic point. Their most common misconception is to look at the effect of the judgment on the defendant rather than the foundation of the award. One federal court exemplified this policy when it observed that "[s]ince a criminal conviction with a possible prison sentence, carries collateral effects which do not necessarily relate directly to the size of the possible fine, the Court does not consider the jury limited, in a civil action, to an award of punitive damages of comparable size."[67]

Like courts that focus on collateral effect,[68] other jurists,[69] and at least one commentator,[70] also treat punitive damages judgments as an unequal counterpart to the stigma-type deterrence associated with a criminal conviction. Such analysis, however, is inconsistent with the

65. "There is no blank on a job application for listing past punitive damages judgments." *Id* at 411.

66. Looking at substance over form in construing a statute as penal or remedial is a Supreme Court rule. *See* Hawker v. New York, 170 U.S. 189, 196 (1897).

67. Morrissey v. National Maritime Union, 397 F. Supp. 659, 667 (S.D.N.Y. 1975), *modified*, 544 F.2d 19 (1976).

68. *See supra* note 58 and accompanying text.

69. In Peterson v. Superior Court, 31 Cal. 3d 147, 642 P.2d 1305, 181 Cal. Rptr. 784 (1982), the California Supreme Court stated:

> The potential punitive damages award in this case is unquestionably a penalty civil in nature. There is no possibility of the stigma of a criminal conviction nor the potential loss of personal freedom. Thus, although the award of punitive damages is a type of penalty imposed to deter wrongful conduct, "[t]he authorization to award exemplary damages . . . does not convert a civil action into a criminal action insofar as it affects constitutional protections in criminal proceedings.

Id. at 161, 642 P.2d at 1313, 181 Cal. Rptr. at 792 (quoting People v. Superior Court, 12 Cal. 3d 421, 433, 525 P.2d 716, 724, 115 Cal. Rptr. 812, 820 (1974)).

70. Comment, *supra* note 3, at 411. The author's analysis is not persuasive in today's world of gargantuan awards. That his article is a product of an era yet to see the harsh and extended use of civil punishment is evidenced by his statement that "punitive damages actions are rarely given the publicity accorded a criminal conviction." *Id.* at 411 n.11. On the contrary, publicity has led to juries awarding punitive damages even when not in issue. *See, e.g.*, Marler v. Allen & Farmer's Ins. Group, 93 N.M. 452, 601 P.2d 85 (1979) (punitive damages awarded by jury though not requested by plaintiff). Additionally, unlike the present punitive damages proceedings, courts originally required that the jurors be neighbors or acquaintances of the defendant, familiar with his financial background, and witnesses to the material events constituting the alleged wrongful conduct. *See* Dubois, *supra* note 3, at 347. Thus, originally, the need for special procedural protections was not as necessary as today where juries unfamiliar with any aspects of the case decide the defendant's fate.

cases cited in *Kennedy*. Neither *Garland*, *Lovett*, nor *Flemming*[71] dealt with criminal convictions. If those cases had utilized the conviction-stigma analysis, the refusal to permit an attorney to practice law or the denial of government employment certainly would not be equivalent to the social opprobrium of imprisonment or criminal fines. As the Oregon Supreme Court has recognized in criticism of the test, "[t]he stigma . . . of condemnation can accompany the imposition of a sanction whether it is imprisonment, or fine, or *something else* . . . ."[72] Nevertheless, the decisions in the *Kennedy* cases turned on the *substance* of the proceeding—punishment inflicted by indirect means. Thus, the nomenclature of the penalty is not dispositive.[73] Form does not prevail over substance.[74]

Courts mistakenly have assumed that the magnitude of a punitive damages award does not trigger criminal safeguards since it does not subject a defendant to the ultimate sanction of imprisonment.[75] But viewing the relative severities in the abstract is dangerous. As one scholar observed, a one thousand dollar penalty may be as severe to a poor defendant as a six month prison sentence would be to anyone.[76] Similarly, punitive damages may be a far more severe punishment than a criminal fine carrying the stigma effect of social condemnation.[77] But regardless of the relative harshness of the sanction, the Supreme Court has adamantly stated that "the severity of a sanction is not determinative of its character as 'punishment.' "[78] The Court has never utilized a severity analysis,[79] because while a sanction applied in a regulatory manner may be extremely severe for some individuals, uniform application in the administration of a legitimate government interest, such as qualification for medical practice, will not be construed as punishment regardless of the

71. *See supra* notes 39-57 and accompanying text.

72. Brown v. Multnomah Dist. Court, 280 Or. 95, 106, 570 P.2d 52, 59 (1977) (emphasis added).

73. *E.g.*, Aretz v. United States, 456 F. Supp. 397, 408 (S.D. Ga. 1978), *aff'd*, 604 F.2d 417 (11th Cir. 1979).

74. *E.g.*, Hawker v. New York, 170 U.S. 189, 196 (1898). The New Jersey Supreme Court is in accord, stating that "we will not allow form to prevail over substance. Where the statutory scheme is so 'punitive either in purpose or effect as to negate' the civil label, it is deemed criminal for purposes of the constitutional protections at issue." *In re* Garay, 89 N.J. 104, 111-12, 444 A.2d 1107, 1111 (1982) (quoting United States v. Ward, 448 U.S. 242, 249 (1980)).

75. *See supra* note 69.

76. Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379, 406 (1976).

77. Punitive damages equal a "badge of disgrace." Wheeler, *supra* note 3, at 282.

78. Flemming v. Nestor, 363 U.S. 603, 616 n.9 (1960).

79. *See* Clark, *supra* note 76, at 404.

statute's effect on particular individuals.[80] The manner in which compliance with a statute is effectuated controls, not the end result.

Equally misguided are those cases deferring to the civil process used to administer punitive awards. For example, in the landmark California case of *Toole v. Richardson-Merrell, Inc.*,[81] the defendant specifically challenged the constitutionality of punitive damages on double jeopardy grounds and asserted it had the right to the same number of peremptory challenges as in a criminal trial.[82] The court, misinterpreting the United States Supreme Court opinion in *United States v. Regan*,[83] held that punitive damages, being a relief sought in a "purely" civil action, failed to qualify the defendant for any special constitutional protection.[84] The court could find no constitutional infirmity in awarding "penal damages" under rules of civil procedure.[85] The analysis made no attempt to consider either the purpose of punitive damages or the *effect on the defendant*, whose plight the court ignored in its preoccupation with an irrelevant path of inquiry.[86]

Perhaps most astonishing, courts often retreat from constitutional challenges to punitive damages awards by relying upon stare decisis. One hundred years following the seminal opinions upholding an award of exemplary damages in England,[87] the Supreme Court declared that a century of judicial decision upholding the propriety of punitive damages must be received "as the best exposition of what the law is, [and] the

80. If the government makes no "persuasive showing" that it intended to reach a particular person or persons for their conduct, the sanction is not punishment. *Flemming*, 363 U.S. at 616.

81. 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967).

82. *Id.* at 716 & n.4, 60 Cal. Rptr. at 417 & n.4.

83. 232 U.S. 37 (1914).

84. Actually, the Court in *Regan* held that the government *could* assess penalties in civil proceedings. The power is not disputed. *See infra* part IIF. However, in *Regan* the *substance* of the penalty was not under attack. Although it concededly was assessed for a breach of a public duty, its remedial or criminal nature was not at issue. *Regan*, 232 U.S. at 41. The court in *Toole* apparently applied *Regan* at face value, assuming that *nothing* prevented assessing a punitive fine in a civil proceeding. *See Toole*, 251 Cal. App. 2d at 717, 60 Cal. Rptr. at 418.

85. *Toole*, 251 Cal. App. 2d at 717, 60 Cal. Rptr. at 418.

86. "No amount of [legislative] labelling should determine [a substantive] question." Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478, 494 (1974). Also, courts often defer to legislative history in determining whether a sanction is civil or criminal. *See, e.g.*, United States v. Futura, Inc., 339 F. Supp. 162, 165-66 (N.D. Fla. 1972) (quoting S. REP. No. 507, 92d Cong., 1st Sess. 8-9, *reprinted in* 1971 U.S. CODE CONG. & ADMIN. NEWS, 2283, 2290-91). Charney points out that while this defense may be a commendable attempt to carry out congressional purpose, "it avoids the substantive question of whether Congress has exceeded its constitutional authority." Charney, *supra*, at 494.

87. Huckle v. Money, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (1763).

question will not admit of argument."[88] Ironically, the Washington State Supreme Court noted forty years later that the concept of punitive damages as utilized in America was comparatively modern, resulting from a misconception of impassioned language and inaccurate expressions by judges in earlier opinions.[89] The court noted that no early commentators had sanctioned punitive damages[90] and, to achieve the least embarrassing complication of the law, refused to sanction the doctrine.[91] Similarly, in 1884, the Colorado Supreme Court stated that in the course of time, courts would not condone the use of a private action to redress a public wrong.[92]

The punitive damages doctrine currently is well-shielded from attack in the courts. As expressed by the California Supreme Court, it is too late in the day to change precedent.[93] This adherence has even restrained one California justice from entertaining "doubt" about the "due process survivability" of punitive damages.[94] While the purpose of adhering to prior decisions is to achieve a "stability" in judicially propounded principles,[95] the doctrine of stare decisis is not an insuperable barrier to reconsiderations of prior decisions or principles.[96] Although Justice Brennan's observation that "it is easier to fit oneself within the safe haven of stare decisis than to boldly overrule precedents"[97] is well-taken, the Supreme Court has never considered the doctrine of stare decisis persuasive on constitutional issues.[98] Given the recent support of commentators and jurists questioning the constitutional dimensions of

88. Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851).

89. Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 55, 25 P. 1072, 1075 (1891). Even more interesting is the following observation by the New Hampshire Supreme Court in 1873:

> [I]t is interesting as well as instructive to observe that one hundred and twenty years ago the term *smart money* was employed in a manner entirely different from the modern signification which it has obtained, being then used as indicating compensation for the smarts of the injured person, and not, as now, money required by way of punishment, and to make the wrong-doer smart.

Fay v. Parker, 53 N.H. 342, 355 (1873).

90. *Spokane Truck*, 2 Wash. at 55, 25 P. at 1075.

91. *Id.* at 51, 25 P. at 1073.

92. Murphy v. Hobbs, 7 Colo. 541, 551, 5 P. 119, 125 (1884).

93. Egan v. Mutual of Omaha Ins. Co., 24 Cal. 3d 809-20, 598 P.2d 452, 457, 157 Cal. Rptr. 482, 487 (1979); *see also* Wangen v. Ford Motor Co., 97 Wis. 2d 260, 323, 294 N.W.2d 437, 468 (1980) (Coffy, J., dissenting) ("the question of whether to abolish punitive damages is not for this court to decide, as it has been a part of our law for so long").

94. Rosener v. Sears Roebuck & Co., 110 Cal. App. 3d 740, 759, 168 Cal. Rptr. 237, 248 (1980) (Elkington, J., concurring).

95. *In re* Stranger Creek, 77 Wash. 2d 649, 653, 466 P.2d 508, 511 (1970).

96. Schenk v. Schenk, 100 Ill. App. 2d 199, 201, 241 N.E.2d 12, 13 (1968).

97. Haig v. Agee, 453 U.S. 280, 319-20 (1981) (Brennan, J., dissenting).

98. *See* City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1984).

punitive damages,[99] the demands of justice require that the punitive damages doctrine no longer be considered a stagnant body of law, especially where the defendant's rights are at issue.[100]

While all the cases cited in *Kennedy* involved state proceedings, private actions administered by the courts are equally considered state action.[101] Given the punitive *nature* of punitive damages, their customary use should not be allowed to derail the constitutional protections mandated in proceedings devised to punish the defendant for state-condemned behavior. As one federal court commented, monetary penalties do in fact "inflict a pocket-book deterrence or restraint on the recipient."[102] Arguments that punitive damages automatically dictate a civil label are unpersuasive under the test of affirmative restraint or disability.

B. Historically Regarded as Punishment?

The second test enunciated in *Kennedy* is whether the sanction "has historically been regarded as a punishment . . . ."[103] Again, not all the cases cited involved criminal proceedings. In *Cummings v. Missouri*,[104] another post Civil War oath was held unconstitutional.[105] The oath required that the declarant swear he had not engaged in certain proscribed acts against the Union during the Civil War.[106] The oath effectively precluded the plaintiff-minister from pursuing a religious teaching and preaching profession.[107] The Court held that unconstitutional processes could not suspend constitutional rights, here the pursuit of happiness.[108] The oath was a constitutionally invalid sanction since it indirectly punished behavior rather than legitimately regulated the competency of the profession. Similar to *Garland*, *Lovett*, and *Flemming*, the inquiry emphasized the *nature* of the statute's *effect*.

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99. *See* K. REDDEN, *supra* note 11, at 634; Wheeler, *supra* note 3, at 269; Note, *Punitive Damages: An Exception to the Right of Privacy?*, 5 PEPPERDINE L. REV. 145 (1977).

100. Courts often explicitly acknowledge concern for the plaintiff's rights without realizing the defendant's rights are at issue since he is the one being punished. The plaintiff has no *right* to punitive damages. *See infra* note 508 and accompanying text.

101. Use of compulsory processes of the court is considered state action since the court is a governmental entity. Britt v. Superior Court, 20 Cal. 3d 844, 856 n.3, 574 P.2d 766, 773 n.3, 143 Cal. Rptr. 695, 702 n.3 (1978).

102. Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 518 F.2d 990, 1001 (5th Cir. 1975), *aff'd*, 430 U.S. 442 (1977).

103. 372 U.S. at 168.

104. 71 U.S. (4 Wall.) 277 (1867). *Cummings* was decided the same day as *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866).

105. 71 U.S. (4 Wall.) at 331-32.

106. *Id.* at 316-17.

107. *Id.* at 317.

108. *Id.* at 332.

Three other cases cited in *Kennedy* follow different logic.[109] In *Ex parte Wilson*,[110] the Court held that imprisonment for forgery traditionally had been regarded as "infamous punishment," activating the constitutional rights to indictment by a grand jury.[111] *Mackin v. United States*[112] had a similar result, holding that anyone facing potential "infamous punishment" also had the right, under the Fifth Amendment, to grand jury indictment.[113] Finally, in *Wong Wing v. United States*,[114] the Court held that administrative agencies could not imprison aliens at hard labor without criminal procedural safeguards.[115]

While the latter three cases embraced the idea of "infamous punishment," on its face the logic may apply when reexamining the historical purpose of punitive damages.[116] As the *Mackin* Court pointed out, the Fifth Amendment embodies protections for those individuals subject to infamous punishment as defined originally by English people.[117] And "[w]hat punishment shall be considered as infamous may be affected by changes of public opinion in one age to another . . . ."[118] Punitive damages, of course, were never considered infamous punishment. They were developed originally as a nonpenal, civil sanction invoked by the English judiciary.[119]

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109. Wong Wing v. United States, 163 U.S. 228 (1896); Mackin v. United States, 117 U.S. 348 (1886); *Ex parte* Wilson, 114 U.S. 417 (1885).

110. 114 U.S. 417 (1885).

111. *Id.* at 429. "Deciding nothing beyond what is required by the facts of the case before us, our judgment is that a crime punishable by imprisonment for a term of years at hard labor is an infamous crime, within the meaning of the Fifth Amendment of the Constitution . . . ." *Id. See also infra* note 116.

112. 117 U.S. 348 (1886).

113. *Id.* at 354-55.

114. 163 U.S. 228 (1896).

115. *Id.* at 237.

116. While *Wong Wing* determined that imprisonment at hard labor constituted "infamous punishment" for Fifth Amendment purposes, any punishment that can be classied as "infamous" should be sufficient to trigger not only the Fifth Amendment, but any constitutional safeguard in question. *See* Clark, *supra* note 76, at 401.

The Court has not, however, applied *Wong Wing*, *Mackin*, or *Wilson* to a civil proceeding. Yet none of the cases has been overruled, and the very fact that *Kennedy* cited the cases indicates that the *Wong Wing* rationale and principle remain valid. *Id.* At least one federal court has indicated recently that "the notion of what constitutes an infamous punishment varies from one age to another." United States v. Armored Transp., Inc., 620 F.2d 1313, 1319 (9th Cir. 1980).

117. *Mackin*, 117 U.S. at 351.

118. *Id.*

119. Walther & Plein, *supra* note 53, at 370-71. The first reported opinion considering punitive or exemplary damages is Huckle v. Money, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (1763). The court upheld punitive damages, stating that in the tort action for unlawful search,

> the personal injury done to [plaintiff] was very small, so that if the jury had been confined by their oath to consider the mere personal injury only, perhaps 20 [pounds]

The English jurors who originally assessed punitive damages had to be neighbors or acquaintances of the defendant, familiar with his financial conditions, and witnesses to the tortious act.[120] Punitive damages were not awarded as punishment, nor were the proceedings considered lacking in protections.[121] However, just as the full panoply of constitutional safeguards now protects any criminally accused[122] regardless of the nature of the sanction, punitive damages defendants also deserve higher procedural protections like the original English safeguards,[123] which never were adopted as part of the American system. Thus, punitive damages, a severe sanction at loose in America's civil courts, conceivably might be labeled as "infamous" because of their random infliction of punishment in degrees impossible to calculate.[124] But the bold visage of the "infamous punishment" analysis seldom has been utilized, and usually only in cases where the allegedly criminal penalty involved some type of physical coercion or punishment.[125]

In any event, the *Kennedy* test requires only that the sanction historically had been regarded as punishment, *not* as infamous punishment.

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damages would have been thought damages sufficient; but the small injury done to the plaintiff . . . did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at the trial . . . . I think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject.

Id. at 206-07, 95 Eng. Rep. at 768-69.

120. *See* Dubois, *supra* note 3, at 347.

121. This fact is exemplified by the original rule that judges and appeals courts would not disturb the awards since the jurors had first hand knowledge of the facts. *Id.* at 347. It also has been contended that judicial deference to jury verdicts was the result of a lack of "established standards for measuring compensatory damages." Mallor & Roberts, *supra* note 53, at 643.

122. *See supra* note 13.

123. The trier of fact is still considered to be in the best position to assess punitive damages. As expressed in Neal v. Farmer's Ins. Exch., 21 Cal. 3d 910, 582 P.2d 980, 148 Cal. Rptr. 389 (1978), the courts will follow the " 'historically honored standard of reversing as excessive only those judgments which the entire record, when viewed most favorably to the judgment, indicates were rendered as the result of passion and prejudice.' " *Id.* at 927, 582 P.2d at 990, 148 Cal. Rptr. at 399 (quoting Bertero v. National Gen. Corp., 13 Cal. 3d 43, 65 n.12, 529 P.2d 608, 624 n.12, 118 Cal. Rptr. 184, 200 n.12 (1974)). Correspondingly, "[t]rial and appellate courts have demonstrated their realization that a tighter rein should be employed in punitive damage cases, as compared to other civil cases, by the frequency in which courts have cut down the *amounts* of punitive damage awards or granted new trials if remittitur is not accepted . . . ." Woolstrum v. Mailloux, 141 Cal. App. 3d Supp. 1, 11, 190 Cal. Rptr. 729, 735-36 (1983).

124. The difficulty in calculation is due to the unguided and unfettered discretion of supposedly neutral juries, a method unknown in the original English system. *See supra* text accompanying note 120.

125. *See generally* Clark, *supra* note 76, at 402-03.

Labeling punishment as "infamous" is relevant only in assessing whether *all* criminal due process safeguards should be provided in a particular proceeding.[126] It is not necessary to take the punitive damages analysis that far. Nevertheless, the reasoning of the "infamous punishment" cases reconciles those opinions with *Cummings*, which also examined the history of the sanction to determine whether it should be considered punishment and, if so, what safeguards were mandated.

Punitive damages are assessed to accomplish the same punitive ends as criminal fines and most of the aims of imprisonment.[127] Courts[128] and commentators[129] articulate this crossover point in stressing their penal nature. Nonetheless, it can be argued that punitive damages are no more penal than treble damages or civil penalties that consistently have been held remedial. Yet when the punitive damages doctrine is examined against the very reason that all other types of enhanced damages consistently and overwhelmingly have been held nonpenal, the distinctions between the penalties support the finding that punitive damages constitute

126. *Id.* at 401; *Wong Wing*, 163 U.S. at 234.

127. Both criminal law and punitive damages serve the purposes of retribution, deterrence, and rehabilitation. Comment, *supra* note 3, at 410. While the penal law does encompass the additional sanction of incarceration, this distinction is not compelling. The punitive damages defendant is like the criminal defendant subject only to fine; incarceration normally is not needed in the punitive damages defendant's case since he is not the type of person that needs to be incapacitated until he can safely return to society. *See generally* Collings, Jr., *Negligent Murder—Some Stateside Footnotes to* Director of Public Prosecutions v. Smith, 49 CALIF. L. REV. 254, 295 (1961) (incapacitation is required only for that special class of criminals who are unsafe at large in the community). While incarceration certainly dictates a finding of penal purposes, its nonexistence is not dispositive of the issue. *See* Trop v. Dulles, 356 U.S. 86 (1958). The issue of whether actual imprisonment results is important only as to whether the defendant will be entitled to each and every procedural protection that is available when penal sanctions are levied. *See supra* note 13.

128. The rule of compensation insufficient to give the injured party all that he is entitled to, and to go beyond that, and usurp the powers of the state in the infliction of punishment, may well be challenged as a "sin against sound judicial principle"; a sin which cannot be made to stand for the right by an adherence to it.

Greeley, S.L. & P. Ry. v. Yeager, 11 Colo. 345, 350, 18 P. 211, 214 (1888). A number of modern courts have held that while they disagree that punitive damages proceedings deserve special procedural protections, the doctrine is nonetheless penal in nature. *See, e.g.*, Campus Sweater & Sportswear Co. v. M.B. Kahn Constr., 515 F. Supp. 64, 108 n.129 (D.S.C. 1979); Hammond v. North Am. Asbestos Corp., 97 Ill. 2d 195, 211, 454 N.E.2d 210, 219 (1983); Unified School Dist. No. 409 v. Celotex Corp., 6 Kan. App. 2d 346, 356, 629 P.2d 196, 206 (1981).

129. Comment, *supra* note 3, at 410-12. The author notes that while punitive damages serve the same functions as criminal law, not all procedural protections are mandated since a sanction under criminal law carries greater effect than punitive damages. For example, he points out that "[t]here is no blank on a job application for listing past punitive damages judgments." *Id.* at 411. *Contra* K. REDDEN, *supra* note 11, at 604 (the argument can be made that some punitive damages punishment is "virtually indistinguishable from a criminal fine . . . .").

a criminal sanction.[130]

To clarify this distinction, a review of the historical treatment of enhanced and punitive damages is necessary. The contrast in treatment supports the conclusion that punitive damages in their traditional and historical role are in theory and practice equivalent to a penal sanction.

At the outset, it must be noted that punitive damages arrived in American jurisprudence as early as 1784.[131] Their singular purpose is exemplified by California's first case, where they were awarded as "vindictive damages."[132] These damages, which in the writings of Blackstone, Hammond, or Rutherford,[133] have no sanction, contrast with enhanced damages that developed later in the law, such as penalties under the Clayton Antitrust Act.[134] Since both antitrust treble damages and punitive damages have been held mutually exclusive,[135] the Clayton Act serves as an appropriate focal point for construing the historical purpose of damage enhancement. The examination reveals that rather than possessing characteristics comparable to normal enhanced damages provisions, punitive damages more clearly parallel criminal law. The discussion dispels any notion that punitive damages can be justified as nonpenal.

1. Penal-Remedial Distinctions

The well-settled rule in construing a sanction that punishes is that it is saved from a penal construction if the sanction has any remedial purpose or effect. As stated in *Helvering v. Mitchell*,[136] the determinative criterion is whether the actual damages awarded fully compensate the

130. For example, the same reasoning that distinguishes antitrust treble damages from criminal fines distinguishes enhanced damages from punitive damages. Antitrust treble damages under the Clayton Act, 15 U.S.C. § 15 (1982), have a partial remedial nature, while punitive damages and criminal fines do not. *See infra* text accompanying notes 150-55. It should be noted that the criminality of statutory treble damages provisions repeatedly has been addressed and rejected. *See infra* note 139.

131. Genay v. Norris, 1 S.C.L. (1 Bay) 6 (1784) (exemplary damages assessed against defendant who, as a practical joke, placed a "spanish fly" in plaintiff's wine, causing plaintiff to become ill).

132. Wilson v. Middleton, 2 Cal. 54 (1852). The headnote summing up the case refers to exemplary damages as "vindictive." *Id.* at 54. Courts still refer to punitive damages as "vindictive." *See* Webb's City, Inc. v. Hancur, 144 So. 2d 319, 321 (Fla. 1962).

133. *See* Murphy v. Hobbs, 7 Colo. 541, 546, 5 P. 119, 122 (1884). Justice Helm also points out that punitive damages were "entirely unknown to civil law." *Id.*

134. Under 15 U.S.C. § 15 (1982), Clayton antitrust damages are clearly delineated in amount and awarded to rectify injury to property. Punitive damages are undefined in limit and are assessed as punishment for outrageous behavior.

135. For a collection of cases, see Wahba v. H & N Prescriptions Center, Inc., 539 F. Supp. 352, 356 (E.D.N.Y. 1982).

136. 303 U.S. 391, 401 (1938).

plaintiff.[137] If any compensatory purpose can be found in damage enhancement, the statute will not be construed as penal.[138]

Clayton Act antitrust damages provide a good illustration. Although they exact some retribution, they have not been regarded as penal.[139] A number of courts have held that the Clayton Act's treble damages provision is designed to substitute for other, more complex measures of damages. Moratory interest, for example, is not awarded in antitrust actions as "an element of damages sustained."[140] Treble damages compensate for that loss and avoid "difficult questions of proof" on highly abstruse inquiries into the duration and amount of interest.[141]

In antitrust litigation, a person or corporation eliminated permanently or effectively from competition will have difficulty establishing the full amount of damage.[142] But the treble damages provision circumvents any problems by allowing for "ample" awards and providing an "open . . . door of justice" to those suffering *actual* harm.[143] For instance, only special damages are pleaded in antitrust actions, though treble damages may very well serve to redress types of injury that are not compensable under the compensatory provisions of the antitrust laws.[144] While treble damages have been declared somewhat punitive in nature, their

137. Even where indemnity for loss may be greater than actual damages, a penalty is still remedial if it can be said the compensation did not represent full value of the loss. *Id.* at 401. A fixed civil penalty in addition to criminal fines for the same wrong may be considered remedial if it can be said to reasonably compensate society or the government for damages caused by the crime. *See* Rex Trailer v. United States, 350 U.S. 148, 153-54 (1956).

138. *Helvering*, 303 U.S. at 401.

139. The courts have repeatedly held that treble damages under the Clayton Act are nonpenal. *See, e.g.*, Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 397 (1906); Rogers v. Douglas Tobacco Bd. of Trade, 244 F.2d 471, 483 (5th Cir. 1957); United States v. Countryside Farms, Inc., 428 F. Supp. 1150, 1159 (C.D. Utah 1977).

140. Trans World Airlines, Inc. v. Hughes, 449 F.2d 51, 80 (2d Cir. 1971), *rev'd*, 409 U.S. 363 (1973) (treble damages adequately compensate plaintiff for moratory interest). *Contra* 15 U.S.C. § 15 (1982) (prejudgment interest may be awarded for *bad faith* in antitrust litigation).

141. *Hughes*, 449 F.2d at 80.

142. The difficulty of measuring damages is illustrated by the case of Twentieth Century Fox Film Corp. v. Brookside Theatre Corp., 194 F.2d 846, 854-57 (8th Cir.), *cert. denied*, 343 U.S. 942 (1952) (attempt to calculate "[t]he value of the right to continue business, of which the plaintiff was deprived by the wrongful act of the defendants." 194 F.2d at 855). Treble damages are provided in antitrust cases to assure injured plaintiffs " 'ample damages for the wrong suffered.' " Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486 n.10 (1977) (quoting 51 CONG. REC. 9073 (1914) (remarks of Rep. Webb)).

143. Treble damages under the Clayton Act were provided only in part to achieve a punitive end. They were primarily designed as a remedy for those injured by illegal antitrust activities. *Brunswick Corp.*, 429 U.S. at 486 n.10.

144. Treble damages under the Clayton Act have a dual function: they cover all damages suffered by plaintiff and encourage private enforcement of the antitrust laws. Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp., 269 F. Supp. 540, 542 (E.D. Pa. 1967), *cert. denied*, 390 U.S. 931 (1968). Treble damages are intended to redress injury and

remedial purpose brings them within the rule of *Helvering v. Mitchell*.[145]

Similar conclusions have been reached regarding other enhanced damages.[146] Enhanced damages may be assessed in patent infringement actions, for example, without being construed as criminal.[147] The premise is that an award of compensation does not necessarily reflect actual damages where the plaintiff has sustained prolonged abridgment of his rights.[148] Another line of reasoning holds that enhanced damages may be considered "liquidated damages" where they are in the nature of a fixed fine and serve to cover reasonable costs associated with litigation.[149]

On the other hand, punitive damages are purely penal in nature, a proposition made clear by the majority rule reflected in the *Second Restatement of Torts*.[150] They are not construed as serving any remedial goal.[151] While a remedial purpose exists in most cases of statutorily en-

to achieve the social object of antitrust laws. Mach-Tronics, Inc. v. Zirpoli, 316 F.2d 820, 828 (9th Cir. 1963).

145. 303 U.S. 391 (1937). *See supra* note 137.

146. The typical treble damages provision compensates for losses sustained against property rights and thus serves a remedial purpose. *See, e.g.*, Rayonier, Inc. v. Polson, 400 F.2d 909, 922 (9th Cir. 1968) (by bringing an action for wrongful cutting and removal of timber seeking statutorily enhanced damages, " 'plaintiffs have declared for double or treble value of the trees as their measure of damages, instead of single value with interest.' " *Id.* (quoting McCloskey v. Powell, 138 Pa. 383, 398, 21 A. 148, 150 (1891)); *see also* Armstrong v. Emerson Radio & Phonograph Corp., 132 F. Supp. 176, 179 (S.D.N.Y. 1955) (patent treble damage actions survive the plaintiff's death since they compensate for the taking of another's property); Momand v. Twentieth Century Fox Film Corp., 37 F. Supp. 649, 657 (W.D. Okla. 1941) (Clayton Act antitrust treble damage action is assignable since it remedies injury to business or property interests).

However, an enhanced damages provision will be construed as purely penal if it has no remedial effect. *See* Ashcraft v. Saunders, 251 Or. 139, 142, 444 P.2d 924, 926-27 (1968).

147. 35 U.S.C. § 284 (1982). *See also* Armstrong v. Emerson Radio & Phonograph Corp., 132 F. Supp. 176, 179 (S.D.N.Y. 1955) ("[p]ublic policy dictates that where the injury is to property, intangible aspects of the damage claim which relate to the complexities of our industrial society be satisfied by the imposition of additional damages, which though in some aspects punitive, are inherently remedial").

148. *Armstrong*, 132 F. Supp. at 179; *accord* Trio Process Corp. v. L. Goldstein's Sons, Inc., 638 F.2d 661, 663 (3d Cir. 1981) (Clayton Act antitrust treble damages serve as interest for the loss of use of money and "all other remedial . . . factors necessary to vindicate the policies of the underlying substantive law").

149. Rex Trailer v. United States, 350 U.S. 149, 153-54 (1955).

150. RESTATEMENT (SECOND) OF TORTS § 908 (1979). "[T]he purposes of awarding punitive damages, or 'exemplary' damages as they are frequently called, are to punish the person doing the wrongful act and to discourage him and others from similar conduct in the future." *Id.*, comment a.

151. Punitive damages are not compensation, they are "private fines." Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974). Although Connecticut, Michigan, and New Hampshire assign a compensatory purpose to punitive damages, courts in those states are emphatic in their view that the doctrine may not be utilized to punish. *See* Veselenak v. Smith, 414 Mich. 567, 576-77, 327 N.W.2d 261, 265 (1982) (punitive damages may be awarded to compensate intangible injury, but must not doubly compensate plaintiffs); Miller v. Drouin, 183 Conn. 189,

hanced damages, punitive damages justify no compensatory end.[152] Indeed, punitive damages are considered a mere "windfall"[153] to the plaintiff and are not favored in law.[154] These observations have not been made about other types of enhanced damages.[155]

2. *Matter of Right*

By virtue of statutory language, both state and federal courts[156] have interpreted the award of Clayton Act antitrust treble damages as an absolute right when the plaintiff prevails on his cause of action.[157] Correspondingly, a plaintiff in a patent infringement action may collect treble damages for violation of a registered patent.[158] While the statutory language is vague, courts have interpreted the patent treble damages provision as a right when the plaintiff proves the defendant's violation was

190, 438 A.2d 863, 864 (1981) (punitive damages may not be utilized to punish a defendant). New Hampshire allows punitive damages to enhance a compensatory award, but disallows them for punishment and deterrence purposes. *See* Vratsenes v. N.H. Auto Inc., 112 N.H. 71, 73, 289 A.2d 66, 68 (1972).

Four states—Louisiana, Massachusetts, Nebraska, and Washington—disallow punitive damages completely. *See* Breaux v. Simon, 235 La. 453, 104 So.2d 168 (1958); O'Reilly v. Curtis Publishing Co., 31 F. Supp. 364 (D. Mass. 1940); Miller v. Kingsley, 194 Neb. 123, 230 N.W.2d 472 (1975); and Conrad v. Lakewood Gen. Hosp., 67 Wash. 2d. 934, 410 P.2d 785 (1966). However, a bill recently has been introduced in the Louisiana House that would impose on insurers a duty of good faith and fair dealing, authorizing punitive damages for arbitrary or intentional violation of the duty. H. 760, 1984 Sess. (1984 LA.). A Senate bill would authorize punitive damages for fraudulent, malicious, wanton, or reckless conduct. S. 560, 1984 Sess. (1984 LA.).

152. Gertz v. Robert Welch, Inc., 418 U.S. at 350.

153. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 84 (1971) (Marshall, J., dissenting); Travelers Indem. Co. v. Armstrong, 442 N.E.2d 349, 362 (Ind. 1982).

154. Punitive damages are not favored in the law because of their "penal nature." Hammond v. North Am. Asbestos Corp., 97 Ill. 2d 195, 211, 454 N.E.2d 210, 219 (1983); *see also* Rosener v. Sears Roebuck & Co., 110 Cal. App. 3d 740, 750, 168 Cal. Rptr. 237, 242 (1980).

155. Indeed, enhanced damages are favored. *See supra* note 147.

156. *See, e.g.*, Clark Oil Co. v. Phillips Petroleum, Inc., 148 F.2d 580, 582 (8th Cir. 1945); Uneedus v. California Shoppers, Inc., 86 Cal. App. 3d 932, 942, 150 Cal. Rptr. 596, 602 (1978).

157. The treble award is mandated on the face of the Clayton Act whenever actual damages are proved. 15 U.S.C. § 15 (1982) provides:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained . . . .

See also Clark Oil Co. v. Phillips Petroleum, Inc., 148 F.2d at 581 (treble damages "automatically" follow actual damages).

158. 35 U.S.C. § 284 (1982). When actual damages are awarded, "the court may increase the damages up to three times the amount found or assessed." *Id.*

willful and intentional.[159] These two examples reflect the general rule that where a plaintiff prevails on a statutory cause of action, enhanced damages, where available, will be permitted.[160] This rule parallels the reasoning holding treble damages to be nonpenal: if they compensate, then the right necessarily *must* exist.[161]

In contrast, punitive damages are not considered a right in any jurisdiction.[162] Such an award rests totally within the jury's discretion.[163] For example, the Wisconsin Supreme Court has held that it is never error *not* to award punitive damages.[164] Questioning the propriety of the doctrine, the United States Supreme Court has noted that juries may employ punitive damages inappropriately to punish unpopular defendants.[165] Instead of uniform application of a rule, punitive damage awards result in a farrago of erratic verdicts lacking even-handed justice.[166]

Further, unlike the general treble damages proceeding in which a jury verdict on enhanced damages is advisory only,[167] a jury's decision not to award punitive damages constitutes a final determination of that issue.[168] A fascinating paradox thus materializes. In a criminal proceeding, an acquittal by the jury forever bars prosecution or appeal by the government.[169] Remarkably, the identical rule applies to punitive damages proceedings. Like criminal procedure, a jury decision that punitive

159. The plaintiff is "entitled" to enhanced damages where the breach is willful, intentional, and not in good faith. Saf-Gard Prod., Inc. v. Service Parts, Inc., 491 F. Supp. 996, 1011 (D. Ariz. 1980); Jenn-Air Corp. v. Penn Ventilator Co., 394 F. Supp. 665, 676 (E.D. Pa. 1975) (knowingly, intentionally, and willfully infringing patent "entitles" plaintiff to treble damages).

160. *See, e.g., Jenn-Air Corp.*, 394 F. Supp. at 676.

161. *See supra* note 159. The rights may be limited, however. *See* Trio Process Corp. v. L. Goldstein's Sons, Inc., 638 F.2d 661, 663-64 (3d Cir. 1981) (if damages for patent infringement are found to be punitive, interest may be computed only on primary damages).

162. *See infra* note 242.

163. *See infra* note 316.

164. Wangen v. Ford Motor Co., 97 Wis. 2d 260, 301-02, 294 N.W.2d 437, 458 (1980).

165. Electrical Workers v. Foust, 442 U.S. 50 n.14 (1979).

166. The Ninth Circuit is in accord. In rejecting the contention that statutory denial of punitive damages in wrongful death actions violates equal protection, the court stated: "The frequently violent and dramatic circumstances of accidents that lead to wrongful death actions not only would pose this danger of extreme awards, but also might increase the temptation for a jury to award punitive damages even when concrete elements of fraudulent or intentional wrongdoing are absent." *In re* Paris Air Crash, 622 F.2d 1315, 1323 (9th Cir. 1980).

167. White v. Mar-Bel, Inc., 509 F.2d 287, 292 (5th Cir. 1975) (patent infringement).

168. "A plaintiff is entitled to [punitive] damages only after the jury, in the exercise of its untrammeled discretion, has made the award." Lewis v. Hayes, 165 Cal. 527, 533, 132 P. 1022, 1024 (1913).

169. "[T]he plea of *autrefoits acquit* . . . is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence." Benton v. Maryland, 395 U.S. 784, 795 (1969) (quoting 4 W. BLACKSTONE, COMMENTARIES *335).

damages liability shall not extend to the defendant for his alleged acts is conclusive and unappealable.[170] Thus, while courts[171] and commentators[172] assert that punitive damages are not penal, they treat them in theory and practice like criminal punishment. Unlike a criminal defendant, however, a punitive damages defendant faces an exaggerated course of procedural hurdles on his way to exoneration.[173] Additionally, there is still great judicial reluctance to reduce punitive damages liability on a defendant's appeal;[174] a number of states refuse remittitur absolutely.[175]

3. *Relationship to Actual Damages*

Treble damages are not awarded absent a showing of actual damages.[176] The rule is similar for other statutorily enhanced damages[177] and is consistent with the reasoning that such damages are awarded to compensate for property losses rather than intangible personal losses. If no

170. Even where liability is clear, awarding or withholding punitive damages is the jury's sole domain. *See* Brewer v. Second Baptist Church, 32 Cal. 2d 791, 801, 197 P.2d 713, 719 (1948).

171. Campus Sweater & Sportwear Co. v. M.B. Kahn Constr., 515 F. Supp. 64, 108 n.129 (D.S.C. 1979) ("The imposition of punitive damage awards, though penal in nature, does not approach the severity of criminal sanctions."); Unified School Dist. No. 490 v. Celotex Corp., 6 Kan. App. 2d 346, 356, 629 P.2d 196, 206 (1981) (though punitive damages are "penal in nature," they do "not approach the severity of criminal sanctions and [do] not demand the same safeguards as do criminal prosecutions").

172. Commentators generally refuse to acknowledge the criminality of punitive damages, asserting they are not as severe a sanction as penal punishment. *See* Mallor & Roberts, *supra* note 53, at 644-45; Comment, *supra* note 3, at 410.

173. The punitive damages defendant can be found liable on a preponderance of the evidence; has the disadvantage of having prejudicial information concerning his wealth introduced at trial before he is adjudged guilty; can be compelled to testify against himself; and can be punished multiply for the same wrong. *But see infra* notes 355-56 (for the states requiring higher burdens of proof); Comment, *Pretrial Discovery of Net Worth in Punitive Damages Cases*, 54 S. CAL. L. REV. 1141, 1144 (1981) (discussing effect of pretrial discovery of defendant's wealth).

174. *See supra* note 123. A finding of civil liability need only be supported by "any substantial evidence, contradicted or uncontradicted, which supports the jury's conclusion." Beck v. State Farm Mut. Auto Ins. Co., 54 Cal. App. 3d 347, 354, 126 Cal. Rptr. 602, 606 (1976). On the other hand, a finding of criminal liability depends on "whether reasonable minds could conclude that the evidence is inconsistent with the hypothesis of the accused's innocence." United States v. Warner, 441 F.2d 821, 825 (5th Cir.), *cert denied*, 404 U.S. 829 (1971).

175. See the collection of jurisdictions at 22 AM JUR. 2D, *Damages* § 446 n.12 (1965).

176. To recover treble damages, the plaintiff must prove the "fact of damage" from injury to his business or property interest due to a violation of antitrust laws. Response of N.C., Inc. v. Leasco Response, Inc., 537 F.2d 1307, 1320 (5th Cir. 1976).

177. *See, e.g.*, 35 U.S.C. § 284 (1982) (the statute on its face requires actual damages before enhancement may be made); CAL. CIV. CODE § 54.3 (West 1984) (three times the amount of actual damages arising from interference with the rights of physically disabled persons); CAL. CIV. CODE § 3346 (West 1970) (three times actual damages arising from wrongful injury to trees).

cognizable injury to property merits compensatory damages, double or treble damages cannot be justified.[178]

Punitive damages, however, can be awarded on a showing of nominal damages.[179] They have been assessed in addition to verdicts of one dollar,[180] six cents,[181] and no actual damages at all.[182] This result is in harmony with the doctrine's goal of punishing outrageous conduct rather than compensating injury.[183] As one federal court pointed out, the need to protect the public's rights controls regardless of whether actual damage was sustained.[184]

Unlike the treatment of double or treble damages, most jurisdictions have not delineated measurements or a multiples framework to guide punitive damages juries.[185] A court may simply instruct a jury to determine the extent to which a defendant is monetarily liable for punishment.[186] Thus, rather than determine whether the plaintiff has

178. Only nominal damages are available in antitrust actions if no specific injury is shown. United Exhibitors, Inc. v. Twentieth Century Fox Film Distrib. Corp., 31 F. Supp. 316, 317 (W.D. Pa. 1940). Actual injury must be proved, and compensatory damages must be awarded before treble damages will be upheld. Clark Oil Co. v. Phillips Petroleum Co., 148 F.2d 580, 582 (8th Cir.), *cert. denied*, 326 U.S. 734 (1945). To qualify for treble damages under the Clayton Act, there must be injury to business or property by reason of defendant's violation of antitrust laws. *See* J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION, PRACTICE AND PROCEDURE § 81.02[2][c][iii] (1984).

179. The authorities are split on the issue. *See* Annot., 17 A.L.R. 542-45 (2d ed. 1951). Since punitive damages are assessed to punish the defendant, thereby vindicating public policy rather than any interests of the plaintiff, it is the nature of the act and not the dollar amount of harm that is decisive. Thus nominal damages are considered sufficient to support punitive assessments. *See* Kent v. City of Buffalo, 61 Misc. 2d 142, 304 N.Y.S. 2d 949 (1969), *rev'd on other grounds*, 29 N.Y.2d 818, 277 N.E.2d 669, 327 N.Y.S.2d 653 (1971).

180. *E.g.*, Reynolds v. Pegler, 123 F. Supp. 36 (S.D.N.Y. 1954) (libel action awarding a total of three dollars in nominal damages and $175,000 punitive damages against three defendants).

181. Toomey v. Farley, 2 N.Y.2d 71, 138 N.E.2d 221, 156 N.Y.S.2d 840 (1956) (defamation).

182. Parnell v. Continental Casualty Co., 146 Cal. App. 3d 483, 194 Cal. Rptr. 275 (1983) (breach of the covenant of good faith and fair dealing implied in an insurance contract—trial court order for new trial upheld).

183. Authority is split on the issue. *Compare* Rosener v. Sears Roebuck & Co., 110 Cal. App. 3d 740, 751, 168 Cal. Rptr. 237, 243 (1980) (requiring both a reasonable relation to actual damages and that punitive damages not be excessive to the amount of harm caused) *with* Kent v. City of Buffalo, 61 Misc. 2d 142, 304 N.Y.S. 2d 949 (1969), *rev'd on other grounds*, 29 N.Y.2d 818, 277 N.E.2d 669, 327 N.Y.S. 2d 653 (1971) (no need for actual damages or relation of compensatory damages to punitive damages).

184. Wills v. Trans World Airlines, Inc., 200 F. Supp. 360, 367 (S.D. Cal. 1961).

185. "There is no fixed standard for the measurement of exemplary or punitive damages . . . ." See the collection of cases at 25 C.J.S. *Damages*, § 126(1)-(4) (1966 & Supp. 1983).

186. *Id.* As the Nevada Supreme Court said in Tahoe Village Realty v. DeSmet, 95 Nev. 131, 135, 590 P.2d 1158, 1161 (1979): "[T]he assessing of punitive damages is wholly subjective. There are no objective standards by which the monetary amount can be calculated."

proved damages to a personal or property right, the punitive damages jury decides whether the defendant should be penalized financially for his behavior and, if so, to what extent. The focus on the defendant's culpability and liability for punishment, instead of damage or injury to the plaintiff,[187] constitutes a unique exception to tort law.[188]

4. Survival and Assignment

There is no survival of penal actions at common law.[189] On the other hand, enhanced damages provisions—being remedial in purpose and effect—do survive since the action is not against a deceased tortfeasor.[190] Rather, the action is against his estate, which may have benefited wrongfully at the plaintiff's expense.[191] Punitive damages claims, however, do not survive.[192] Once again, the irony is that punitive damages are treated historically and theoretically like criminal fines. The general rule is that a personal representative cannot be forced to step into the shoes of a deceased tortfeasor's punitive damages liability any more than he can be made to accept vicarious criminal liability for the wrong.[193]

187. Punitive damages are assessed against a defendant rather than awarded to the plaintiff. *See, e.g.*, Caple v. Raynel Campers, Inc., 90 Nev. 341, 344, 526 P.2d 334, 336-37 (1974). "[T]he concept of punitive damages rests upon a presumed public policy to punish a wrongdoer for his act . . . ." *Id. See also* 22 AM. JUR. 2D *Damages* § 240 (1965).

188. Tort remedies, with the exception of punitive damages, provide relief for some damage threatened or suffered. *See generally* D. DOBBS, REMEDIES 1-3 (1973).

189. Schreiber v. Sharpless, 110 U.S. 76, 80 (1884).

190. Barnes Coal Corp. v. Retail Coal Merchants Ass'n, 128 F.2d 645, 649 (4th Cir. 1942).

191. Prosser points out that early American courts adopted the rule that an action against a decedent's estate survived where the estate otherwise would be unjustly enriched and "the action could be maintained as one of quasi-contract restitution." W. PROSSER, LAW OF TORTS 899 (4th ed. 1971). The modern trend is that the fortuitous event of death should not extinguish a claim that legitimately can be asserted against the estate of the tortfeasor. *Id.* at 901.

192. At common law, no action against the tortfeasor survived. Henshaw v. Miller, 58 U.S. (17 How.) 212 (1854). The common law rule has been altered by statute so that today only the punitive damages claim does not survive the tortfeasor's death. *See, e.g.*, CAL. CIV. PROC. CODE § 573 (West. Supp. 1984) (survival of all actions except punitive damages claims); WIS. STAT. ANNOT. § 895.02 (West 1983) (no survival of punitive damages claim against decedent's estate). Since punitive damages are designed to punish the defendant, no purpose is served by assessing them against his estate or heirs upon his death. Abatement of the claim is not unjust since such damages are assessed against a tortfeasor for his personal wrong and not for the benefit of the plaintiff. Evans v. Gibson, 220 Cal. 476, 489-90, 31 P.2d 389, 395 (1934) ("Punitive damages serve no purpose after the wrongdoer's death."); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 311, 294 N.W.2d 437, 463 (1980); Thompson v. Estate of Petroff, 319 N.W.2d 400, 408 (Minn. 1982).

193. The criminal law imposes punishment on those transgressing social barriers of acceptable behavior, both to prevent further misbehavior and to deter others similarly situated. Those who have "lived up to the social standards of the criminal law" have necessitated no

A brief comment on the history of tort action survival is even more revealing. At common law, the death of the tortfeasor abated every cause of action.[194] Eventually, the exception developed that actions for torts affecting property rights survived.[195] Torts affecting the person, however, survive only by virtue of statute.[196] While it is not certain why this divergence in the law occurred,[197] it is most likely attributable to the early common law that treated personal torts and crimes identically. Since criminal actions abated with the defendant's death, so did the personal tort.[198] Prosser attributed this phenomenon to "the development of the tort remedy as an adjunct and incident to criminal punishment in the old appeal of felony and the action of trespass which succeeded it."[199] Thus, since a dead person could not be punished, personal tort liability disappeared with death.[200] However, at least half of American jurisdictions now permit a personal injury action to survive the death of the tortfeasor.[201] Nevertheless, the uniform rule is that a punitive damages claim related to a personal injury still abates with the defendant's demise.[202] Because punitive damages are considered retributional, like criminal penalties, they serve no purpose after the wrongdoer's death.[203] While it may be argued that punitive damages still serve some minimal level of deterrence, once the death of the malefactor occurs, there simply is nothing left to deter.[204] Attempts to castigate the heirs of the accused would be a gross deviation from civil or criminal justice.[205]

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reason for punishment. Commonwealth v. Koczwara, 397 Pa. 575, 580 n.1, 155 A.2d 825, 827 n.1 (1959), *cert. denied*, 363 U.S. 848 (1960).

194. Henshaw v. Miller, 58 U.S. (17 How.) 212 (1884). *See also* 1 AM. JUR. 2D *Abatement, Survival, and Revival* § 47 (1962) (death of party abating action).

195. The reason for this distinction is that a dead person cannot be punished, whereas his property, remaining in existence, can compensate for injury done to another's property interests. Barnes Coal Corp. v. Retail Coal Merchants Ass'n, 128 F.2d at 649. *See also* 1 AM. JUR. 2D *Abatement, Survival, and Revival* § 51 (1962).

196. *See, e.g.*, Cort v. Steen, 36 Cal.2d 437, 439, 244 P.2d 723, 723-24 (1950) (the common law maxim *actio personalis moritur cum persona* applies absent a statute to the contrary).

197. D. DOBBS, *supra* note 188, at 551; W. PROSSER, *supra* note 191, at 900.

198. D. DOBBS, *supra* note 188, at 551.

199. W. PROSSER, *supra* note 191, at 898.

200. *Id.*

201. *Id.* at 900.

202. *See supra* note 192.

203. Nor may punitive damages be assessed against innocent persons. Thompson v. Estate of Petroff, 319 N.W.2d at 408 ("to punish [the decedent's] estate . . . would be to ignore the entire purpose of punitive damages").

204. *Id.* ("Obviously, if the tortfeasor is dead, no need exists for either punishment or deterrence.").

205. *See supra* note 193.

The development of such legal distinctions marshals the argument that punitive damages are a misplaced criminal sanction. For if they served any justifiable need of the victim—something more than pure retribution—the evolution of personal tort actions would not have excluded such claims. Thus, the mere fact that symmetry between criminal law and punitive damages has not disappeared, contrary to all other instances in tort law, indicates that punitive damages never made a complete transition to civil law.

In accord are the related concepts that punitive damages claims cannot be assigned absent a statute and that any punitive damages claim must be prosecuted in the plaintiff's own behalf.[206] Since the wrong is personal and affects only the victim and society, no other person can have a legitimate interest in prosecuting for his own benefit. Similarly, in a criminal proceeding, only the state has a right to prosecute.[207] However, other types of enhanced damages, such as those provided by the Clayton Act, can be assigned because they remedy injured property interests, rather than serve penal ends.[208]

In summary, like the "infamous punishment" cases, the history of the practical implications of punitive damages discloses a substantive relation to criminal law. The wrong addressed under punitive damages is unlike those wrongs that create a right to enhanced damages. While the punitive damages defendant is treated differently than the enhanced damages defendant, he also shares a special relationship with the criminal defendant: both are punished in order to deter future misconduct. Punitive damages apparently satisfy the second *Kennedy* factor. The reasoning that justifies the absence of safeguards under enhanced damages provisions like the Clayton Act does not legitimize current punitive damages procedures. As the Ninth Circuit has stated, the punitive damages doctrine is "a hybrid of the civil and criminal law."[209] It is an inevitable conclusion that punitive damages constitute an orphan of the penal law abandoned in the development of distinctions between criminal and civil

206. People v. Superior Court, 9 Cal. 3d 283, 287, 507 P.2d 1400, 1403, 107 Cal. Rptr. 192, 195 (1973). The suit must be prosecuted on the insured's behalf and only he is entitled to the punitive damages award. French v. Orange County Inv. Corp., 125 Cal. App. 587, 591, 13 P.2d 1046, 1048 (1932). In an action by an assignee on a debt assignment, "a judgment rendered in [the assignor's] favor with regard to punitive damages cannot be sustained." Dugar v. Happy Tiger Records, Inc., 41 Cal. App. 3d 811, 819, 116 Cal. Rptr. 412, 417 (1974).

207. "An offense which *amounts* to a crime is pursued by the sovereign . . . ." Bergman v. State, 187 Wash. 622, 625, 60 P.2d 699, 701 (1936) (emphasis added).

208. Gerr v. Schering, 256 F. Supp. 572, 574 (S.D.N.Y. 1966); Health Care Equalization v. Iowa Medical Soc'y, 501 F. Supp. 970, 977 (S.D. Iowa 1980).

209. *In re* Paris Air Crash, 622 F.2d 1315, 1322 (9th Cir. 1980).

jurisprudence.[210]

5. Bankruptcy

The omnipresence and inseparability of criminal logic from the punitive damages doctrine is reinforced by the federal bankruptcy laws. The Bankruptcy Code does not discharge government fines, penalties, and forfeitures where they are purely penal in nature.[211] Only where a compensatory purpose addresses "actual pecuniary loss" will the penalty be discharged.[212]

Technically, to be excepted from discharge, a debt must be "willful and malicious."[213] For purposes of the federal bankruptcy statutes, "willful" is defined as voluntary,[214] while "malice" equals the intentional doing of a wrongful act without just cause or excuse.[215] Thus, given the punitive purpose of punitive damages, the goals of punitive damages would not be furthered by asserting them against trustees in bankruptcy.[216] Nor should third party creditors suffer for the bankrupt's punishment by allowing their interest to be discharged.[217] The punitive damages tortfeasor and the criminal defendant alone must bear the burden of judgments against them.

Another interesting parallel in the federal bankruptcy law relates to the discharge of criminal fines involving restitution.[218] An example is *In re Newton*.[219] In *Newton*, a debtor under Chapter 13 proceedings sought to discharge a $10,000 restitutionary claim he had been ordered to pay to the victim of a large livestock theft and fraud scheme. The restitution was a parole condition, subject to setoff if the victim proceeded against

210. *See generally* Murphy v. Hobbs, 7 Colo. 541, 548, 5 P. 119, 124 (1884) (noting that in a punitive damages proceeding, juries may turn to the domain of criminal law and consider the nature of the public wrong).

211. There is no discharge of a penal debt under federal bankruptcy laws. 11 U.S.C. § 523(a)(7) (1982) provides in part that "to the extent such debt is for a fine, penalty or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss [the debt may not be discharged] . . . ."

212. See the discussion on the discharge of fines and penalties in COLLIER BANKRUPTCY MANUAL (MB) § 523.17 (1983); *In re* Tauscher, 26 Bankr. 99 (Bankr. E.D. Wis. 1982).

213. Coen v. Zick, 458 F.2d 326, 330 (9th Cir. 1972); National Homes Corp. v. Lester Indus., Inc., 336 F. Supp. 644, 647 (W.D. Va. 1972). A debt for damage arising from willful and malicious injury to another is not discharged. 11 U.S.C. § 523(a)(6) (1982).

214. Tinker v. Colwell, 193 U.S. 473, 485 (1904).

215. *Id.* at 485-86.

216. *In re* GAC Corp. v. Callahan, 681 F.2d 1295, 1301 n.5 (11th Cir. 1982).

217. *Id.*

218. Depending on state penal laws, court-ordered restitution may not be dischargeable as a debt under federal bankruptcy laws. *See generally In re* Tauscher, 26 Bankr. 99 (Bankr. E.D. Wis. 1982); *In re* Newton, 15 Bankr. 708 (Bankr. N.D. Ga. 1981).

219. 15 Bankr. 708 (Bankr. N.D. Ga. 1981).

him in a civil suit under Georgia law. Since this arrangement allowed the victim to proceed against the defendant to enforce his right to restitution, the court held that it created a creditor-debtor relationship and that restitution equaled a debt. The question then became whether such a debt could be discharged under bankruptcy. The court, citing legislative history, stated that "[t]he bankruptcy laws are not a haven for criminal offenders. . . . Criminal actions and proceedings may proceed in spite of bankruptcy laws."[220] The court concluded that restitution, assessed as part of a penalty subject to parole condition, created a "debt" which, unlike other debts, could not be discharged by bankruptcy.[221] When this reasoning is compared with the logic preventing discharge of punitive damages, the result is imposing. Like restitution under Georgia law, punitive damages constitute a debt. Yet they are not dischargeable because neither the punitive damages defendant nor the criminal defendant can use bankruptcy proceedings to escape the consequences of intentional wrongdoing. While bankruptcy laws provide economic efficiency and encourage private enterprise, they do not shield punishment.

Ironically, bankruptcy enhances the punitive effect of a punitive damages award. Since a punitive judgment is assessed on the basis of the defendant's wealth,[222] after bankruptcy the award ceases to bear any relation to the defendant's financial condition. The bankruptcy transforms the punitive damages burden into a civil enigma, a punishment based in part on defendant's wealth that no longer bears any relation to that factor. Although the courts have stated that punitive damages are not intended to bankrupt a defendant, the bankrupt punitive damages defendant ultimately may have been better off with a criminal conviction. There, at least, suspension of punishment is available.

C. Scienter

The third *Kennedy* test is whether the sanction "comes into play only on a finding of *scienter* . . . ."[223] All jurisdictions require some element of "knowing wrongdoing" to justify awards of punitive dam-

220. *Id.* at 710 (quoting H.R. REP. No. 595, 95th Cong., 1st Sess., 342-43 (1977)).

221. 15 Bankr. at 710.

222. Those states adopting the "reasonable relation" rule require the punitive damages judgment to be proportional to the actual damages so that the defendant is not over- or under-punished to achieve the desired level of deterrence. *See* Rosener v. Sears Roebuck & Co., 110 Cal. App. 3d 740, 750-51, 168 Cal. Rptr. 237, 243 (1980). If the defendant is later declared bankrupt, the punitive damages judgment, because it cannot be discharged, may become an insuperable burden with a lasting effect worse than the wrong for which he was originally punished.

223. *Kennedy*, 372 U.S. at 168.

ages.[224] However, since remedial and civil penalty statutes are often found to be nonpenal,[225] a review of the *Kennedy* test and applicable cases is necessary.

The *Kennedy* opinion cited two authorities supporting the "scienter" test.[226] The first case, *Helwig v. United States*,[227] involved statutory assessment of "extra" duties[228] for undervaluation of import goods equal to or greater than forty percent of the goods' value.[229] The excessive penalty, combined with an inference of fraud, was held to serve one purpose only—punishment of the importer.[230] As a result, the extra duties were penal, and criminal procedural safeguards were mandated.[231]

The second authority was the *Child Labor Tax Case*.[232] That case involved the imposition of a ten percent tax on the net profit of any business that employed a child fourteen years old or younger unless there was a reasonable mistake or belief as to the child's true age.[233] Concluding that the "tax" was in effect a "heavy exaction for a departure from a detailed and specific course of conduct,"[234] the Court held it to be penal. The alleged tax adopted "the criteria of wrongdoing and impos[ed] its principal consequence on those who transgress[ed] its standard" of knowingly departing from prescribed courses of conduct.[235]

224. A proscribed mental state is required to support an award of punitive damages—a state of mind showing a conscious or criminal indifference to the rights of others. *See* D. DOBBS, *supra* note 188, at 205-06.

225. *See* Charney, *supra* note 86, at 481-83 (civil penalties are not criminal when regulatory in nature). *See also* United States v. Ward, 448 U.S. 242 (1980) (holding that a civil penalty assessed under the Federal Water Pollution Control Act survived the *Kennedy* tests and was not penal in nature); Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 518 F. 2d 990 (5th Cir. 1975) (penalties assessed under the Occupational Safety and Health Act are not penal since the statute regulates rather than reprimands. The opinion lists one hundred similar civil penalty statutes. *Id.* at 1003-09).

226. *Kennedy*, 372 U.S. at 168 n.24. The cases cited were Child Labor Tax Case, 259 U.S. 20 (1921); Helwig v. United States, 188 U.S. 605 (1902).

227. 188 U.S. 605 (1902).

228. *Id.* at 610.

229. *Id.* at 609-10. The appellant in the case had nearly $10,000 in penalties assessed against him after a United States appraiser determined that the market value of the wood pulp he imported was 27% greater than he had declared. The actual duty was $1,679.20, but the penalty amounted to $9,067.68. *Id.* at 606-07. Although there had been no intent to defraud the government, the fine remained intact. *Id.* at 611.

230. *Id.* at 612.

231. At issue in *Helwig* was whether the defendant had the right to original jurisdiction in district court, as opposed to circuit court, because circuit courts had no jurisdiction to hear claims for penalties under United States customs laws. *Id.* at 608. Since the fine was held to be penal in nature, the district court had jurisdiction. *Id.* at 619.

232. 259 U.S. 20 (1921).

233. *Id.* at 34-35.

234. *Id.* at 36.

235. *Id.* at 38.

The crux of both opinions is that the "taxes" or "duties" were not legitimate exercises of government power with incidental regulatory effects. The legislation effectively punished the presumed or actual mental states combined with forbidden acts. As the Court in the *Child Labor Tax Case* lamented, "[s]cienter is associated with penalties not with taxes [or duties]."[236] In both cases, the size of the fine combined with the element of scienter rendered the acts penal.[237]

A plausible argument arises from this conclusion: while punitive damages are premised on forbidden scienters such as malice,[238] the logic that finds an element of scienter[239] in nonpenal intentional torts or civil penalty statutes arguably may find application to the punitive damages doctrine.

Initially, it must be conceded that any statute allowing a civil penalty may be both remedial and penal since such penalties remedy injury as well as further penal objectives.[240] But while a statutory penalty may be considered punitive to the defendant and remedial to the plaintiff,[241] punitive damages must be examined in light of the effect on the defendant because the plaintiff has no right to such damages.[242]

Federal decisions applying the *Kennedy* "scienter" criterion have

236. *Id.* at 37.

237. Under the statute in *Helwig*, if fraud was presumed and not rebutted by the defendant, total forfeiture of his undervalued imported goods constituted the penalty. 188 U.S. at 612. Enhancing the penalty on the basis of scienter logically supported the Court's conclusion that the statute's purpose was to punish the defendant, rather than serve some legitimate nonpunitive governmental purpose.

238. *See infra* note 276.

239. Certain torts require minimum mental states before liability can attach. For example, assault, battery, trespass, and false imprisonment require some element of intent. *See* W. PROSSER, *supra* note 191, at 31-32. Illustrative is the development of intentional infliction of emotional distress. Liability will not attach absent "(1) outrageous conduct by the defendant; (2) the defendant's intention of causing or reckless disregard of the probability of causing emotional distress; (3) the plaintiff's suffering severe or extreme emotional distress; and (4) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 394, 89 Cal. Rptr. 78, 88 (1970). To establish liability for intentional torts, the conduct causing injury must be extreme, outrageous and intentionally or recklessly committed. RESTATEMENT (SECOND) OF TORTS § 46 (1965). Although this mental element resembles that required for punitive damages liability, the fact that compensation is the immediate objective removes the tort from *Helwig* and the *Child Labor Tax Case* where the effect and purpose of the penalties was not wholly compensatory.

240. Riggs v. Government Employees Fin. Corp., 623 F.2d 68, 69-72 (9th Cir. 1980).

241. Huntington v. Attrill, 146 U.S. 657, 667 (1892).

242. White v. State, 661 P.2d 1272, 1275 (Mont. 1983) (there is a constitutional right to recover for actual injury, but no constitutional right to punitive damages). *See also supra* note 187.

concluded that knowledge triggers the scienter test.[243] Two cases construing the Federal Water Pollution Control Act[244] illustrate this point. An early lower federal court interpretation in *United States v. LeBeouf Brothers Towing Co.*[245] held the act penal, based not only on the scienter test, but also on composite answers to all seven *Kennedy* inquiries.[246] The case involved the penalty section of the act, which permitted a fine of up to $10,000 for *knowingly* engaging in illegal discharges of oil into waterways.[247] However, in *United States v. General Motors Corp.*,[248] another district court pointed out that the "knowing" requirement was removed later from the penalty section of the act. Elimination of the knowledge requirement represented a "significant distinction" between the two cases, thus permitting a nonpenal interpretation.[249] In addition to the lack of knowledge in *General Motors*, the nonpenal purpose of the statute also was supported by nonexcessive fines, tailored to fit the particular situation, and the defendant's ability to absorb the penalty.[250]

It should be emphasized that the mental state under the *Kennedy* "scienter" factor encompasses that frame of mind embraced in the criminal "conclusory scienter concept."[251] But as the Fifth Circuit in *Atlas*

243. If defendant's knowledge of the wrong committed is relevant only to the issue of mitigation, then there is no initial scienter factor to trigger the third *Kennedy* test. *See* Atlas Roofing Co. v. Occupational Safety & Health Comm'n, 518 F.2d 990, 1001-02 (5th Cir. 1975), *aff'd*, 430 U.S. 442 (1977). A requirement of "knowingly" as a predicate to liability may indicate penal purpose. United States v. General Motors Corp., 403 F. Supp. 1151, 1162 (D. Conn. 1975), but when the fine is aimed at actual injury and damage rather than the act itself, it is regulatory in nature rather than penal. 403 F. Supp. at 1162.

244. 33 U.S.C. §§ 1251-76 (1978 & Supp. 1983).

245. 377 F. Supp. 558 (E.D. La. 1974), *rev'd*, 537 F.2d 149 (5th Cir. 1976), *cert denied*, 430 U.S. 987 (1977).

246. 377 F. Supp. at 563.

247. Formerly, 33 U.S.C. § 1161(B)(5) provided in part:

> Any owner or operator of any vessel, onshore facility, or offshore facility from which oil is *knowingly* discharged in violation of paragraph (2) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $10,000 . . . .

(emphasis added) (superseded by Pub. L. No. 92-500 § 2, 86 Stat. 816 (1972)).

248. 403 F. Supp. 1151 (1975).

249. *Id.* at 1162.

250. *Id.* at 1163. *See also* 33 U.S.C. § 1321(b)(6) (Supp. 1983). That section provides in part that:

> In determining the amount of the penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered by such Secretary.

251. *Atlas Roofing*, 518 F.2d at 1001. Presumably, the court in *Atlas Roofing* was referring to conduct classified as *malum in se*. Such acts, if statutorily proscribed, may result in criminal punishment without proof of intent because the intent is imputed. *See, e.g.*, Griffin v. State, 578 S.W.2d 654, 657 (Tenn. 1978), *cert. denied*, 444 U.S. 854 (1979) (driving under the influence of alcohol is an illegal act *malum in se* that presumes criminal intent of the actor).

Roofing Co. v. Occupational Safety & Health Review Commission[252] eloquently noted in construing a civil penalty provision under the Occupational Safety and Health Act, making available the defenses of reasonable belief or mistake does "not orbit to the apogee of a suspected scienter factor," and such excuses are distant from the limitations of criminal law.[253] For example, under the Occupational Safety and Health Act, a penalty assessment takes into consideration the size of the employer's business, gravity of the violation, history of previous violations, and the employer's good faith.[254] While the factors mitigating liability are far broader than those available in criminal law,[255] good faith is not usually a mitigating factor where the criminal defendant makes a mistake. For example, in *People v. Young*[256] the New York Court of Appeals stated the general rule that a mistake of good faith belief is not enough to exonerate a defendant from criminal liability.[257] In that case the victim was held liable for assaulting police officers whom he believed to be "hoods" assaulting an innocent victim.[258] A mistaken but reasonable belief could not mitigate criminal culpability. Thus, the critical distinction between a civil and criminal penalty is the extent to which the actual or presumed mental state, intent, or knowledge controls assessment of liability.

Both the Federal Water Pollution Control Act and the Occupational Safety and Health Act illustrate what constitutes a civil penalty as opposed to a criminal penalty. Under those statutes, knowledge or good faith affect penalty assessments only to the extent of reducing damages.[259] The defendant suffers no repercussion for any mental state, and

252. 518 F.2d 990 (5th Cir. 1975).

253. *See id.* at 1001-02. Knowledge is not required to establish liability for violations of the Occupational Safety and Health Act. It is enough if the exercise of reasonable diligence would indicate a safety violation. *See* 29 U.S.C. § 666(j) (1975).

254. *See* 29 U.S.C. § 666(i) (1975).

255. The gravity and number of violations would be a consideration in *sentencing*. *See, e.g.*, CAL. PENAL CODE § 190.2 (West Supp. 1984) (gravity of offense elevating the degree of punishment); CAL. PENAL CODE § 667 (West Supp. 1984) (sentence enhancement for repeat offenders); CAL. PENAL CODE § 1170 (b) (West Supp. 1984) (mitigation affecting sentencing).

256. 11 N.Y.2d 274, 183 N.E.2d 319, 229 N.Y.S.2d 1 (1962).

257. *Id.*

258. *Id.* at 275, 183 N.E.2d at 319-20, 229 N.Y.S.2d at 2.

259. The Occupational Safety and Health Act provides:

> The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations. 29 U.S.C. § 666 (j) (1982).

Similarly, the Federal Water Pollution Control Act amendments provide: "The amount of such penalty shall not exceed $50,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and

the act may even be mitigated or excused by the size of his business[260] or his inability to pay.[261] Although this disregard for a defendant's mental state is not conclusive on whether the statutes are penal,[262] it does result in negative findings on the scienter issue.

Under the reasoning of either *Atlas Roofing* or *General Motors*, a punitive damages sanction would be penal. The sanction requires a clear finding of a proscribed mental state, such as malice, and the financial status of the defendant does not mitigate the initial liability assessment. Also, in most jurisdictions, evidence of wealth is not a prerequisite to a punitive damages assessment.[263]

Like criminal liability, punitive damages liability addresses culpability to determine whether punishment should be inflicted.[264] The unity of act and intent controls,[265] and wealth is irrelevant to the issue of whether punishment is justified.[266] Correspondingly, initial liability for punitive damages is determined in identical fashion to criminal law: did the defendant commit the act with the requisite state of mind?[267]

The element of scienter also distinguishes punitive damages liability from ordinary tort law. Aside from punitive damages, compensation for

knowledge of the owner, operator, or person in charge, such penalty shall not exceed $250,000." 33 U.S.C. § 1321 (b)(6)(B) (1982).

260. *See supra* note 250.

261. *Id.* In contrast, the general rule relating to punitive damages is that wealth may be considered in assessing punishment, although it is not a prerequisite to assessing such damages. *See* 25 C.J.S. *Damages* § 126(3) (1966 & Supp. 1984). However, "the fact finder is not required to consider the wealth of the defendant as paramount. His decision to award punitive damages should be based on the 'enormity of the wrong and the necessity of preventing similar wrongs.'" E.C. Ernst, Inc. v. Manhattan Constr. Co., 551 F.2d 1026, 1036 (5th Cir. 1977) (quoting Loch Ridge Constr. Co. v. Barra, 291 Ala. 312, 320, 280 So. 2d 745, 751 (1973)).

262. The statute may dictate a penal finding on a different *Kennedy* factor.

263. *See supra* note 261.

264. *See* 21 AM. JUR. 2D *Criminal Law* § 37 (1981). The degree of culpability determines whether, and to what extent, the defendant is liable for delineated crimes and punishments. *See* People v. Watson, 30 Cal. 3d 290, 637 P.2d 279, 179 Cal. Rptr. 43 (1981) (importance of examination into the actor's mental state to sustain a charge of murder).

265. *See, e.g.*, CAL. PENAL CODE § 20 (West 1970) providing that "[i]n every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence."

266. "A cardinal principle of the Anglo-American legal system is that the wealth of the parties should have no effect on the administration of the law." *See* Comment, *supra* note 173, at 1154 (citing Laidlaw v. Sage, 158 N.Y. 73, 103, 52 N.E. 679, 690 (1899)).

267. Assessing punitive damages is a two step process. First, liability must be established by showing that the challenged conduct involved "some element of outrage similar to that usually found in crime." RESTATEMENT (SECOND) OF TORTS § 908 comment b (1979). Once liability is determined, the jury may assess the amount of damages by taking into account other considerations besides the act itself. *Id.* at comment e.

injury is the focus of any civil damages proceeding.[268] Even where a damages award rests on the finding of an intentional tort, culpability is determined only for purposes of compensation.[269] Furthermore, while tort damages were originally incident to criminal prosecution,[270] each remedy developed to achieve a different end.[271] Unlike the usual tort remedies, however, punitive damages are assessed for a "character of outrage frequently associated with crime."[272] The action justifying punitive damages requires "more than the mere commission of a tort."[273] The defendant must have acted oppressively, with malice, with an evil motive, or wickedly.[274] The defendant's state of mind towards the plaintiff separates punitive damages liability from all other tort damages.[275] Conversely, intentional torts do not require any ill will on the defendant's part.[276] Unlike proceedings under civil penalty statutes, a punitive damages proceeding examines the defendant's motives and conduct. A de-

268. Compensatory damages are based on the nature of the wrong, while punitive damages address the nature of the actor's conduct. Wangen v. Ford Motor Co., 97 Wis. 2d 260, 275, 294 N.W.2d 437, 446 (1980). Compensatory damages represent a "substantial relief" to remedy a loss measurable in money. D. DOBBS, *supra* note 188, at 135.

269. For instance, in the tort of intentional infliction of emotional distress, the element of intent merely determines whether damages will be awarded, but does not affect the extent of recovery itself. *See supra* note 239.

270. W. PROSSER, *supra* note 191, at 8.

271. *Id.* at 335.

272. *Id.* at 8. *See* Kink v. Combs, 28 Wis. 2d 65, 80, 135 N.W.2d 789, 798 (1965) (punitive damages serve to fulfill the inadequacies of the criminal law).

273. W. PROSSER, *supra* note 191, at 9.

274. D. DOBBS, *supra* note 188, at 205. *See* Sturm, Ruger & Co. v. Day, 594 P.2d 38, 46 (Alaska 1979), *cert. denied*, 454 U.S. 894 (1981) (reckless indifference toward the safety of others, malice, or wantonness required to support liability for punitive damages); Hazelwood v. Illinois Cent. Gulf R.R., 114 Ill. App. 3d 703, 710, 450 N.E.2d 1199, 1205 (1983) (willful and wanton conduct required); Hicks v. McCandlish, 221 S.C. 410, 415, 70 S.E.2d 629, 631 (1952) (wantonness, willfulness or recklessness required to support punitive damages); Kink v. Combs, 28 Wis. 2d at 79, 135 N.W.2d at 797 (punitive damages "require" a showing of wanton, willful or reckless disregard of the plaintiff's rights).

275. *See supra* note 268; D. DOBBS, *supra* note 188, at 205.

276. W. PROSSER, *supra* note 191, at 31. By contrast "[a]nimus malus or evil motive, then, is the central element of the malice which justifies an exemplary award." G.D. Searle & Co. v. Superior Court, 49 Cal. App. 3d 22, 30, 122 Cal. Rptr. 218, 223 (1975). *See also* Young Mercantile Trust Co. v. National Ass'n, 522 S.W.2d 274 (Mo. App. 1974) (necessity of showing evil intent to support punitive damages); Cordova v. Chonko, 315 F. Supp. 953, 964 (N.D. Ohio 1970) (mistake will not support punitive damages liability as no evil intent involved).

Some courts may hold that evil intent is not the sole predicate of liability. Rather, acts done with bad motives or reckless indifference to the rights of others may sometimes establish punitive damages liability. *See* Alaska Statebank v. Fairco, 674 P.2d 288, 289 (Alaska 1983). Nevertheless, wrongful intent must be present, whereas the typical intentional tort requires no particular evil state of mind. *See* Rosener v. Sears Roebuck & Co., 110 Cal. App. 3d 740, 748-49, 168 Cal. Rptr. 237, 241-42 (1980) (*bad* state of mind required to support punitive damages liability).

fendant's mental state thus constitutes the first line of defense to liability for punitive damages.[277] While the punitive damages defendant may contest the amount of judgment,[278] this consideration is secondary to culpability.[279] Additionally, unlike the intentional tort, culpability does not determine liability for any damages proximately caused by the act, but instead pinpoints the degree of reprehensibility for which punishment will be affixed.[280]

The foregoing liability determination parallels criminal law. There, a criminal defendant's subjective awareness of the risk of death or serious bodily injury that may result from his act generally subjects him to more serious charges.[281] Likewise, the punitive damages defendant faces higher degrees of liability depending on the outrageousness of his behavior. One major gauge is the defendant's awareness of his actions.[282] For example, the act of driving while intoxicated with a conscious appreciation of the risk involved shows wanton conduct.[283] When the defendant acts with such a conscious disregard for life, malice is implied[284] and the conduct becomes sufficiently aggravated to impose punitive damages liability.[285] Meanwhile, negligent or reckless traffic law disobedience may exhibit similar willful or wanton behavior, but will not merit punitive

277. For example, if the defendant shows that the wrong resulted from mistake, liability is limited to compensation for actual injury. *See* Cordova v. Chonko, 315 F. Supp. 953, 964 (N.D. Ohio 1970); Ebaugh v. Rabkin, 22 Cal. App. 3d 891, 895, 99 Cal. Rptr. 706, 709 (1972).

278. *See supra* note 123. New York courts, representing the majority view, will not reverse awards for being disproportionate to actual damages. *See* Kent v. City of Buffalo, 61 Misc. 2d 142, 304 N.Y.S.2d 949 (1969).

279. This focus accounts for the growing trend of courts and legislatures to bifurcate issues of liability from punishment assessments. *See* Rupert v. Sellers, 48 A.D.2d 265, 272, 368 N.Y.S.2d 904, 912 (1975) ("Defendant's wealth should not be a weapon to be used by plaintiff to enable him to induce the jury to find the defendant guilty of malice . . . ."); CONN. GEN. STAT. ANN. § 52-240b (West Supp. 1984) (court determines the amount of punitive damages in products liability actions, in an amount no more than twice the actual damages, after a jury verdict of liability); MODEL UNIFORM PRODUCT LIABILITY ACT § 12(c) (1983) (trial judge shall determine the amount of punitive damages after liability is established).

280. "[P]unitive damages may be awarded because of, and measured by [the defendant's] wrongful purpose or intent . . . ." RESTATEMENT (SECOND) OF TORTS § 908 comment b (1979). Punitive damages claims are decided on a case-by-case basis to ensure that punishment is not unduly inflicted. Fahrenberg v. Tengal, 96 Wis. 2d 211, 233-36, 291 N.W.2d 516, 526 (1980).

281. See the discussion of implied malice in criminal law in Grass, *Drunk-Driving Murder and* People v. Watson: *Can Malice Be Implied?*, 14 S.W. L.J. 401, 435 (1984).

282. *See, e.g.*, Taylor v. Superior Court, 24 Cal. 3d 890, 896-97, 598 P.2d 854, 857, 157 Cal. Rptr. 693, 697 (1979) (drinking to the point of intoxication with the knowledge that one will later drive exhibits a conscious disregard for life and supports liability for punitive damages).

283. *Id.*

284. *Id.*

285. G.D. Searle & Co. v. Superior Court, 49 Cal. App. 3d 22, 32, 122 Cal. Rptr. 218, 225 (1975) (malice or willful and wanton conduct is evidenced by a conscious and deliberate disre-

damages punishment.[286] Just as criminal law is hesitant to inflict serious sanctions on those who transgress only objective standards of reasonableness but quick to punish those who actually appreciate the consequences of their acts,[287] a punitive damages defendant does not face the ultimate sanction of "civil" punishment for simple negligent conduct.

In sum, punitive damages, like the civil penalties in *Helwig* and the *Child Labor Tax Case*, penalize proscribed activities when combined with unacceptable mental states. Unlike civil penalty statutes in general, they do not focus on the amount of damages for which the defendant is liable. Nor do they reflect the amount of damages that the defendant proximately caused, as intentional damages do. The inquiry concerns what level of reprehensibility the defendant achieves by his behavior. As with a criminal defendant, this question controls when and to what degree the defendant will be punished. The punitive damages defendant thus is punished for his act combined with a mental state similar to that required for criminal culpability.[288] Requiring unity of act and intent to justify the infliction of punitive sanctions replicates criminal theory.[289] Like the propositions from the cases cited in *Kennedy*, punitive damages are not an exercise of some legitimate governmental regulatory power with an *incidental* punishment effect. Instead, the sanction is imposed for punishment purposes only, giving the punitive damages doctrine a positive finding on the scienter question. The third *Kennedy* test thus dictates a penal finding on the punitive damages issue.

D. Retribution and Deterrence

The fourth *Kennedy* test is whether the "operation [of the statute] will promote the traditional aims of punishment—retribution and deterrence."[290] Punitive damages appear penal for all intents under this fourth inquiry. Indeed, noting the criminal retributive function, one

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gard of others' rights). *See* Taylor v. Superior Court, 24 Cal. 3d at 894-95, 598 P.2d at 859, 157 Cal. Rptr. at 696.

286. *Taylor*, 24 Cal. 3d at 899-900, 598 P.2d at 859, 157 Cal. Rptr. at 699.

287. Generally, unless provided by statute, conviction for negligent conduct must rest on conduct that is so negligent as to be equivalent to a criminal intent. State v. Ankeny, 185 Or. 549, 563, 204 P.2d 133, 140 (1949). However, when the defendant is under a special duty regarding another's safety, even the mere negligent omission to perform that duty may subject him to criminal prosecution. *See* State v. Williams, 4 Wash. App. 908, 915, 484 P.2d 1167, 1172 (1971) (statutory manslaughter conviction sustained where defendant's child died as a result of lack of medical care that an ordinarily prudent person would have obtained).

288. RESTATEMENT (SECOND) OF TORTS § 908 comment b (1979).

289. Criminal law also requires a unity of act and intent—i.e., that the requisite mental state accompany the commission of the forbidden act. People v. Vogel, 46 Cal. 2d 798, 801, 299 P.2d 850, 852-53 (1956). *See also* 21 AM. JUR. 2D *Criminal Law* § 4 (1982).

290. *Kennedy*, 372 U.S. at 168.

commentator observed that "in the framing of a model code of damages today for use in a country unhampered by legal tradition, the doctrine of exemplary damages would find no place."[291]

The majority of courts and commentators refuse to acknowledge punitive damages' actual nature, contending that punitive damages, though penal, belong in the civil arena. Perhaps they accept this contradiction only "because it has lived with them for so long."[292] Therefore, a review of the cases cited in *Kennedy*[293] is imperative to determine when the traditional aims of punishment dictate a penal label.

In *United States v. Constantine*,[294] the first opinion cited, the Court considered a special federal excise tax levied on alcohol dealers and manufacturers who violated state laws. The tax amounted to as much as forty times the normal liquor tax.[295] Because the special excise tax was not levied until the taxpayer violated the law, the Court concluded that the tax—grossly disproportionate to the regular tax and coupled with requisite illegal conduct—indicated one purpose only: "to impose a penalty as a deterrent and punishment of unlawful conduct."[296] The effect of the sanction was to "remove all semblance of a revenue act, and stamp the sum it exacts as a penalty."[297]

Kennedy next cited *Trop v. Dulles*,[298] a case involving expatriation for wartime desertion. The plaintiff in *Trop* was denied a passport because pursuant to a statute, he had lost his nationality after a court-martial conviction for wartime desertion. An indignant Court, finding no other legitimate purpose for revoking his citizenship except punishment,[299] declared the statute "penal."[300] Since the loss of citizenship was held to be penal, the statute violated the Eighth Amendment's ban on cruel and unusual punishment because the method of punishment exceeded the limits of "civilized standards" for the crime charged.[301] *Constantine* and *Trop* stand for the following proposition: "If the statute

291. Note, *Punitive Damages*, 46 VA. L. REV. 1036, 1042 (1960) (quoting R. MCCORMICK, DAMAGES § 77, at 276-77 (1935)).

292. Comment, *supra* note 3, at 409.

293. 372 U.S. at 168 n.25. The cases cited to support the fourth *Kennedy* test are: United States v. Constantine, 296 U.S. 287 (1935), and Trop v. Dulles, 356 U.S. 86 (1958).

294. 296 U.S. 287 (1935).

295. *Id.* at 295.

296. *Id.*

297. *Id.*

298. 356 U.S. 86 (1958).

299. *Id.* at 97.

300. *Id.* at 96-97.

301. The concept of cruel and unusual punishment involves more than physical punishment. As the Court noted, "[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 101.

imposes a disability for purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.,—it [will be] considered penal."[302]

To classify a sanction as penal, courts interpreting this *Kennedy* factor have held that the penalty assessed must be aimed at acts of the wrongdoer rather than at the results.[303] But the courts have misconstrued *Kennedy* by assuming that this factor is not necessarily triggered by a purpose of punishment and deterrence.[304] Examining deterrence, courts note that while it may promote the traditional aims of criminal law, it does not ipso facto transform a civil penalty into a penal penalty.[305] In fact, deterrence by itself could never justify finding a statute penal because any civil penalty or remedy has some deterrent value.[306] Ironically, while the federal courts agree that deterrence exists in any civil penalty statute,[307] at least one court balances deterrence *against* the punitive end of a statute. Construing the Occupational Safety and Health Act,[308] the *Atlas Roofing* Court agreed that a punitive civil statute could escape a penal label by declaring that a remedial purpose "means not only compensatory but . . . prospective deterrence . . . to encourage compliance with a given government regulation."[309] How "prospective deterrence" transforms deterrence into a remedial function defies explanation.[310] Deterrence is nothing more than prevention of an act that might otherwise occur. In this sense, "deterrence" and "prospective deterrence" are identical.

Generally, however, courts avoid finding retribution and deterrence under the fourth *Kennedy* test by utilizing the "act over effects test."[311] For example, if a pollution statute exacts a fine for discharging oil into a waterway instead of penalizing the actual act of the polluter,[312] the declared effect of the statutory penalty is that it attempts to minimize pollution damage rather than penalize the wrongdoer. If the conduct itself is not penalized, no retribution is exacted[313] and the statute will be regula-

302. *Id.* at 96.

303. *See* Ward v. Coleman, 423 F. Supp. 1352, 1356 (W.D. Okla. 1976), *rev'd*, 448 U.S. 242 (1980); United States v. General Motors Corp., 403 F. Supp. 1151, 1162 (D. Conn. 1975).

304. *See infra* text accompanying notes 307-10.

305. Ward v. Coleman, 423 F. Supp. at 1356.

306. United States v. General Motors Corp., 403 F. Supp. 1151, 1162 (1975).

307. *Id.*

308. 29 U.S.C. §§ 651-78 (1975 & Supp. 1984).

309. Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 518 F.2d 990, 1002 (5th Cir. 1975), *aff'd*, 420 U.S. 442 (1977).

310. Deterrence is effectuated by the rational weighing of costs and benefits the deteree is likely to incur from his contemplated action. Wheeler, *supra* note 3, at 306.

311. *See supra* note 303 and accompanying text.

312. Ward v. Coleman, 423 F. Supp. at 1356.

313. *Id.*

tory rather than criminal. That deterrence may be achieved as well is irrelevant since any regulatory scheme has some deterrent value.[314]

The deterrent purpose of punitive damages is *not* incidental to any regulatory purpose. In fact, the defendant's culpability may often receive little juror attention or consideration[315] where a plaintiff develops the case by relying heavily on evidence of the defendant's wealth. Although such evidence may prejudice the jury, the jury does not have to account for its determinations.[316] Consequently, the entire process of "jury discretion" has become a farce in recent years, with scores of gargantuan verdicts being remitted on the basis of passion and prejudice. In the infamous *Grimshaw* case,[317] the original verdict was $125 million, while a recent verdict in Los Angeles against Allstate Insurance Company was $40 million.[318] The resulting paradox is that wealthier defendants will be deterred by the threat of a punitive damages verdict; yet their behavior may be a product born not of fear of punishment for evil acts, but for the circumstance of their financial condition. Meanwhile, impoverished defendants may act with impunity. They cannot be prejudiced by their wealth, nor will the threat of "civil" punishment constitute a meaningful deterrent.

The Court explicitly recognized the wealth problem when it refused to hold municipalities liable for punitive damages in *City of Newport v. Facts Concerts, Inc.*[319] The Court noted the obvious prejudice where the punitive damages award against the defendant city was twice the total amount assessed against seven city officials accused of civil rights violations. Recognizing the risk of unpredictable awards, the Court deter-

314. *See* United States v. General Motors Corp., 403 F. Supp. at 1162. ("by itself the function of deterrence does not indicate a criminal sanction"). *See supra* text accompanying note 306.

315. *See* Comment, *supra* note 173, at 1154 (since evidence of defendant's net worth is relevant only on the issue of actual punishment, it can be highly prejudicial in determining liability for actual damages). In recognizing this problem, one New York appellate court declared: "Defendant's wealth should not be a weapon to be used by plaintiff to enable him to induce the jury to find the defendant guilty of malice, thus entitling plaintiff to punitive damages." Rupert v. Sellers, 48 A.D.2d 265, 272, 368 N.Y.S.2d 904, 912 (1975).

316. Juries "remain free" to utilize selective punishment. Gertz v. Robert Welch, Inc., 418 U.S. at 350. Additionally, "the only limit placed on the jury in awarding punitive damages is that the damages not be 'excessive,' and in some jurisdictions, that they bear some relationship to the amount of compensatory damages awarded." Rosenbloom v. Metromedia, 403 U.S. 29, 83 (1971) (Marshall, J., dissenting).

317. Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (verdict reduced to $3.5 million).

318. The verdict stemmed from a $31,000 bad faith claim. The trial judge held the verdict "grossly excessive" and ordered a new trial on that issue. Fellows v. Allstate Ins. Co., No. 25-993 (L.A. Super. Ct. Nov. 8, 1983).

319. 453 U.S. 247, 270-71 (1981).

mined that assessing punitive damages against municipalities was unjustified and refused to permit punitive damages awards against governmental entities.[320] The Supreme Court's observation should extend to any trial where wealth is a factor. One commentator echoed this point by noting that a defendant only marginally culpable may be liable for punitive damages assessed in a manner wholly irrelevant to the reprehensibility of his act.[321]

Regardless of an exaggerated deterrent effect, however, a statute's regulatory purpose still may outweigh its punitive and deterrent effects and thus avoid a penal label.[322] This result is particularly true when the statute regulates an activity affecting the public.[323] Thus, injunctions preventing false and misleading advertising[324] or penalties for public water tampering[325] may be found regulatory even though they deter similar activity. The same holds true when a driver's license is forfeited for writing bad checks to the state vehicle department.[326] Also, the assessment of punitive damages in products liability or insurance bad faith actions could be construed as encouraging responsible management in areas of great public concern. Thus, although punitive damages inflict punishment for the sake of deterrence, arguably they provide a prominent regulatory effect.

It is imperative, then, to understand the function of deterrence in punitive damages. Rather than having a distinct regulatory effect or purpose, punitive damages impose a deterrence that exceeds any proffered or imagined utilitarian regulatory goal. In fact, a majority of jurisdictions claim deterrence by punishment as an objective.[327] Deterrence constitutes a basic justification for punitive damages sanctions, unlike various civil penalty statutes.[328] Not only is the overt purpose of punitive damages to exact retribution, the function of punitive damages may impede the exercise of constitutional liberties, thereby creating a deterrence more powerful than that produced by criminal law.[329] For example, the

320. *Id.*

321. Comment, *supra* note 173, at 1154.

322. *See* United States v. J.B. Williams Co., 354 F. Supp. 521, 529 (S.D.N.Y. 1973).

323. Nickelson v. People, 607 P.2d 904, 910 (Wyo. 1980).

324. *E.g., J.B. Williams*, 354 F. Supp. 521 (S.D.N.Y. 1973).

325. *E.g., Nickelson*, 607 P.2d 904 (Wyo. 1980).

326. Bauer v. Mallory, 135 Vt. 175, 177, 376 A.2d 17, 18 (1977).

327. Wheeler, *supra* note 3, at 306.

328. *See* RESTATEMENT (SECOND) OF TORTS § 908 comment b (1979).

329. In addition to deterring undesirable social conduct, punitive damages may inhibit the free exercise of inalienable constitutional rights such as free speech. Rosenbloom v. Metromedia, 403 U.S. 29, 84 (1971) (Marshall, J., dissenting). Constitutional law forbids criminal punishment for the content of free speech, but not all speech is protected. Speech that constitutes " 'advocacy . . . directed to inciting or producing *imminent* lawless action and . . .

Supreme Court has expressed considerable concern about the effect of punitive damages on First Amendment protections.[330] Since society's only legitimate interest in deterrence is to "discourage undesirable conduct,"[331] the Supreme Court has developed specific tests of malice that must be satisfied before punitive damages for defamation can be imposed.[332] Some Justices fear that punitive damages may cause "self-censorship" where the punishment inflicted is *greater* than that needed to deter the underlying misconduct.[333] Moreover, the jury is not given any meaningful guidance to determine proper deterrence in the punitive damages process.[334] The import of the jury's discretion is that a method of restraint, unparalleled even in the common law, is achieved. There is no way to determine what a jury actually considers when assessing punitive damages liability. Deterrence is thus arguably double-edged: first, there is the possibility of an uncontrolled jury, and second, there is a possible punitive damages assessment. Nowhere else in the law is the jury allowed such unbridled discretion.

That punitive damages may serve a criminal-like deterrence found nowhere else but in penal law is supported by its treatment in various courts. The general approach to insurability against punitive damages illustrates the overriding nature of deterrence in the punitive damages doctrine.[335] In light of the doctrine's punitive purpose, California, for

likely to incite or produce such action.' " may be punished. Hess v. Indiana, 414 U.S. 105, 108 (1973) (per curiam) (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)). Similarly, obscene speech may be forbidden and punished. Miller v. California, 413 U.S. 15 (1973). While other speech may not be subject to content regulation or criminal punishment, the civil law knows no bounds. Punitive damages may be assessed to punish *any* defamatory speech relating to the plaintiff where malice is proven. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974). *See also* Burnett v. National Enquirer, Inc., 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983), *appeal denied*, 104 S. Ct. 1260 (1984) (defamation action by a public figure resulting in punitive damages judgment). The Court has never expressly sanctioned punitive damages in cases of defamation against public figures or officials. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 17, at 951.

330. Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) ("jury discretion to award punitive damages unecessarily exacerbates the danger of media self-censorship").

331. Wheeler, *supra* note 3, at 306 (citing Neal v. Farmers Ins. Exch., 21 Cal. 3d 910, 928, 582 P.2d 980, 990, 148 Cal. Rptr. 389, 399 (1978)).

332. Punitive damages for defamation must be supported by a showing that the defamation involved knowing or reckless falsity. Gertz v. Robert Welch, Inc., 418 U.S. at 349.

333. Rosenbloom v. Metromedia, 403 U.S. at 74-75 (Harlan, J., dissenting); *id.* at 83 (Marshall, J., disssenting).

334. *Id.* at 83 (Marshall, J., dissenting) ("The manner in which unlimited discretion may be exercised is plainly unpredictable.").

335. American jurisdictions appear to be evenly divided on whether liability for punitive damages may be "shifted" to an insurer. A lengthy discussion of the issue is contained in Northwestern Nat'l Casualty Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962). See also the collection of cases and commentators at 20 A.L.R. 343-52 (3d ed. 1968 & Supp. 1984); Harrell v.

example, has adopted the view that if a tortfeasor could shift the burden of punitive damages, such an award would serve no useful function.[336] The rationale is that *no deterrence* would be effectuated since the punishment would ultimately fall on the consumer.[337] The award would depend on the amount of insurance rather than on the magnitude and flagrancy of the offense,[338] and thus would not further the goal of punitive damages. Clearly, no intent is manifested merely to regulate the activity subject to punitive damages liability. Rather, the desire is to inhibit the defendant's tortious conduct. Another state court has noted that such damages are "personal" and are justifiable only if the one who pays is the wrongdoer.[339] Other courts have rejected this "shifting of the burden" as well.[340]

Closely related to the insurance reasoning is the fact that punitive damages may not be assessed against a nontortfeasor.[341] This penal aspect becomes apparent in those opinions prohibiting punitive damages against government entities.[342] In *White v. State*,[343] for example, the Montana government appealed a holding that the state statute immunizing government from punitive damages was unconstitutional under the Fourteenth Amendment Equal Protection Clause. The plaintiff alleged that as a result of the state's reckless conduct, a violent and dangerous mental hospital patient escaped, later attacking her and causing serious emotional injury. Holding the Montana law valid, the Montana Supreme Court stated that punitive damages assessed for the alleged reckless acts of the government would have an extremely remote deterrent effect on the tortfeasor because the taxpayers ultimately would be the ones pun-

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Travelers Indemn. Co., 279 Or. 199, 226-27, 567 P.2d 1013, 1026-27 (1977) (Holman, J., dissenting).

336. City Prod. Corp. v. Globe Indemn. Co., 88 Cal. App. 3d 31, 41, 151 Cal. Rptr. 494, 500 (1979) (the court noted that those jurisdictions extending punitive damages to gross negligence, recklessness, or wanton conduct are generally the states allowing insurability of punitive damages).

337. *Id.* at 39-40, 151 Cal. Rptr. at 499. The Fifth Circuit noted the same interesting paradox if it were to allow insurance protection against punitive damages judgments. The "burden" would ultimately come to rest on the public, not on the insurance companies, since insurance companies would pass along the added cost of liability to the premium-payers. Northwestern Nat'l Casualty Co. v. McNulty, 307 F.2d at 440. The result would have the anomalous effect of society punishing itself for a wrong committed against it.

338. *City Prods. Corp.*, 88 Cal. App. 3d at 42, 52 Cal. Rptr. at 500-01.

339. Crull v. Gleb, 382 S.W.2d 17, 23 (Mo. Ct. App. 1964).

340. *See, e.g.*, Northwestern Nat'l Casualty Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962), and the reasoning of Justice Holman's dissent in Harrell v. Travelers Indemn. Co., 279 Or. at 219-31, 567 P.2d at 1022-28 (Holman, J., dissenting).

341. *See supra* text accompanying notes 201-03.

342. *See* City of Newport v. Facts Concerts, Inc., 453 U.S. 247 (1981).

343. 661 P.2d 1272 (Mont. 1983).

ished.[344] Thus, exempting a governmental entity from punitive damages was constitutional because such damages would have punished the public, deterred no one, and ignored the doctrine's basic justification.[345]

The deterrent and retributive purpose of punitive damages was more extensively addressed by the Supreme Court in *City of Newport v. Facts Concerts, Inc.*[346] In *Newport*, the Court considered whether punitive damages could be assessed against a municipality for civil rights violations under section 1983 of the Civil Rights Act.[347] Holding that Congress did not intend to permit punitive damages awards under the statute, the Court considered whether public policy dictated a "contrary result." The Court concluded that "exposing municipalities to punitive damages" advanced no legitimate retributive purpose.[348] The Court also noted that the deterrent aspect of punitive damages would be speculative at best.[349] The Court stated that the deterrence function of punitive damages is best served by assessing such awards against the individual tortfeasor's personal resources.[350]

It is important to note that, as with all of the Court's dissertations on punitive damages, the Court in *Newport* had no illusion that punitive damages exhibit even the slightest remedial or regulatory purpose.[351] This nonregulatory purpose of punitive damages is exemplified further by the growing trend of courts and legislatures to curb application of punitive damages and to treat them on a plane removed from tort law. The Wisconsin Supreme Court requires that culpability for punitive damages be proved by a "clear and convincing standard."[352] The court held that verdicts finding liability for punitive damages carry a "stigma" much like civil actions involving criminal acts.[353] Thus, a higher standard of proof

344. *Id.* at 1276. *See also* Sharapata v. Town of Islip, 82 A.D.2d 350, 363-64, 441 N.Y.S.2d 275, 283 (1981) (punitive damages assessed against a municipality would create the anomalous situation of punishing the taxpayers who should benefit from such punishment).

345. White v. State, 661 P.2d at 1276.

346. 453 U.S. 247 (1981).

347. 42 U.S.C. § 1983 (1982).

348. 453 U.S. at 268.

349. For example, indemnification for punitive damages judgments under local law might not be available, thereby offering no deterrence value to the policymaker and making the impact on the actual tortfeasor uncertain at best. *Id.* at 268-69.

350. *Id.* at 269-70.

351. Consider *id.* at 266-67, where the court said that punitive damages are not intended to compensate the plaintiff. *See also* Gertz v. Robert Welch, Inc., 418 U.S. at 350 (punitive damages are "private fines" designed to "punish reprehensible conduct.").

352. *See* Wangen v. Ford Motor Co., 97 Wis. 2d 260, 300-01, 294 N.W.2d 437, 458 (1980).

353. *Id.* at 300, 294 N.W.2d at 458.

was mandated.[354] Other jurisdictions also have reacted, instituting various evidentiary reforms. Colorado requires that punitive damages be proven beyond a reasonable doubt,[355] while Minnesota, Oregon, and Indiana require proof by clear and convincing evidence.[356] Additionally, the proposed Uniform Federal Products Liability Act would also require a clear and convincing evidence standard.[357] Still other states have enacted legislation or have bills pending that limit the extent of punishment assessable by either the trial judge or the jury.[358] And the Indiana Legislature is considering a bill that would limit the percentage of a punitive damages judgment awarded to the plaintiff,[359] allocating the greater portion of any award to the state. This scheme follows the logic that since punitive damages are punishments that exact deterrence, such awards should not go to plaintiffs.

In line with this trend, some states require bifurcated trials in which a criminal proceeding, the issue of liability must be determined separately from the issue of punishment. One New York court ordered bifurcation in *all* cases on the issues of liability and damages,[360] demanding that evidence of wealth be withheld until liability is determined by a jury. To prevent unjust punishment, the court held that "wealth should not be a weapon to be used by plaintiff to enable him to induce the jury to find the defendant *guilty* of malice . . . ."[361] And under increasing support by legal scholars,[362] California,[363] Kansas,[364] and the United States Con-

354. *Id.* Similarly, criminal procedure requires higher procedural protections because of the "stigma" associated with criminal fines or imprisonment. If the nature of the forbidden conduct carries a general moral opprobrium, a jury trial is probably constitutionally required. "[W]hether the offense is morally offensive and *malum in se* or merely *malum prohibitum* is one factor often employed in determining whether an offense is petty." United States v. Arbo, 691 F.2d 862, 864 (9th Cir. 1982).

355. COLO. REV. STAT. § 13-25-127(2) (1984).

356. MINN. STAT. § 30.925 (1981); OR. REV. STAT. § 52-49.20 (1981). This middle standard also is required by judicial rule in Indiana. *See* Travelers Indemn. Co. v. Armstrong, 422 N.E.2d 349 (Ind. 1982).

357. S. 44, 98th Cong., 1st Sess. § 13(a)(1) (1983).

358. *E.g.*, CONN. GEN. STAT. ANN. § 52-240b (West Supp. 1982) (punitive damages in products liability action limited to twice the compensatory damages); S. 1513, 1984 Sess., § 1(d) (Cal.) (judge determines amount of punishment after liability found by jury).

359. S. 17, 1984 Sess. (Ind.). That bill would provide that 75% of all punitive damages judgments, less litigation expenses, be paid into the state general revenue fund.

360. Rupert v. Sellers, 48 A.D.2d 265, 368 N.Y.S.2d 904 (1975) (evidence of wealth not admissible until liability is determined). The case is critiqued thoroughly in Note, *The Use of Evidence of Wealth in Assessing Punitive Damages in New York:* Rupert v. Sellers, 44 ALB. L. REV. 422 (1980).

361. 48 A.D.2d at 272, 368 N.Y.S.2d at 912.

362. *See* Mallor & Roberts, *supra* note 53, at 664 & n.153 (listing a number of commentators in accord). Mallor and Roberts argue that the judge should assess punitive damages since

gress[365] have similar bills pending that would make the trial judge responsible for assessing punitive damages once liability is established.

Some courts have refused to sanction multiple punitive damages awards for the same tort.[366] One commentator theorized that the basis for such opinions is the spirit of the Double Jeopardy Clause. While "courts do not always make express reference to the [Fifth Amendment] it is clear from the decisions that they have its mandate in mind."[367] One federal district court has noted that multiple punitive damages awards must be unconstitutional since repeated punishment violates due process.[368] Perhaps this trend reflects the observation of the Indiana Supreme Court that "it is better to exonerate a wrongdoer from punitive damages" than to punish an innocent person, because society *can* tolerate an error where such a serious sanction is involved.[369] In any event, most courts agree that punitive damages deter and punish,[370] that they have no collateral goal or effect,[371] that the retribution exacted carries a criminal-type stigma,[372] and that they do further interests that parallel aims of the criminal law.[373] Given their overwhelming punitive character, it is difficult to argue that punitive damages do not fulfill the fourth *Kennedy* criterion of promoting the traditional aims of punishment—retribution and deterrence.

Finally, it should be recognized that punitive damages often are assessed on the equivalent of an ex post facto judgment. For example, in

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> the question of punishment calls for expertise. Delicate issues of economics and social policy are involved in deciding the amount of punishment—issues with which the ordinary juror is likely to have little familiarity. Beyond being more aware of the public policy implications of the award of punitive damages, judges have more experience in meting our punishment.

Id. at 664 (footnotes omitted).

363. S.B. 1513, Reg. Sess. 1983-84 Cal.

364. A.B. 2457, 71st Leg., Reg. Sess. 1985 Kan. (bill adopted from a model statute drafted by this author).

365. S. 44, 98th Cong., lst Sess., § 13(c) (1983).

366. *See* Comment, *supra* note 3, at 414.

367. *Id.* at 414 n.28. California, to some limited extent, prevents double recovery for wrongful death punitive damages claims. *See* CAL. CIV. CODE § 3294(d) (West Supp. 1984) (multiple punitive damages may not be recovered in wrongful death actions arising from a felony-homicide for which the defendant was convicted).

368. *In re "Dalkon Shield,"* 526 F. Supp. 887, 899 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied sub nom.* A.H. Robins Co. v. Abed, 459 U.S. 1171 (1983).

369. Travelers Indemn. Co. v. Armstrong, 442 N.E.2d 349, 362 (Ind. 1982).

370. See W. PROSSER, *supra* note 191, at 9 n.62 for a list of authorities.

371. Gertz v. Robert Welch, Inc., 418 U.S. at 350. See also the discussion on alternative justifications to the punitive damages doctrine, *infra* part IIF.

372. *See* Wangen v. Ford Motor Co., 97 Wis. 2d at 300, 294 N.W.2d at 457. *See also* Wheeler, *supra* note 3, at 282 (punitive damages equal a "badge of disgrace").

373. *See supra* note 272.

determining actual damages, the jury may use "hindsight" to determine liability of a defendant product manufacturer.[374] The jury may find a defect in the design of a product if it finds that at the time of the product's conception "the risk of danger inherent in the challenged design outweigh[ed] the benefits of such design."[375] Such a determination may establish outrageous behavior on the part of the defendant. Since today's social and ethical values may guide a jury's consideration of yesterday's mistakes,[376] corporations ultimately may be punished for business judgments that were ethical at the time they were made.[377] If anything effectively promotes retribution and deterrence it is hindsight, the very antithesis of American jurisprudence.[378] A judgment founded on hindsight will discourage a former course of conduct and should be declared unconstitutional in areas, such as free speech, that may be affected by self-censorship.[379]

Punitive damages are intended only to punish and deter. Unlike nonpenal civil penalties, punitive damages target conduct, not the resulting harm. Finally, and most importantly, unlike anything else in tort law, punitive damages are not assessed for injuries but are geared to the reprehensibility of the actor's behavior. No purer method of retribution and deterrence exists, with the exception of criminal law.

E. Is the Punished Conduct Already a Crime?

Much of the conduct punished by punitive damages could be pun-

374. Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 430, 573 P.2d 443, 454, 143 Cal. Rptr. 225, 236 (1978). For example, a jury using hindsight may find a product defective in design if such design contained an excessive, preventable danger. *Id.* at 434, 573 P.2d at 457, 143 Cal. Rptr. at 239. It is only a small leap in logic to determine that such conduct may also arise to a "conscious disregard" of the rights of others—although it is not clear that such an award has been sustained without a showing of an intentional course of conduct with an actual knowledge of a product's defect. *See* Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 808, 174 Cal Rptr. 348, 381 (1980); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 267, 294 N.W.2d 437, 442 (1980). Indeed, coupled with knowledge, a conscious disregard for the safety of others creates the liability for punitive damages. Racer v. Utterman, 629 S.W.2d 387, 396-97 (Mo. Ct. App. 1981).

375. *Barker*, 20 Cal. 3d at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236.

376. Professor Owen cautions that care should be taken to avoid punishing the defendant for conduct or actions that may have been justified at the time performed, although the justification is not apparent at the time the jury hears the case. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 5 J. PROD. LIAB. 341, 353-54 (1982).

377. *Id.*

378. Thus, ex post facto laws and bills of attainder designed to assess punishment for prior conduct are forbidden by the Constitution. U.S. CONST. art. I, § 9, cl. 3.

379. *See* Rosenbloom v. Metromedia, 403 U.S. 29, 82-83 (1971) (Marshall, J., dissenting).

ished as crime.[380] In fact, it has been acknowledged that punitive damages compensate for the shortcomings of the criminal system in prosecuting such conduct.[381]

The fifth *Kennedy* test is "whether the behavior to which [the sanction] applies is already a crime."[382] A positive finding on this test would not only require criminal procedural safeguards, but also would end a growing controversy surrounding mass tort claims for punitive damages and polarized rulings on due process.[383]

One district court has held that multiple awards do not violate due process,[384] whereas the Northern District of California has ruled to the contrary.[385] Labeling the proscribed behavior as criminal would eliminate these discrepancies since the Fifth Amendment would prohibit double punishment. However, because it is preferable to develop universal legal principles relating to punitive damages, it is not desirable to require an abstract inquiry into each punitive damages claim to determine whether the conduct would be a crime under a particular jurisdiction's statutes. Additionally, since a foreign jurisdiction may punish a punitive damages defendant for his conduct,[386] anomalous situations can result in which a defendant is punished for a wrong that was not classi-

380. Assault often supports punitive damage awards. See the collection of cases at Annot., 98 A.L.R. 3D 872-85 (1980 & Supp. 1984).

381. Kink v. Combs, 28 Wis. 2d 65, 80, 135 N.W.2d 789, 798 (1965).

382. *Kennedy*, 372 U.S. at 168.

383. *See* Neal v. Carey Can. Mines, Ltd., 548 F. Supp. 357, 376-77 (E.D. Pa. 1982); *In re "Dalkon Shield,"* 526 F. Supp. 887, 898-900 (N.D. Cal. 1981); State *ex rel.* Young v. Crookham, 290 Or. 61, 65-70, 618 P.2d 1268, 1273-74 (1980). In the second case, the court reviewed the purpose of punitive damages and concluded that since their purpose was punitive, multiple punishment of the defendant would violate both the prohibition against double jeopardy and due process because "overlapping damage awards violate that sense of 'fundamental fairness' which lies at the heart of constitutional due process." *In re "Dalkon Shield,"* 526 F. Supp. at 898-900.

384. In *Neal*, the court adopted the position that a product manufacturer owes a separate duty to each consumer and injury caused by the product to any one consumer is individual to that person. Independently punishable acts arise each time a product user is injured despite the existence of a universal defect. Thus, for example, all persons poisoned by asbestos fiber can maintain a claim for punitive damages, unaffected by other claims. 548 F. Supp. at 377-78.

385. "[C]ommon sense dictates that a defendant should not be subjected to multiple civil punishment for a single act or unified course of conduct which causes injury to multiple plaintiffs." *In re "Dalkon Shield,"* 526 F. Supp. at 900. A class action, held the district court, is the preferable way to proceed when a mass tort is involved so that the defendant is punished only once for his wrong. *Id.*

386. The constitutional requirements for asserting "long arm jurisdiction" over out-of-state defendants are well-settled:

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

fied as a crime in the state where it was committed.[387] Therefore, it becomes necessary to determine whether conduct punishable as a crime requires due process protection, and whether *all* conduct punished by punitive damages can be considered criminal.

Kennedy referred to three cases that support the "crime" analysis.[388] In *Lipke v. Lederer*,[389] the petitioner appealed from a denial of injunction to prevent the federal government from collecting a "double tax" for his illegal sale of liquor. He asserted that in reality the tax punished activity, and as such criminal procedure must guide collection of the "tax."[390] The Court held that a double tax for illegal behavior lacked the "ordinary characteristics of a tax" since it "clearly involve[d] the idea of punishment" instead of revenue collection.[391] The Court emphasized that a tax "primarily designed to define and suppress crime" was unconstitutional since criminal penalties must be assessed in accordance with due process guarantees.[392]

The second cited authority, *United States v. LaFranca*,[393] involved the same "tax" assessment for the unlawful sale of alcohol. Again, the Court held the tax constituted a penalty, exacting nothing more than punishment "for illegal acts."[394] *LaFranca* added the admonishment that courts should not defer to legislative labeling of a "penalty involving the idea of punishment for infraction of the law."[395] Since the petitioner already had been fined and imprisoned for the same acts, he could not be repunished by "double taxation."[396]

International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1941)). Thus a defendant can be ordered punished by punitive damages while not present in the state, and another jurisdiction, unconcerned with the subject matter of the lawsuit, can effectuate the punishment under the Full Faith and Credit Clause of the Constitution. Stupar v. Bank of Westmont, 40 Ill. App. 3d 514, 352 N.E.2d 29 (1976).

387. In Brown v. Clorox Co., 56 Cal. App. 3d 306, 128 Cal. Rptr. 385 (1976), California asserted jurisdiction over a California manufacturer in a suit arising out of injury caused by a defective product shipped to Washington State where the harm occurred. Because Washington disallows punitive damages, the manufacturer would have been liable in that state only for the actual damage caused. By successfully asserting jurisdiction in California, however, the plaintiff was given the opportunity to punish the defendant, regardless of Washington public policy. *Id.* at 312-13, 128 Cal. Rptr. at 390.

388. The cases are: United States v. Constantine, 296 U.S. 287 (1935); United States v. LaFranca, 282 U.S. 568 (1931); Lipke v. Lederer, 259 U.S. 557 (1922).

389. 259 U.S. 557 (1922).

390. *Id.* at 559.

391. *Id.* at 562.

392. *Id.*

393. 282 U.S. 568 (1931).

394. *Id.* at 572.

395. *Id.*

396. *Id.* at 572-76.

The final supporting proposition that the *Kennedy* Court relied upon was *United States v. Constantine*,[397] discussed previously. The Court reiterating that an increase in taxes caused by a taxpayer's conduct only serves as deterrence and punishment for illegal behavior,[398] added one important observation to the holdings of *Lipke* and *LaFranca*: the "highly exorbitant" assessment of forty times the regular tax rate indicated that the tax was not exacted for government revenue or for the "importance of the business or supposed ability to pay."[399] Thus, where the penalty is premised on a crime, it will be considered penal when accompanied by a fine grossly disproportionate to any legitimate regulatory power.

There is no doubt that many punitive damages verdicts are premised on criminal deportment.[400] One commentator has argued that this relationship affects only the issue of whether to mitigate or enhance punitive damages once criminal fines have been imposed.[401] The reason offered is that civil punishment can effectuate adequate deterrence when penal sanctions are not sufficient.[402] However, another commentator has pointed out that additional punishment inflicted by the "sole discretion" of a jury "is clearly uncivilized."[403] He proposes instead that if the defendant is not deterred, injunctive relief and, ultimately, incarceration for contempt are available.[404]

Legislatures are not exempt from this punishment/enhancement confusion either. In California, for example, special legislation was passed permitting a plaintiff to collect punitive damages in a wrongful death action once the defendant is convicted of the felony that caused the death of the deceased.[405] A review of the bill reveals that the apparent purpose is to advance punishment of criminals through civil suits![406]

397. 296 U.S. 287 (1935). *See supra* notes 294-97 and accompanying text.

398. *Id.* at 295.

399. *Id.*

400. Comment, *supra* note 3, at 413. Punitive damages commonly are assessed for injuries caused by intoxicated drivers where the defendants have been criminally punished for their acts. *See, e.g.*, Harrell v. Ames, 265 Or. 183, 508 P.2d 211 (1973). For a list of similar opinions, see 65 A.L.R. 3D 666-68 (1975).

401. Comment, *supra* note 3, at 413-17.

402. *Id.*

403. K. REDDEN, *supra* note 11, at 627.

404. *Id.*

405. CAL. CIV. CODE § 3294(d) (West Supp. 1984) ("Damages may be recovered pursuant to this section in an action . . . based upon a death which resulted from a homicide for which the defendant has been convicted of a felony, whether or not the decedent died instantly or survived the fatal injury for some period of time.").

406. Previously, punitive damages had not been allowed in wrongful death actions. *See* CAL. CIV. PROC. CODE § 377 (West Supp. 1984) and CAL. PROB. CODE § 573 (West Supp.

Courts that have addressed the criminality question have taken several different approaches. One federal court held that under *Kennedy*, filing a civil action premised on criminal prosecution "triggers" a positive finding on the fifth *Kennedy* test.[407] Another court decided that when criminal immunity for the penalized conduct is available, the criminal effect of punitive damages is vitiated, which results in a negative finding under the fifth *Kennedy* criterion.[408] Another approach is the "parallel statutes test."[409] Under this test, courts look for a criminal statute that parallels the civil penalty provision. Such examination, however, leads to uneven logic and inconsistent results since many civil penalty statutes have no counterpart in criminal law.[410] In any event, whether the act is subject to both civil and criminal punishment is *not* determinative, but only indicative of a remedial nature.[411] Legislatures often impose criminal and civil sanctions for the same act.[412] The real question, as posited by the Supreme Court, is whether the allegedly civil sanction is actually penal and thus merits appropriate safeguards.[413]

The core concern is simply whether the punishment is premised on criminal behavior. Of course, this reasoning could become circular because the punishment often indicates that the behavior is considered criminal.[414] But even without parallel penal statutes, the base behavior may be so similar to criminal behavior that the ostensibly criminal conduct activates the penalty, thereby satisfying the fifth *Kennedy* factor. Essentially, a cause of action provided solely to compensate injury would be found remedial.[415] Conversely, where the statute provides punishment for "an offense against the public justice of the state,"[416] the act is considered penal. In short, public or criminal wrongs constitute "a

1984). However, the Act is part of the Crime Victim Restitution Program of 1983, 1983 CAL. STAT., ch. 408, § 2, and was designed to enable "the survivors of homicide victims to obtain punitive damages from convicted criminals." 1983 CAL. LEGIS. SERV. 2688 (West).

407. *See* United States v. General Motors Corp., 403 F. Supp. 1151, 1162 (D. Conn. 1975).

408. Ward v. Coleman, 423 F. Supp. 1352, 1356 (W.D. Okla. 1976), *rev'd*, 598 F.2d 1187 (10th Cir. 1979), *rev'd sub nom.* United States v. Ward, 448 U.S. 242 (1980).

409. Charney, *supra* note 86, at 500.

410. *Id.* at 501 ("parallel statutes test" is unsatisfactory since most civil penalty provisions "do not have companion criminal sanction provisions").

411. United States v. Eureka Pipeline Co., 401 F. Supp. 934, 940 (N.D. W. Va. 1975).

412. *Id.*

413. Helvering v. Mitchell, 303 U.S. 391, 398 (1938) (determining whether a parallel civil statute was penal in the face of a double jeopardy challenge).

414. *See supra* parts IIA & B.

415. A statute is penal if it inflicts punishment for an offense against the state, but remedial if it provides a private remedy to an injured party. Tulsa Ready-Mix Concrete Co. v. McMichael Concrete Co., 495 P.2d 1279, 1282 (Okla. 1972) (quoting Huntington v. Attril, 146 U.S. 657 (1892)).

416. *Tulsa Ready-Mix Concrete Co.*, 495 P.2d at 1282.

breach and violation of public rights and duties."[417]

Although *Lipke*, *LaFranca*, and *Constantine* each involved a delineated crime as the premise for assessing a civil penalty, a civil statute predicated on conduct that constitutes criminal behavior should satisfy the fifth *Kennedy* test. This approach is consistent with that of punishment exacted only to redress the breach of a social duty.[418] An individual can punish another only by stepping into the state's shoes as a "private attorney general"[419] or as a deputy of the state,[420] and only then by prosecuting claims for wrongs committed against society.[421] The essence of vindicating a public wrong led one Wisconsin Supreme Court justice to declare that the function of civil law and punitive damages is not to address the concerns of the criminal system.[422]

Punitive damages will fall within the fifth *Kennedy* criterion when the underlying tort involves a crime.[423] Even where the behavior qualifying for punishment has not been classified as criminal conduct, punitive damages vindicate breaches of social duties that the defendant owes to the public as a whole.[424] This proposition is supported implicitly by vari-

417. 4 W. BLACKSTONE, COMMENTARIES *2. As one federal court further pointed out, "[t]he true test is whether the wrong to be . . . punished is primarily to an individual or to the State." Porter v. Household Fin. Corp., 385 F. Supp. 336, 340 (S.D. Ohio 1974) (quoting Huntington v. Attril, 146 U.S. 657, 667 (1892)).

418. Acknowledging this point, the Wisconsin Supreme Court has held that "[t]he protection of the public from such conduct [gross negligence] or from reckless, wanton, or wilful conduct is best served by the criminal laws of the state." Bielski v. Schulze, 16 Wis. 2d 1, 18, 114 N.W.2d 105, 113 (1962).

419. As the court said in *In re Paris Air Crash*: "So far is this opportunity [of seeking punitive damages] from being a fundamental personal right that it is an interest not truly personal in nature at all. It is rather a public interest, and in defining who may give it effect the legislature should be given a broad discretion, similar to the discretion of a prosecutor." 622 F.2d 1315, 1319-20 (9th Cir.), *cert. denied sub nom.* Kalinsky v. General Dynamics Corp., 449 U.S. 976 (1980).

420. *See infra* note 454.

421. *See id.* and *supra* note 419. Blackstone pointed out that public wrongs "are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of *crimes* and *misdemesnors* [sic]." 4 W. BLACKSTONE, COMMENTARIES *2.

422. Wangen v. Ford Motor Co., 97 Wis. 2d at 328, 294 N.W.2d at 471 (Coffy, J., dissenting).

423. Assault and battery are the most common crimes supporting punitive damages liability. *See supra* note 380. Responding to the troublesome invasion of criminal functions into civil law via punitive damages, Justice Coffy of the Wisconsin Supreme Court declared that one of the major concerns is that "[t]he doctrine of punitive damages does not provide the defendant with the benefits of the constitutional safeguards afforded in criminal proceedings." Wangen v. Ford Motor Co., 97 Wis. 2d at 328, 294 N.W.2d at 471 (Coffy, J., dissenting).

424. Where fraud, malice, or outrageous conduct is involved, punitive damages punish the breach of civil duty and not the injury to the plaintiff. *In re* Paris Air Crash, 622 F.2d at 1323. *See also* RESTATEMENT (SECOND) OF TORTS § 908 & comment b (1979).

ous state courts' formulations of the punitive damages function. In California, for instance, punitive damages function to assail socially unacceptable behavior[425] and to vindicate public interest.[426] A Wisconsin Supreme Court justice concurred with this judgment, inquiring why damages do not go "to the public in whose behalf [the defendant] is punished."[427] Even more convincing is the Wisconsin court's statement that punitive damages bring punishment to conduct that goes "unpunished by the prosecutor."[428] Language from an Illinois court is in accord. Stating that "punitive damages are in the nature of a criminal sanction," the court held that "the punishment should fit the *crime*."[429] In Florida, punitive damages are aimed at "antisocial conduct."[430] The language from these courts constitutes the ultimate irony. While refusing to recognize the defendant's rights to due process protections, they nevertheless have acknowledged that only ostensibly criminal conduct justifies punitive damages.

An additional aspect of punitive damages strengthens the conclusion that they are premised on the equivalent of criminal behavior. Before a claim for punitive damages will lie, the plaintiff must have a recognizable cause of action based on some other claim, since punitive damages alone cannot constitute a cause of action.[431] The plaintiff has no personal right to punitive damages,[432] while the jury possesses unfettered discretion to punish for socially unacceptable behavior. If the social wrong may be punished, the act should be considered functionally equivalent to a criminal wrong.[433] Since punitive damages arise only for misconduct against the public, and are never awarded as a matter of right, the conduct upon which punitive damages are premised should be sufficiently

425. *See* Egan v. Mutual of Omaha Ins. Co., 24 Cal. 3d 809, 820, 598 P.2d 452, 457, 157 Cal. Rptr. 482, 487 (1979) (purpose of punitive damages is to deter socially unacceptable acts).

426. *In re "Dalkon Shield,"* 526 F. Supp. at 899 ("Punitive damages are exacted for the benefit of society . . . .").

427. Bass v. Chicago & N.W. Ry., 42 Wis. 654, 672 (1877) (Ryan, C.J., concurring). Chief Justice Ryan also stated that "[i]t is difficult on principle to understand why, when the sufferer by a tort has been fully compensated for his suffering, he should recover anything more." *Id.*

428. Kink v. Combs, 28 Wis. 2d at 80, 135 N.W.2d at 798.

429. Hazelwood v. Illinois Cent. Gulf R.R., 114 Ill. App. 3d 703, 713, 450 N.E.2d 1199, 1207 (1983) (emphasis added).

430. Northwestern Nat'l Casualty Co. v. McNulty, 307 F.2d 432, 436 (5th Cir. 1962).

431. "There is no cause of action for punitive damages." Hilliard v. A.H. Robins Co., 148 Cal. App. 3d 374, 391, 196 Cal. Rptr. 117, 127-28 (1983). They can never be the basis for litigation. *Id.* The plaintiff first must plead and prove an independent cause of action on which he can premise a punitive damages claim. See the discussion and cases at 22 AM. JUR. 2D *Damages* § 241 (1965 & Supp. 1984).

432. Since the plaintiff has no inherent right to punitive damages, it is *never* error not to award them. *See* Wangen v. Ford Motor Co., 97 Wis. 2d at 301-02, 294 N.W.2d at 458.

433. *Id.* at 309 n.30, 294 N.W.2d at 462 n.30.

penal for a positive finding under the fifth *Kennedy* factor. This determination, however, could open up a Pandora's box of constitutional debate. As one federal court noted, a cause of action solely for the purpose of punishing social injustice may be brought *only* by the state.[434]

Some may argue that not all conduct justifying punitive damages can be classified as criminal. For example, the government may not punish a publisher in any manner for defamation or libel; yet a private citizen can punish the publisher, subject only to proving malice before a jury.[435] But as one commentator retorted, if the base conduct is not worthy of penal sanctions, or if public punishment cannot be constitutionally inflicted, no legitimate ratiocination should justify exacting retribution by means that circumvent the Bill of Rights.[436]

On the whole, however, qualifying behavior requires elements similar to criminal law. For instance, many jurisdictions punish fraud by both criminal sanctions and punitive damages.[437] A growing number of jurisdictions allow drunk driving to be punished by both methods as well.[438] Even more persuasive is the ubiquitous use of "malice" to prove socially unacceptable behavior. The malice terminology could erode the distinction between punitive damages and criminal law. For example, in upholding a charge of second degree murder in *People v. Watson*,[439] the California Supreme Court established the requisite criminal conscious disregard for life by adopting a malice definition articulated in a drunk driving tort case that awarded punitive damages.[440] The court intertwined punitive damages and criminal law analyses to the extent that the borrowed punitive damages doctrine to clarify criminal culpability under

434. *Cf.* Porter v. Household Fin. Corp., 385 F. Supp. 336, 342 (S.D. Ohio 1974).

435. *See supra* note 25.

436. *See* K. REDDEN, *supra* note 11, at 627 (if conduct is not formally proscribed, it should not be a jury function to decide whether the behavior should be punished).

437. For example, any person in California who signs the name of another person to any document of value with the intent to defraud another person is guilty of forgery. CAL. PENAL. CODE § 470 (West 1970). The same conduct is punishable by punitive damages as an intentional misrepresentation of a material fact if done with the intent to deprive someone of property or legal rights, or cause someone injury. CAL. CIV. CODE § 3294 (West Supp. 1985). A punitive damages claim is not barred merely because the same conduct is also punishable by criminal sanctions. Wilson v. Middleton, 2 Cal. 54, 54-56 (1852).

438. The reasoning of the Oregon Supreme Court generalizes the rule allowing punitive damages for illegally driving while under the influence of alcohol. The rationale is that sanctioning such damages in injury suits will act "as a deterrent to the conduct proscribed by . . . statute." Dorn v. Wilmarth, 254 Or. 236, 242-43, 458 P.2d 942, 945 (1969). See the collection of similar cases at Annot., 65 A.L.R. 3D 666-68 (1975).

439. 30 Cal. 3d 290, 637 P.2d 279, 179 Cal. Rptr. 43 (1981).

440. *Id.* at 300-01, 637 P.2d at 286, 179 Cal. Rptr. at 50.

the penal system.[441]

In sum, both the spirit and the nature of conduct supporting punitive damages are criminal. Like *Lipke*, *LaFranca*, and *Constantine*, socially unacceptable conduct triggers punishment. With this type of behavior activating a punitive damages sanction, the basis for liability constitutes a wrong that is criminal in nature.[442] Thus, the fifth *Kennedy* test dictates stricter procedural due process protections under the punitive damages doctrine.

F. Alternative Purpose

The sixth test enunciated in *Kennedy*, "whether an alternative to which [punitive damages] may be rationally connected is assignable for [them],"[443] relies on previously cited cases to assign meaning to the inquiry.[444] While the punishment/deterrent purpose of punitive damages has already been discussed, a subtle rationale is often suggested to defend the doctrine. For this reason, an examination of punitive damages under the sixth *Kennedy* test is necessary.

The basic proposition from the cited cases is that if the alleged penalty serves a legitimate government purpose other than punishment, the sanction will be construed as nonpenal. This construction has been utilized restrictively because courts are not in the position to assess which remedy in a dual-function statute is "most likely to achieve the legislative aim."[445] If the possible alternative is reasonably related to a legitimate statutory aim, the alternative will supplant any penal effect.[446] In *Ward v. Coleman*,[447] the Tenth Circuit held that a penalty assessed for violating the Federal Water Pollution and Control Act had an alternative purpose:

441. *See* Grass, *supra* note 281, at 434 (discussing the adoption of delineated "civil malice" to establish the "conscious disregard for life" necessary to sustain a homicide charge).

442. 4 W. BLACKSTONE, COMMENTARIES *2.

443. *Kennedy*, 372 U.S. at 168-69.

444. To support the sixth *Kennedy* test, the Court cited Flemming v. Nestor, 363 U.S. 603, 615, 617 (1960) (*see supra* notes 48-52 and accompanying text); Trop v. Dulles, 356 U.S. 86, 96, 97 (1958) (*see supra* notes 298-302 and accompanying text); United States v. LaFranca, 282 U.S. 568, 572 (1931) (*see supra* notes 393-96 and accompanying text); Child Labor Tax Case, 259 U.S. 20 (1921) (*see supra* notes 232-37 and accompanying text); Lipke v. Lederer, 259 U.S. 557, 561, 562 (1922) (*see supra* notes 389-92 and accompanying text); and Cummings v. Missouri, 71 U.S. (4 Wall) 277, 319 (1867) (*see supra* notes 104-08 and accompanying text).

445. Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 518 F.2d 990, 1010 (5th Cir. 1975), *aff'd*, 430 U.S. 442 (1977).

446. Ward v. Coleman, 598 F.2d 1187, 1194 (10th Cir. 1979), *rev'd on other grounds sub nom.* United States v. Ward, 448 U.S. 242 (1980). In construing a penalty provision under the Occupational Safety and Health Act, another federal court cautioned that the jury knows little about the hazards of industry save what they see in a tragic case after the event of death or injury. *Atlas Roofing Co.*, 518 F.2d at 1010.

447. 598 F.2d 1187 (10th Cir. 1979).

remedying environmental damage. The Court in *Ward* noted, however, that if a fine exceeds the amount of reasonable compensation to the government, it will become penal.[448] Nevertheless, even though a civil penalty statute may involve some punishment, if there is an alternative remedial purpose, such as reimbursement to the government for litigation costs, and such compensation is not unreasonable in relation to the harm, a civil remedy will not otherwise be transformed into a criminal penalty.[449]

When interpreting civil penalty statutes, courts will not make legislative evaluations.[450] Even where punishment is clearly an unavoidable by-product, "[t]he Court cannot substitute its own judgment for the informed choice of the [legislature] by interpreting [the] by-product to be the primary purpose of the statute."[451] The bottom line is that even where a significant punitive end is effectuated, any alternative purpose that reasonably relates to a legitimate end will save the statute as remedial. While the exclusive purpose of punitive damages is punishment for the sake of deterrence,[452] the argument has been made that alternative purposes exist.[453] Presumably, such arguments could save punitive damages from a penal label and vitiate the need for higher degrees of constitutional safeguards.

The first proffered alternative purpose is that punitive damages provide an incentive for private prosecution, encouraging citizens to take on the responsibility of a "private attorney general" to vindicate public justice.[454] This alternative might persuade individual parties to bring suits where the tortfeasor has caused little damage and the injured party might not otherwise seek compensation in the complex and slow judicial process.[455] Thus, awarding punitive damages arguably rewards a persistent plaintiff for his efforts to right a wrong. The second alternative purpose, which overlaps the first, asserts that punitive damages satisfy the costs

448. *Id.* at 1194.

449. *In re* Garay, 89 N.J. 104, 444 A.2d 1107 (1982). The *Garay* court reiterated the general rule that as long as a penalty *fixed by statute* was not too unreasonable or excessive on its face, a civil *remedy* would not be transformed into a criminal penalty. *Id.* at 114, 444 A.2d at 1112.

450. *Atlas Roofing Co.*, 518 F.2d at 1010.

451. United States v. General Motors Corp., 403 F. Supp. 1151, 1163 (D. Conn. 1975).

452. *See supra* part IID.

453. Owen, *Punitive Damages in Product Liability Litigation*, 74 MICH. L. REV. 1257, 1287-88 (1976).

454. *Id.* The state, in effect, authorizes private litigants to act "as deputies to bring suits expressing social condemnation and disapproval." *In re* Paris Air Crash, 622 F.2d 1315, 1322 (9th Cir.), *cert. denied*, 449 U.S. 976 (1980).

455. *See generally* Owen, *supra* note 453, at 1293 (expense of litigation may prevent a plaintiff from asserting his legal rights).

and attorneys' fees incurred when prosecuting a successful suit in the public's interest.[456]

Both of the foregoing alternatives are inherently inconsistent given the theory of punitive damages and the practical utilization of "incentives" or "costs" under either statute or judicial rule.[457] Before analyzing these alternative justifications, however, brief mention of those jurisdictions that explicitly assign other purposes to the punitive damages doctrine is appropriate.

In Michigan, for example, punitive damages are available to compensate for humiliation, sense of outrage, and indignity resulting from the defendant's willful, malicious, and wanton acts.[458] This remedial purpose, however, seems to compensate the plaintiff for emotional distress and is therefore consistent with the doctrine's original purpose of relief for incompensable injuries.[459]

The judicially defined role of punitive damages in Connecticut resembles that of Michigan: "[p]unitive damages are designed not to punish the defendant for his offense but rather to compensate the plaintiff for his injuries."[460] Courts in these two states do not conduct an "alternative purpose" analysis because damages are premised solely on compensatory, rather than punishment, objectives. Nothing in these jurisdictions dictates higher standards of procedural protection since retribution is neither the goal nor the effect of punitive damages.[461]

When examining alternative purposes for punitive damages in the majority of states, a brief look at forfeiture proceedings proves helpful. In general, where there is no legitimate justification other than retribution, the courts have disallowed forfeitures absent procedural protections. The leading case in this area is *One 1958 Plymouth Sedan v. Pennsylvania*.[462] The petitioner in that case previously had been charged with

456. *See* Brewer v. Home-Stake Prod. Co., 200 Kan. 96, 434 P.2d 828 (1967) (jury could not be instructed to award attorneys' fees in addition to punitive damages, but could consider attorneys' fees and costs as a function of punitive damages). See the collection of similar cases at Annot., 30 A.L.R. 3D 1448-53 (1970 & Supp. 1983).

457. *See infra* notes 471-511 and accompanying text.

458. Kewin v. Massachusetts Mut. Life Ins. Co., 409 Mich. 401, 419, 295 N.W.2d 50, 55 (1980) (citing McFadden v. Tate, 350 Mich. 84, 85 N.W.2d 181 (1957)).

459. *See* Duffey, *Punitive Damages: A Doctrine Which Should Be Abolished*, in THE CASE AGAINST PUNITIVE DAMAGES 5 (Defense Institute Research Monograph 1969).

460. Miller v. Drouin, 183 Conn. 189, 191, 438 A.2d 863, 864 (1981). *See also* Vratsenes v. New Hampshire Auto, Inc., 112 N.H. 71, 289 A.2d 66 (1972) (punitive damages not allowed in New Hampshire for purposes of punishment and deterrence).

461. Connecticut recently approved *limited* punitive damages awards in products liability actions, but the award decision is assigned to the trial judge. CONN. GEN. STAT. ANN. § 52-240b (West Supp. 1982).

462. 380 U.S. 693 (1965).

criminally violating Pennsylvania liquor laws. Subsequently, the State of Pennsylvania sought possession of the defendant's automobile through civil forfeiture proceedings. The Court held that forfeiture was disproportionate to the wrong and to attendant penalties which the defendant already faced.[463] Even though forfeiture might become the state's only recourse, greater punishment than the penalties obtained by conviction could result.[464] The main issue in the case was whether the Fourth Amendment's ban against unreasonable searches and seizures prohibited introducing possibly unlawful evidence. The Court noted that the exclusionary rule[465] might apply in the alternate criminal proceeding and thereby thwart prosecution. The Court then said that it would be "anomalous" to disregard the rule in the civil forfeiture proceeding where the defendant faced the loss of his $1,000 car for a crime punishable by no more than a $500 fine. Hence, the Court found the potential loss of the car disproportionate to the authorized criminal sanction and declared the forfeiture proceeding to be penal, thereby requiring the Fourth Amendment's protection.[466]

Similarly, *United States v. Coin & Currency*[467] involved the statutory forfeiture of illegal gambling proceeds through civil proceedings. A forfeiture was predicated entirely on violation of federal law. In fact, the only statutory defense available provided that if the defendant could show that the "forfeiture was incurred without willful negligence or without any intention . . . to violate the law . . . ," he could avoid the penalty.[468] Based on the face of the statute, the Court found no other apparent effect except an attempt to penalize the alleged wrongdoer.[469] No alternative remedial purpose for forfeiture was evident, nor was there any intent, purpose, or effect to secure reasonable compensation to support a nonpunitive end. These forfeiture cases indicate that the courts will guard against improper circumvention of the criminal process. This reasoning applies not only to forfeiture but also to any instance where

463. *Id.* at 702.

464. *Id.* at 700-01. For example, the defendant in *One Plymouth Sedan* was subject to a maximum $500 fine, whereas the value he stood to lose in his car through civil forfeiture would have been $1,000.

465. The exclusionary rule provides that evidence seized by public authorities in violation of the Constitution cannot be introduced against the accused at trial. *See* Mapp v. Ohio, 367 U.S. 643 (1961).

466. *One Plymouth Sedan*, 380 U.S. at 702-03.

467. 401 U.S. 715 (1971).

468. *Id.* at 721.

469. *Id.* at 721-22. *See also* Clark, *supra* note 76, at 477 (forfeitures of property other than contraband is punitive).

guaranteed rights are infringed.[470]

The alternative purpose of "providing incentive" to prosecute a suit has not been sanctioned frequently by the courts.[471] Nevertheless, one commentator has suggested that "punitive damages awards have come to serve the function of encouraging private prosecutions."[472] Since virtually every tort action now seeks punitive damages,[473] the observation hardly can be disputed. But the extent of unsuccessful litigation indicates that the merits of many punitive damages claims are in serious doubt.[474] Consequently, this "alternative" is really no alternative at all, but only a furtherance of the retributive goal.[475] This effect is precisely what the Wisconsin Supreme Court noted in *Kinks v. Combs*[476] when it discussed the incentive rationale. The court considered the efficacy of a punitive damages claim based on a tort action of assault and battery. The facts suggested an attempted rape, but arguably the evidence fell short of that needed for a successful criminal prosecution. While a criminal action for assault and battery might have been successful, the court pointed out that, in any event, such actions are seldom prosecuted. Using this scenario as justification for retribution exacted through the civil process, the court stated: "Suffice it to say that whatever shortcomings the award of punitive damages may have, nevertheless, it must be remembered that it has the *effect of bringing to punishment* types of conduct that though oppressive and hurtful to the individual almost invariably go unpunished by the public prosecutor."[477] The court stated further that "the self interest of the plaintiff will lead to prosecution of the claim

470. Boyd v. United States, 116 U.S. 616, 635 (1886). Discussing the propriety of civil forfeiture proceedings, the Court said "[i]t is the duty of courts to be watchful for the constitutional rights of the citizen, and against *any* stealthy encroachments thereon." *Id.* (emphasis added). An excellent analysis of *Boyd* is contained in Clark, *supra* note 76, at 414-20.

471. Comment, *supra* note 173, at 1145.

472. *Id.*

473. Rosener v. Sears Roebuck & Co., 110 Cal. App. 3d 740, 761-62, 168 Cal. Rptr. 237, 249-50 (1980) (Elkington J., concurring) (The "widely expanded" circumstances under which punitive damages can now be awarded, both as to types of actions and amounts, "have brought about the present day practice of seeking punitive damages in substantially *all* damage actions, and what will reasonably be termed the explosion of punitive damage awards.").

474. In Los Angeles, for example, a study by the *Los Angeles Times* has shown that despite the rising popularity of assessing punitive damages, the damages are actually assessed in less than 10% of tort cases. The Los Angeles verdicts for punitive damages in 1982 ranged from $25 to $64 million. Hiltzik, *Punitive Claims Challenge Limits of Law*, L.A. Times, Feb. 17, 1984, § 1, at 1, col. 4.

475. This point is further manifested by those scholars who contend that punitive damages are "outlets" or "relief valves" for private vengeance. *See, e.g.*, Mallor & Roberts, *supra* note 53, at 650.

476. 28 Wis. 2d 65, 135 N.W.2d 789 (1965).

477. *Id.* at 80, 135 N.W.2d at 798 (emphasis added).

. . . ."[478] The "incentive" alternative, rather than evidencing a collateral remedial objective like that in *Ward*, merely extends the criminal punishment mechanism like the forfeiture attempts discussed above. Thus, while punitive damages provide an incentive to prosecute suits in society's interest, justifying them on this ground clearly acknowledges that the doctrine furthers the punitive ends of criminal law.

A further criticism of the incentive alternative is that it treats punitive damages as merely a proxy for an inadequate criminal justice system. As such, punitive damages actions would be unconstitutional private prosecutions, since criminal justice is the sole domain of the government.[479] The Supreme Court declared long ago that enforcing punitive sanctions through civil procedure is forbidden.[480] Additionally, if legislatures wanted to provide incentive to prosecute specific types of actions, thereby compensating plaintiffs for their socially laudable efforts, it should follow that punitive damages could constitute an independent cause of action, yet they do not. Nor is it clear why punitive damages, if they are considered a proper alternative incentive, are not favored in the law.[481]

It might also be argued that the purpose of punitive damages is to encourage private suits seeking redress of slight injury as opposed to punishment of an individual. This justification is outweighed, however, by a number of factors. For instance, small claims courts are provided for just such purposes.[482] In California, for example, plaintiffs may prosecute cases in small claims courts for actual damages up to $1,500.[483] The procedure is expeditious, inexpensive, lawyerless, and generally conclusive.[484] Where claims are moderate, municipal and district courts are also available as expedient forums.[485] The plaintiff does not need puni-

478. *Id.*

479. Punishment for crime is a state responsibility. Bergman v. State, 187 Wash. 622, 625, 60 P.2d 699, 701 (1936).

480. Helvering v. Mitchell, 303 U.S. 391, 402 n.6 (1937).

481. Rosener v. Sears Roebuck & Co., 110 Cal. App. 3d 740, 750, 168 Cal. Rptr. 237, 242 (1980); Lewiston Pistol Club, Inc. v. Imthurn, 94 Idaho 264, 266, 486 P.2d 275, 277 (1977); McElwain v. Georgia Pacific, 245 Or. 247, 249, 421 P.2d 957, 958 (1966).

482. *See* CAL. CIV. PROC. CODE § 116.2 (West 1982).

483. *Id.*

484. For example, the legislative declaration in the California Code of Civil Procedure provides that the small claims forum is intended to provide an expeditious, inexpensive "forum accessible to all parties." CAL. CIV. PROC. CODE § 116.1 (West 1982). An adverse judgment on the plaintiff's claim is not appealable. *Id.* § 116. Further, parties are precluded from appearing in a small claims action with an attorney. *Id.* § 117.4.

485. In California, municipal courts generally have jurisdiction of suits demanding less than $15,000. In the simplified municipal court litigation process, discovery is extremely lim-

tive damages as an incentive to vindicate minor injury when other mechanisms are available.

When the damages are more severe, the argument that the unavailability of punitive damages would deter plaintiffs from suing large corporate enterprises due to the complexity of the suit or the corporation's overwhelming legal resources is without merit. For example, in the exploding Pinto case,[486] it cannot be argued that the horribly mutilated and burned plaintiff would not have brought her suit absent the potential for a punitive damages verdict. Nor can it be argued that there is a lack of products liability lawsuits against corporations in those states that prohibit punitive damages.[487] There also appears to be no lack of wrongful death lawsuits against manufacturers despite the statutory preclusion of punitive damages in such actions.[488] That wrongful death suits often involve products manufacturers[489] or large corporate enterprises[490] obviates any argument that legitimate claims are deterred by the prospect of

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ited and parties may use affidavits in lieu of direct testimony. *See* CAL. CIV. PROC. CODE §§ 85-100 (West 1982 & Supp. 1984).

486. Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981).

487. Although Washington State prohibits punitive damages, products liability suits against auto and truck manufacturers are prevalent. *See, e.g.*, Seay v. Chrysler Corp., 93 Wash. 2d 319, 609 P.2d 1382 (1980); Baumgardner v. American Motors Corp., 83 Wash. 2d 751, 522 P.2d 829 (1974); Ulmer v. Ford Motor Co., 75 Wash. 2d 522, 452 P.2d 729 (1969); Tokarz v. Ford Motor Co., 8 Wash. App. 645, 508 P.2d 1370 (1973).

488. *See, e.g., In re* Paris Air Crash, 427 F. Supp. 701 (C.D. Cal. 1977), *rev'd*, 622 F.2d 1315 (9th Cir.), *cert. denied*, 449 U.S. 976 (1980) (constitutional challenge to statutory denial of punitive damages in wrongful death actions); Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (cannot recover punitive damages in wrongful death action where forbidden by statute); Georgie Boy Mfg., Inc. v. Superior Court, 115 Cal. App. 3d 217, 171 Cal. Rptr. 382 (1981) (rational basis exists in statutory denial of punitive damages in wrongful death cases).

489. *E.g.*, Neal v. Carey Can. Mines, Ltd., 548 F. Supp. 357 (E.D. Pa. 1982). In that case, 15 individual claims of asbestos poisoning had been consolidated for trial. *Id.* at 365. As of 1984, there were over 16,000 asbestos related suits pending against the Johns-Manville Corporation. United Press Int'l News Serv. (available on DIALOG, General News Section, Jan. 3, 1984, A.M. cycle). As another example, 10,000 suits were filed against A.H. Robins for injuries arising from a defectively manufactured intrauterine contraceptive. *Unsafe Products: The Great Debate Over Blame and Punishment*, BUS. WK., Apr. 30, 1984, at 96, 100.

490. *See, e.g., In re* Air Crash Disaster, 644 F.2d 594 (7th Cir. 1981), *cert. denied*, 454 U.S. 878 (1981). This case exemplifies the eagerness of plaintiffs to assert claims for punitive damages. The complex opinion had to consider whether to allow punitive damages against the manufacturer of a DC-10 or the airline involved in the crash, since "[t]he law of the place of disaster, the law of the place of manufacture of the airplane, and the law of the primary place of business of the airplane [did] not allow punitive damages; but, the law of primary place of business of the manufacturer of airplane and the law of the place of the maintenance of the airplane [did] allow punitive damages." *Id.* at 604. There were 118 wrongful death actions at issue, many requesting punitive damages. *Id.* Punitive damages were disallowed under the law of Illinois. One commentator summed up the case by observing that, "[i]n applying the law of Illinois, the court of appeals was able to avoid the inequity of allowing punitive damage

fighting a large corporation.[491]

The other alternative justification for punitive damages is that they provide costs and attorneys' fees in situations where the plaintiff prevails on a cause of action for damages arising out of "outrageous conduct."[492] As one commentator explained, "punitive damages tend to alleviate, however imprecisely, the rigors of the American rule."[493] The American rule on attorneys' fees provides that absent statutory authorization, attorneys' fees are not available to prevailing litigants in civil actions.[494] Such fees may be awarded as an exception to the rule where "the losing party has acted in bad faith, vexatiously, or for oppressive reasons."[495] Although state courts have developed other exceptions,[496] state legislatures and Congress[497] generally make provisions for attorneys' fees and costs where bad faith litigation is involved[498] or where interests benefit a

claims against one defendant and not against the other." Note, *Conflict of Laws*, 47 J. AIR L. & COM. 339, 359 (1982).

491. In defense of allowing punitive damages in products liability actions, Professor Owen contends that the complexities and expense of litigating a valid claim may deter a claimant from seeking a remedy, and that manufacturers may "take advantage of [the] practical shortcomings in the legal system." Owen, *supra* note 453, at 1293-94. *But see supra* note 487 and accompanying text.

492. See the collection of cases at 30 A.L.R. 3D 1448-53 (1970 & Supp. 1984).

493. Owen, *supra* note 453, at 1297. Another commentator has attempted to rationalize punitive damages as attorneys' fees by concluding that such damages seem "consistent with the historic rule of punitive damages as a means of compensating plaintiffs for otherwise noncompensable elements of injury." Note, *supra* note 3, at 1163. The author cites to Michigan and Connecticut for support, but those states utilize the doctrine for nonpunitive ends. *See supra* notes 458-61 and accompanying text.

494. Alyeska Pipeline Serv. Co., v. Wilderness Soc'y, 421 U.S. 240, 245 (1975).

495. *Id.* at 258-59. In McEnteggart v. Cataldo, 451 F.2d 1109 (1st Cir. 1971), *cert. denied*, 408 U.S. 943 (1972), the court held that the plaintiff could recover fees where he was forced to seek by way of litigation an administrative reason explaining why his employment contract was not renewed, something he was constitutionally entitled to under procedural due process. *Id.* at 1112.

496. *See, e.g.*, Serrano v. Priest, 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977) (noting that courts recognize exceptions to the American rule when passive beneficiaries derive a benefit from a prevailing litigant who financed the cause of action and thus created a fund from which the beneficiaries profit; or, under the "substantial benefit theory," courts may require beneficiaries to help pay the costs of litigation).

497. *Alyeska*, 421 U.S. at 271.

498. *See, e.g.*, 15 U.S.C. § 298(C) & (D) (1976) (reasonable attorney fees and costs in addition to punitive damages for defendant when action is brought "frivolously, for the purposes of harassment, or in implementation of any scheme in restraint of trade"); 15 U.S.C. § 1691(d) & (e) (1982) (reasonable attorneys' fees, costs, and punitive damages in action for unlawful creditor discrimination); 18 U.S.C. § 2520 (Supp. 1984) (reasonable attorneys' fees and costs as well as punitive damages for unlawful interception of wire or oral communications); CAL. CIV. PROC. CODE § 1021-39 (West 1980 & Supp. 1984) (delineating instances where attorneys' fees and costs are mandated).

large class.[499]

There is often an attempt, however, to ignore these limited exceptions to the American rule by justifying punitive damages as fees and costs. Professor Owen has stated that such awards mitigate the cost of litigation to plaintiffs, who may pay up to one-third of a compensatory damages verdict in legal fees.[500] Nevertheless, no logical exception to the American rule legitimately transmutes punitive damages into awards for attorneys' fees. By statutory authority, costs and attorneys' fees are often awarded separately in the same actions where punitive damages are assessed.[501] Thus, legislatures specifically provide fees and costs as elements separate from punitive damages when they believe such costs are justified and necessary.

Over one hundred years ago, the Supreme Court stated the controlling rule on attorneys' fees and costs in punitive damages actions. In *Day v. Woodworth*,[502] the Court held that punitive damages were not a function of fees and costs since they did not inure to the prevailing defendant.[503] Punitive damages awards are based on considerations of wanton, malicious, oppressive, or outrageous conduct, not litigation expenses.[504]

499. *See* CAL. CIV. PROC. CODE § 1021.5 (West 1980). This rule permits reimbursement of attorneys' fees "in cases where the litigation has conferred a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." Mills v. Electric Auto-Lite, 396 U.S. 375, 393-94 (1970).

500. Owen, *supra* note 453, at 1297.

501. *See, e.g.*, ALASKA STAT. § 09.60.010 (1983); ALASKA R. CT. P. 54, 79, & 82; Sturm, Ruger & Co., Inc. v. Day, 627 P.2d 204, 205 (Alaska 1981) (since attorneys' fees are not a function of punitive damages, it is error to deny such fees arbitrarily even though punitive damages are awarded).

In one products liability case, the Third Circuit remanded on the issue of attorneys' fees (awarded under V. I. CODE ANN., tit. 5, § 541(b) (1967)) because such fees under state law must reflect the quality of an attorney's work as evidenced by the amount of recovery. Since a punitive damages judgment was reversed on appeal in the case, the court ordered a reevaluation of the fees awarded. As noted in the case, fees were awarded separately and proportioned to the judgment, including the punitive damages judgment. Acosta v. Honda Motor Co., 717 F.2d 828, 843-44 (3rd Cir. 1983). *See also* Doe v. Roe, 93 Misc. 2d 201, 217, 400 N.Y.S.2d 668, 678-79 (1977) (attorneys' fees as a cost of litigation considered separately from issue of punitive damages award).

502. 54 U.S. (13 How.) 363 (1851).

503. *Id.* at 373.

504. The general rule is reflected in the Idaho Supreme Court's holding that if punitive damages are to be "viewed as compensatory damages, there is no sound reason apparent . . . why they should be allowed in this class of actions rather than in any other kind of a tort action." Baird v. Gibberd, 32 Idaho 796, 803, 189 P. 56, 58 (1920). And, as the Minnesota Supreme Court astutely observed:

> The expenses of the prosecution can afford no criterion by which to judge of the degree of malice, oppression or outrage of which the defendant has been guilty, and for which he is to be punished [by punitive damages]; nor can the quantum of punish-

A number of courts, however, have calculated punitive damages by using the "expenses of litigation" as a factor to consider in the assessment.[505] When considered rationally, however, compensation for attorneys' fees and costs as a purpose of punitive damages is not convincing. Unlike statutes[506] and judicial rules[507] permitting such costs, punitive damages never occur as a matter of right, "no matter how egregious the defendant's conduct."[508] Additionally, punitive damages, unlike attorneys' fees and costs, are totally within the jury's discretion.[509] Since the jury does not consider litigation costs,[510] it is difficult to justify fees and costs as an alternative purpose to the punishment aspect of punitive damages. Nowhere else does the law permit a jury to determine an appropriate amount of attorneys' fees. That issue is left to the wisdom and experience of trial judges.[511]

In summary, no legitimate alternative purpose to the punishment objective of punitive damages exists. Courts and statutes offer no purpose outside retribution and deterrence. Punitive damages cannot be justified as paying for costs because in that case they would be no more punitive than fee statutes. And given their uncontrolled assessment, there is no rational connection to a compensatory purpose. Thus, no legitimate remedial or regulatory purpose or effect attends the vindictive award.

G. Excessiveness

The seventh *Kennedy* test is a subjective inquiry:[512] whether the

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> ment which the defendant has deserved, and which will prevent the repetition of the offense by him or others, be measured by these expenses. There is therefore no reason why these expenses should be considered by the jury in arriving at that sum which, in their judgment, will be sufficient as a punishment and an example.

Kelly v. Rogers, 21 Minn. 146, 153 (1874).

505. *See* Hall v. Memphis & Charleston Ry. Co., 15 F. 57, 94 (W.D. Tenn. 1882) and *supra* note 456.

506. *See supra* note 498.

507. *See supra* notes 495-96.

508. Smith v. Wade, 461 U.S. 30, 52 (1983); *see also* Nissen v. Hobbs, 417 P.2d 250, 251 n.6 (Alaska 1966) (punitive damages represent a windfall to the plaintiff, not a right).

509. Generally, however, punitive damages should bear a reasonable relation to the injury suffered. *See* 22 AM. JUR. 2D *Damages* § 264 (1965).

510. *But see supra* notes 456 and 505 and accompanying text (some courts do allow litigation expenses as a function of punitive damage).

511. For example, in Clayton Act antitrust actions, the jury has no function in determining reasonable attorneys' fees—it is left to a well-developed set of guidelines and the judge's discretion. Pollack & Riley, Inc. v. Pearl Brewing Co., 362 F. Supp. 335, 336 (W.D. Tex. 1973). Reasonable attorneys' fees are evaluated in light of the court's experience. *See* Hew Corp. v. Tandy Corp., 480 F. Supp. 758, 761 (D. Mass. 1979).

512. *Kennedy*, 372 U.S. at 169. *See* Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 518 F.2d 990, 1010 (5th Cir. 1975), *aff'd*, 430 U.S. 442 (1977).

sanction "appears excessive in relation to the alternative purpose assigned."[513] Although this test is not particularly useful since there is no legitimate alternative purpose to punitive damages, a brief analysis reveals that the *method* of punishment is determinative.

Again, the *Kennedy* Court cites *Cummings v. Missouri*,[514] for the proposition that where a state qualification for teaching and preaching has no possible relation to the applicant's fitness for the calling, the requirement is in excess of any legitimate regulatory purpose and can only be labeled as punitive.[515] *Helwig v. United States*,[516] also cited, holds that additional import duties on goods undervalued by the importer are not themselves a penal sanction.[517] When the amount of the fine is "enormously in excess" of the highest duty imposed on similar goods, however, the additional duty becomes penal.[518] In *Helwig*, the additional import duty of over one-half the value of the import goods transformed the duty into a criminal sanction. Similarly, *Kennedy* relied upon *United States v. Constantine*,[519] which held that a "tax" became penal when it was "grossly disproportionate to the amount of the normal tax."[520] When combined with a requirement that criminal conduct must trigger the tax, the tax was found to have a penal purpose—making it penal in design.[521]

The Court also referred to *Rex Trailer Co. v. United States*.[522] The defendant in *Rex Trailer* was convicted and fined for fraudulent purchases of war surplus equipment from the federal government. Thereafter, the government brought a civil suit to collect statutory civil penalties totaling $10,000 for five individual violations. The Court held the penalty remedial, since its effect and purpose indemnified the government for injury. The injury included preventing "bona fide sales to veterans," decreasing "the number of motor vehicles available to Government agencies," and promoting "undesirable speculation."[523] Alhough the defendant argued that no precise damage was alleged, the Court held that the statutory recovery was comparable to the liquidated damages provided for in numerous government contracts. In light of the injury re-

513. *Kennedy*, 372 U.S. at 169.
514. 71 U.S. (4 Wall.) 277 (1867).
515. *Id.* at 319.
516. 188 U.S. 605 (1903).
517. *Id.* at 613.
518. *Id.*
519. 296 U.S. 287 (1935).
520. *Id.* at 295.
521. *Id.*
522. 350 U.S. 148 (1956).
523. *Id.* at 153.

sulting from the fraud, the fine was not excessive and its predetermined level did not transform an intended civil penalty into a criminal one.[524]

The *Kennedy* Court then distinguished the *Child Labor Tax Case*[525] from the other cases cited.[526] In that case the Court held the collateral effect of punishment does not render a tax unconstitutional *per se*,[527] even though the tax must still relate to a legitimate taxing purpose.[528] Also cited was *Flemming v. Nestor*,[529] which directly supports the seventh *Kennedy* factor. The opinion's essence is that Congress may exercise its legitimate regulatory powers regardless of the punitive effect as long as they are not utilized to single out specific persons.[530] The Court was careful to point out that the severity of a sanction is not "determinative of its character as 'punishment.' "[531] Thus, *Flemming* merely reaffirms that a legitimate exercise of governmental power is not unconstitutional because of its incidental retributive effect, as long as it reasonably relates to an alternative legislative goal.

The term "excessive" cannot be used in the abstract. As the opinions demonstrate, the determination combines the amount of the penalty, the type of wrong, and whether or not the statute's punitive effect is aimed at an individual rather than regulation of a legitimate government interest. Thus, the overall method of assessment must not be "excessive."

The major factor that indicates a reasonable method of penalty assessment is the degree of flexibility provided in the assessment.[532] To determine whether the penalty assessment possesses the requisite degree of flexibility, courts rely upon five determinative factors. First, is the degree of harm proportionate to the judgment imposed?[533] Second, is the gravity of the offense considered for mitigation purposes?[534] Third, is the size of the defendant's business or his financial condition a mitigating

524. *Id.* at 154.

525. 259 U.S. 20 (1922).

526. Both the *Child Labor Tax Case* and *Flemming v. Nestor* were cited as authority analogous to the other cases cited in support of the seventh *Kennedy* test. *Kennedy*, 372 U.S. at 169 n.28.

527. 259 U.S. at 41-43.

528. *Id.*

529. 363 U.S. 603 (1960).

530. *Id.* at 616. The legislation, which denied deportees Social Security benefits, was found to bear a reasonable relation to the challenged statute. *Id.* at 617.

531. *Id.* at 616 n.9.

532. Providing "flexibility" in assessing the penalty to the circumstances of actual injury or damage indicates a remedial rather than a penal effect or purpose. United States v. General Motors Corp., 403 F. Supp. at 1163.

533. Ward v. Coleman, 423 F. Supp. 1352, 1357 (W.D. Okla. 1976).

534. *Atlas Roofing Co.*, 518 F.2d at 1011.

factor?[535] Fourth, is the wrongdoer's good faith taken into account?[536] Finally, are previous violations—or a lack thereof— an enhancing or mitigating factor?[537]

With respect to the first factor, assessment mechanisms for punitive damages clearly fail. As discussed above, punitive damages are determined according to the outrageousness of the tortfeasor's behavior. It is not the extent of the injury that is determinative, but rather the conduct leading to it. Nevertheless, a number of jurisdictions have adopted the "ratio rule" for assessing punitive damages.[538] This rule takes into account the degree of reprehensibility, but adjusts the penalty to the amount of actual damages awarded.[539] Generally, where the compensatory damages are small, even "considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages . . . ."[540] Although this rule ostensibly points to a "reasonable method" of assessment where an alternative purpose to punishment supports punitive damages, in practice it does not. While appellate courts will remit a jury's verdict to comply with the "ratio rule,"[541] it is not done with any regular consistency, and verdicts nearly two hundred times the actual damages awarded have been sustained.[542] Unlike statutory civil penalty

535. *Id.*

536. *Id.*

537. *Id.*

538. D. DOBBS, *supra* note 188, at 211. *See also* 22 AM JUR. 2D *Damages* § 264 (1965).

539. Rosener v. Sears Roebuck & Co., 110 Cal. App. 3d 740, 751, 168 Cal. Rptr. 237, 243 (1980). The *Second Restatement of Torts* takes the position that wealth of the defendant is relevant since punishment and deterrence are related "to the means of the guilty person." RESTATEMENT (SECOND) OF TORTS § 908 comment e (1979).

540. *Rosener*, 110 Cal. App. 3d at 751, 168 Cal. Rptr. at 243.

541. *See* Cunningham v. Simpson, 1 Cal. 3d 301, 308-09, 461 P.2d 39, 46, 81 Cal. Rptr. 855, 859 (1969) and *supra* note 123.

542. Finney v. Lockhart, 35 Cal. 2d 161, 217 P.2d 19 (1950). In Wetherbee v. United Ins. Co. of Am., 18 Cal. App. 3d 266, 95 Cal. Rptr. 678 (1971), the court refused to remit a $200,000 punitive damages judgment assessed in addition to $1,050 actual damages. The defendant had been found liable for fraudulent misrepresentations made in connection with an insurance contract. The court reasoned that:

> "[jury] estimates of what would be sufficient as a punishment and a deterrent and an example was very high as compared with the actual damages assessed and high from any point of view, but it would hardly be candid to invite them in the language of this instruction to fix such sum which expressed their judgment in such matter, and then charge them with bias or perversity because the measure of their abhorrence of defendant's conduct and their judgment of what would be a sufficient punishment and deterrent was represented by a larger sum of money than that which some other man or men would have allowed."

Wetherbee, 18 Cal. App. 3d at 272, 95 Cal. Rptr. at 682 (quoting Scott v. Times-Mirror Co., 181 Cal. 345, 367, 184 P. 672, 682 (1919)).

awards, a trial judge does not control punitive damage assessments.[543]

Moreover, punitive damages are not compared to injury under the ratio rule to determine whether an alternative purpose is supported.[544] Rather, they are compared with compensatory damages solely to determine whether the given punishment is justified.[545] But even the deference given to the ratio rule is often inadequate. The ability of a jury to disregard it and the reluctance of the judiciary to disturb the verdict point to a method of assessment that is excessive both in mode and manner.

The second factor is whether mitigation is available by considering the gravity of the offense. Under the punitive damages doctrine, even where the "ratio rule" is available, the gravity of the offense may control the assessment of damages. But unlike those civil penalty statutes saved from a penal label by their quasi-remedial nature, neither the judge nor the jury is guided by a statutory maximum or minimum fine in punitive damages assessment. Thus, the trier of fact legislatively determines allowable punishment and then assesses the penalty based on the circumstances before it. No federal civil statute grants the trier-of-fact authority to delineate the boundaries of allowable penalties.[546]

The third factor considers the financial worth of a defendant or his business and the ability to survive a penalty assessment. This inquiry is similar to the considerations of wealth utilized by a number of jurisdictions in determining the appropriate level of punitive damages.[547] Essentially, the award must be great enough to cause financial discomfort,[548] but not so large that it would cause bankruptcy.[549] Although this rule takes into account the defendant's net worth as a function of deterrence,[550] it is not the universal rule.[551] The prevailing punishment and deterrence aspect of punitive damages simply cannot be escaped. As one

543. While the trial judge may remit a punitive damages award, the initial assessment is totally within the jury's unfettered discretion.

544. *See supra* note 222.

545. There are ceiling levels on fine amounts in all federal civil penalty statutes. A collection of over 100 such statutes is listed in *Atlas Roofing Co.*, 518 F.2d at 1001-09.

546. The amount of a fixed fine under civil penalty statutes may become penal if the full amount of the fine is excessive in relation to any conceived remedial purpose. *See In re* Garay, 89 N.J. 104, 444 A.2d 1107 (1982).

547. D. DOBBS, *supra* note 188, at 211.

548. "The purpose of punitive damages is to sting, not kill, a defendant. Punitive damages should not be permitted to bankrupt a defendant." *In re "Dalkon Shield,"* 526 F. Supp. at 899. *See also* Rosener v. Sears Roebuck & Co., 110 Cal. App. 3d 740, 751, 168 Cal. Rptr. 237, 243 (1980) (function of deterrence not served if defendant can "absorb" the punishment without discomfort).

549. Wynn Oil Co. v. Purolator Chem. Corp., 403 F. Supp. 226, 232 (M.D. Fla. 1974).

550. *Rosener*, 110 Cal. App. 3d at 751, 168 Cal. Rptr. at 243.

New York court pointed out, punishment as an objective has nothing to do with the wealth of the defendant.[552]

Nevertheless, in those jurisdictions that consider the defendant's financial condition, it can be argued that the rule lends support to a nonexcessive method of penalty assessment. Trial judges and appellate courts are more likely to remit or reverse an award on the basis of passion and prejudice where the wealth factor is applied.[553] Reduction of punitive damages awards, however, is purely arbitrary. Since a jury need not reveal its method of determination, it is not always certain that the award was disproportionate as a result of prejudice on the issue of wealth. As Professor Owen pointed out, the latent biases of jurors against business, for instance, may condemn the wealthier defendant before he even enters the courtroom.[554] Thus, the jury initially may assign liability on considerations wholly removed from culpability.[555] By allowing the jury to hear evidence of wealth during the culpability phase of the trial, the initial decision to punish may not have been properly deliberated. Therefore, any subsequent penalty assessed by the jury would constitute an excessive assessment method since there is no way to determine if the jury found liability on grounds independent of wealth. Even given judicial remittitur, the reasonable method of assessment seems speculative at best.

The fourth factor considers the defendant's good faith, if any. Good faith is not only a mitigating factor in punitive damages, but also may offer a complete defense.[556] Generally, an action against a good faith defendant will not support a punitive damages claim since by defini-

551. *See* Finney v. Lockhart, 35 Cal. 2d 161, 164, 217 P.2d 19, 21 (1950) (the "reasonable relation rule" is applied only to prevent excessive awards). Additionally, a number of courts utilizing the "reasonable relation rule" simultaneously require more severe punishment for more reprehensible acts, a contradiction in logic since a defendant may be liable for a relatively minor instance of bad conduct, but may be fairly wealthy. Thus, the award must be small in relation to the conduct, but large in proportion to his wealth. *See* Thomas v. E.J. Korvette, Inc., 329 F. Supp. 1163, 1170 (E.D. Pa. 1971), *rev'd*, 476 F.2d 471 (1973); D. DOBBS, *supra* note 188, at 211.

552. The "reasonable relationship rule" is rejected by New York courts since it is the conduct that must be punished sufficiently regardless of the defendant's wealth. *See* Star Credit Corp. v. Ingram, 75 Misc. 2d 299, 347 N.Y.S.2d 651 (1973).

553. *See, e.g.*, Yeager v. Hurt, 433 So. 2d 1176 (Ala. 1983); Nienstedt v. Wetzel, 133 Ariz. 348, 651 P.2d 876 (1982); Neal v. Farmers Ins. Exch., 21 Cal. 3d 910, 928, 582 P.2d 980, 990, 148 Cal. Rptr. 389, 399 (1978).

554. Owen, *supra* note 376, at 351 n.56.

555. The case may have already been decided for the jury in the press.

556. *See* Gordon v. Nationwide Mut. Ins. Co., 30 N.Y.2d 427, 285 N.E.2d 849, 334 N.Y.S.2d 601 (1972), *cert. denied*, 410 U.S. 931 (1973). For instance, where an insurer has breached its duty to settle a claim, it will be liable only up to the policy limits and possible defense costs as long as it did not act in bad faith. *Id.*

tion[557] it rebuts those states of mind needed to support culpability.[558] This factor points towards a reasonable method of penalty assessment.

The final factor considers previous violations. This element tips the scales towards unreasonableness when applied to punitive damages. Previous violations are not a function of jury deliberations on any claim for punitive damages.[559] While a jury may subconsciously consider a defendant's past behavior, it is free to fix the standards of assessment in each case.[560] For example, first time offenders often are penalized so severely as to negate any realistic belief that prior behavior is a function of jury deliberation. A number of manufacturers have been subjected to potentially bankrupting awards despite no evidence of collateral wrongs.[561] Any relationship of "alternative purpose to an award of punitive damages" is fortuitous, and the reasonable inference is that the penalty is really punishment deserving of criminal procedural protections.[562]

In conclusion, many of the factors outlined by federal courts evidencing a reasonable method of penalty assessment generally are contained in the civil penalty statutes themselves. Punitive damages statutes have no similar provisions. The good faith exceptions have been judi-

557. Hash v. Hogan, 453 P.2d 469, 475 & n.19 (Alaska 1969).

558. *See* Gordon v. Nationwide Mut. Ins. Co., 30 N.Y.2d 427, 285 N.E.2d 849, 334 N.Y.S.2d 601 (1972), *cert. denied*, 410 U.S. 931 (1973).

559. Neither the fact of conviction nor the chance of conviction will bar an assessment of punitive damages. Additionally, mitigation is not available where the defendant has received criminal punishment for the same wrong. See the cases collected at 22 AM. JUR. 2D *Damages*, § 248 (1965).

560. For instance, in California, the approved jury instruction for oppression sufficient to support punitive damages liability provides merely that "[o]pression means subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights." CAL. JURY INSTRUCTIONS: CIVIL § 14.71 (6th ed. Supp. 1983). The unbordered definition of "oppression" enables plaintiffs to cultivate juror sympathy and prejudice.

561. By 1983, the A.H. Robins Company had $2.3 billion in punitive damages claims pending against it in the Dalkon Shield suits. President Robins stated: "If every case judgment was against us, there would be no A.H. Robins." *A.H. Robins: Boosting R&D to Inject New Life into Drug Sales*, BUS. WK., Feb. 21, 1983, at 119-20. Union Carbide Corporation now faces the possibility of being "driven into bankruptcy court." By 1985, more than $20 billion in compensatory and punitive damages claims were being sought with the claims for punitive damages premised on Union Carbide's disregard for the safety of Bhopal residents. *Union Carbide Fights for Its Life*, BUS. WK., Dec. 24, 1984, at 52.

Despite the social and economic impact of mass punitive damages awards, bankruptcy may not be a concern to some courts. One Pennsylvania court rejected any bankruptcy disaster argument, stating that if the offending conduct deserves punishment and bankruptcy is the result, the court is "hard pressed to understand why that defendant should not be required to live with its consequences." Martin v. Johns-Manville Corp., 469 A.2d 655, 665 (Pa. Super. 1983).

562. If the alternative justification offered is arbitrary or purposeless, the inference may be drawn that the sanction is criminal punishment. Bell v. Wolfish, 441 U.S. 520, 539 (1979).

cially created.[563] The penal dimension of punitive damages therefore is strengthened by the *absence* of any statutorily prescribed limits on penalty assessments, the availability of which has saved civil penalty statutes from criminal labels.

Finally, as the Supreme Court has stated, "[r]etribution and deterrence are not legitimate nonpunitive governmental objectives."[564] Where punishment is the primary rather than the incidental effect of a sanction, no assertion of an alternative purpose or corresponding relationship will save it from due process challenges.[565]

A perfect example is mass tort or mass disaster litigation, where a defendant may have injured many persons through a single tort or a prolonged course of tortious conduct. The general rule is that all mass tort victims of a single or continuous tort may sue for and recover punitive damages because allowing only one punitive damages recovery would be "unequal treatment" for subsequent litigants.[566] This general trend was reflected in *State ex rel. Young v. Crookham*.[567] In that case, a number of plaintiffs were injured when raw sewage overflowed into a large water supply. Following an initial lawsuit in which the first plaintiff collected punitive damages, the defendant moved for summary judgment to prevent any further punitive damages awards. The trial court granted the defendant's motion, but the state supreme court held that total elimination of all punitive damages after the first plaintiff had been paid was an inappropriate cure for mass litigation. The court held there were other alternatives to the problem of multiple punitive damages judgments.[568] Therefore, it could not allow a system that reduced civil justice to a race

563. Ebaugh v. Rabkin, 22 Cal. App. 2d 891, 895, 99 Cal. Rptr. 706, 709 (1972) (reasonable mistake of fact a defense to punitive damages liability); Gordon v. Nationwide Mut. Ins. Co., 30 N.Y.2d 427, 439, 285 N.E.2d 849, 855, 334 N.Y.S.2d 601, 610 (1972) (no punitive damages where breach of insurance contract not made in bad faith).

564. Bell v. Wolfish, 441 U.S. 520, 539 n.20 (1979).

565. *Id.*

566. *See* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 939 (2d Cir. 1967) (no principle exists prohibiting multiple punitive damages recovery). *See also* Neal v. Carey Can. Mines, Ltd., 548 F. Supp. 357, 376-77 (E.D. Pa. 1982); State *ex rel.* Young v. Crookham, 290 Or. 61, 64-70, 618 P.2d 1268, 1270-74 (1980); 11 A.L.R. 4TH 1261-67 (1982) (reviewing the "first comer" doctrine of punitive damages). *But see In re* Federal Skywalk Cases, 97 F.R.D. 380, 381-82 n.1 (W.D. Mo. 1983) (some jurisdictions *may* limit multiple punitive damages awards, though it is "unfair" to the victims).

567. 290 Or. 61, 618 P.2d 1268 (1980).

568. The court noted that alternatives included jury consideration of the effect of multiple punitive damages awards and class actions "for unitary consideration of such damages." Additionally, the court stated that "other creative and applicable approaches, as yet unsurmised by legal commentators, may be devised by attorneys and judges of this state" to address the problem of multiple punishment. *Young*, 290 Or. at 72, 618 P.2d at 1274.

to the courthouse.[569] The court spoke of justice to the plaintiff rather than to the defendant, who was the one being punished and whose rights were at issue.[570]

An argument may be made that no logical fair play justification can be offered since a criminal may also receive multiple punishment. Both the state and federal governments may prosecute him for the same wrong.[571] But this argument does not address the typical multiple damages claim. Unlike criminal penalties, punitive damages may be awarded for conduct that occurred outside the jurisdiction by virtue of state "long arm statutes."[572] The state may even punish a foreign citizen for a wrong that may not have been punishable in the state where the wrong was committed.[573] Moreover, a plaintiff is entitled to "full faith and credit" in a sister jurisdiction to enforce a punitive damages award.[574] Additionally, nothing bars a punitive damages claim against a defendant who has been previously convicted for the same wrong.[575]

Once again, the punitive damages method of penalty assessment proves excessive. Even if a legitimate alternative purpose is shown, assessment not only fails to account for defendant's previous violations, but also allows repeated penalty assessments for improper courses of conduct where a "mass tort" is involved. As illustrated by the multitude of suits arising out of asbestos poisoning,[576] penalizing a single wrong knows no jurisdictional limitation. And every forum that can assert jurisdiction may assess a penalty.[577] But courts will not tolerate an exaggerated response to a legitimate purpose.[578] The unchecked avenues available for penalizing a punitive damages defendant, with no attendant relationship to anything but retribution and deterrence, destroys any argument of "legitimate alternative purpose."

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569. *Id.* at 67, 618 P.2d at 1272.

570. *Id.* at 65-70, 618 P.2d at 1271-72.

571. Only when entities of the same sovereign are involved will a conviction or acquittal by one entity bar prosecution for the same wrong in another. *See* Waller v. Florida, 397 U.S. 387 (1970). Nevertheless, the punitive damages defendant may be punished for the same tort in multiple jurisdictions, whether or not the tort was committed within the state. Jurisdiction may be obtained by "long arm statutes." *See supra* note 386.

572. *See supra* note 571.

573. *See supra* note 386, 387.

574. *Id.*

575. *See supra* note 559.

576. *See, e.g., In re* Related Asbestos Cases, 566 F. Supp. 818 (N.D. Cal. 1983); Henson v. Bethlehem Steel Corp., 564 F. Supp. 497 (D. Md. 1983); Moran v. Johns-Manville Corp., 28 Bankr. 376 (N.D. Ohio 1983); Rocco v. Johns-Manville Corp., No. 80-0608 (E.D. Pa. Sept. 10, 1982).

577. *See supra* note 386.

578. Bell v. Wolfish, 441 U.S. at 539 n.20.

Conclusion

Punitive damages are an anomaly in civil law. Examining them through the seven-factor *Kennedy* framework proves that they are an extension of the penal system designed to exact retribution as a deterrent to socially undesirable behavior. The result emasculates the symmetry between civil and criminal law and procedure.[579] To continue to allow punitive damages as we know them requires an explicit acknowledgment that pure retribution, previously justified only as a penal goal, may be exacted through the civil system. Punitive damages are and continue to be a gross deviation from the historic rule that the criminal justice system cannot delegate its power of retribution. However, the Supreme Court has never addressed this aspect of punitive damages. Should the Court ever consider the issue, the advice of Justice Roberts provides significant guidance: "illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedures."[580] As he pointed out, it must be the duty of the courts to watch for such encroachments and to remedy the wrongs when they are discovered.[581]

Perhaps the best solution to the constitutional questions surrounding the punitive damages doctrine is to accept the New Hampshire Supreme Court's resolution of the problem in 1872: "The true rule, simple and just, is to keep the civil and the criminal process and practice distinct and separate."[582] As the court then observed, it is only on "the supposed weight of authority" that the doctrine survives; it has not been made "to stand upon principle and inherent strength."[583]

579. Fay v. Parker, 53 N.H. 342, 382 (1873).
580. Boyd v. United States, 116 U.S. 616, 635 (1885).
581. *Id.*
582. Fay v. Parker, 53 N.H. at 397.
583. *Id.* at 353.