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Constitutional Restraints on the Doctrine of Punitive Damages

Theodore B. Olson*
Theodore J. Boutrous, Jr.**

I. INTRODUCTION

In June 1989, the Supreme Court of the United States held in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*¹ that the excessive fines clause of the eighth amendment² "does not constrain an award of [punitive] damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded."³ The Court's decision in *Browning-Ferris* marked the third time in four years in which the Court indicated a willingness to address constitutional challenges to punitive damage awards.⁴ The Court, however, expressly reserved for future review the question whether the excessive fines clause limits punitive damage awards in cases in which the government receives some part of the award.⁵ The Court also left for "another day" the question whether the due process clause of the fourteenth amendment "acts as a check on undue jury discretion to award puni-

* Partner, Gibson, Dunn & Crutcher, Washington, D.C.; LL.B. 1965, University of California, Berkeley (Boalt Hall); B.A. 1962 University of the Pacific. Mr. Olson argued that punitive damages are unconstitutional in the Supreme Court of the United States in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), and *Bankers Life and Casualty Co., v. Crenshaw*, 486 U.S. 1971 (1988).

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1. 109 S. Ct. 2909 (1989).

2. U.S. CONST. amend. VIII. The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

3. *Browning-Ferris*, 109 S. Ct. at 2914.

4. See also *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986). See *infra* notes 13-20 and accompanying text.

5. *Browning-Ferris*, 109 S. Ct. at 2920 & n.21.

tive damages in the absence of any express statutory limit.”⁶

The Court’s continued interest in the subject of punitive damages is not surprising. Although imposed in civil cases, punitive damages are universally recognized as fulfilling purposes traditionally associated with criminal law: punishment, and through punishment, retribution and deterrence.⁷ However, although punitive damages “serve the same function as criminal penalties and are in effect private fines,”⁸ in contrast to the imposition of criminal penalties, juries in civil cases have broad and literally unfettered discretion to determine whether to impose punitive damages, and if so, in what amounts. The standards of liability are vague, elastic, and highly subjective, and yet the vast majority of jurisdictions permits juries to impose unlimited punitive damages upon a finding of liability.

Since its virtual inception in the United States, the judiciary has criticized punitive damage awards as a disruptive and distorting component of the justice system.⁹ As one early case stated, “The idea of punitive damages is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law.”¹⁰ Nonetheless, punitive damages gained acceptance and soon flourished in one form or another across the Nation. Until the last decade or so, however, punitive damages were generally awarded in relatively modest amounts in traditional tort law cases involving egregious and intentional misconduct that resulted in personal injury or death. But in the late 1970s, juries began imposing punitive damages with increasing frequency, in both escalating amounts, and within a wide spectrum of cases. Until recently, courts would have regarded the actionable conduct involved in many of these cases as outside the realm of tort law and therefore, not subject to punishment in the form of punitive damages. Today, however, punitive damages are available in most types of civil cases including libel, products liability, medical malpractice, and commercial disputes

6. *Id.* at 2921. Four Justices concurred in the Court’s opinion specifically on the grounds that it did not foreclose due process objections to punitive damage awards. *Id.* at 2923 (Brennan, J., joined by Marshall, J., concurring); *Id.* at 2924 (O’Connor, J., joined by Stevens, J., concurring in part and dissenting in part).

7. *See, e.g., City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981) (“Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor . . . and to deter him and others from similar extreme conduct.”); *Dyna-Med, Inc. v. Fair Employment & Hous. Comm’n.*, 43 Cal. 3d 1379, 1387, 743 P.2d 1323, 1327, 241 Cal. Rptr. 67, 70 (1987) (“Punitive damages . . . are neither equitable nor corrective; punitive damages serve but one purpose—to punish and through punishment, to deter.”).

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

9. *Smith v. Wade*, 461 U.S. 30, 58 (1983) (Rehnquist, J., dissenting) (“[T]he doctrine of punitive damages has been vigorously criticized throughout the Nation’s history.”).

10. *Fay v. Parker*, 53 N.H. 342, 382 (1872).

involving the interpretation of contracts.¹¹ Also, "[a]wards of punitive damages are skyrocketing."¹²

The standardless, open-ended, and arbitrary nature of punitive damage awards has long been a source of concern to the Supreme Court of the United States. The Court has most often reviewed punitive damages awards and the manner in which they are imposed in the context of two types of cases: libel cases raising first amendment questions and cases interpreting federal statutory provisions that permit punitive damages. However, the focus changed in 1986 in *Aetna Life Ins. Co. v. Lavoie*.¹³ For the first time in an insurance case involving bad faith claims, the Court recognized that federal constitutional challenges to punitive damages under the due process clause, the excessive fines clause, the equal protection clause, and the contracts clause "raise[d] important issues which, in an appropriate setting must be resolved."¹⁴ Nevertheless, the Court set aside the award in *Aetna* on other grounds¹⁵ and did not reach the merits of these issues.

In May 1988, the Court considered the same issues raised in *Aetna* in *Bankers Life & Casualty Co. v. Crenshaw*.¹⁶ The Court again declined to address the merits of these questions on jurisdictional grounds.¹⁷ However, the Court did not depart from its characteriza-

11. Judge Kozinski of the Ninth Circuit sharply criticized this development in *Oki America, Inc. v. Microtech Int'l, Inc.*, 872 F.2d 312 (9th Cir. 1989):

Nowhere but in the Cloud Cuckooland of modern tort theory could a case like this have been concocted. One large corporation is complaining that another obstinately refused to acknowledge they had a contract. For this shocking misconduct it is demanding millions of dollars in punitive damages. I suppose we will next be seeing lawsuits seeking punitive damages for maliciously refusing to return telephone calls or adopting a condescending tone in interoffice memos. Not every slight, nor even every wrong, ought to have a tort remedy. The intrusion of courts into every aspect of life, and particularly every type of business relationship, generates serious costs and uncertainties, trivializes the law, and denies individuals and businesses the autonomy of adjusting mutual rights and responsibilities through voluntary contractual agreement.

Id. at 314-15 (Kozinsky, J., concurring).

12. *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2924 (1989) (O'Connor, J., joined by Stevens, J., concurring in part and dissenting in part). There has been a decided "trend toward multi-million dollar awards of punitive damages." *Id.*

13. 475 U.S. 813 (1986).

14. *Id.* at 828-29.

15. The Court found that judicial bias in the court below had resulted in a violation of the due process clause. *Id.* at 827-29.

16. 486 U.S. 71 (1988).

17. The Court held that the constitutional "claims were not raised and passed upon in state court." *Id.* at 76. Thereafter, the Court discussed whether the "not

tion of these issues as "important." Justice Marshall, writing for the Court, acknowledged that the excessive fines clause challenge presented a "question of some moment and difficulty"¹⁸ and considered the issues to be of "'great public importance.'"¹⁹ In her concurring opinion in *Bankers Life*, Justice O'Connor, joined by Justice Scalia, expressed special interest in the due process challenge to the unfettered discretion of juries "to impose unlimited punitive damages on an *ad hoc*" and subjective basis when she stated: "Bankers Life has touched on a due process issue that I think is worthy of the Court's attention in an appropriate case."²⁰

The Court returned to the question of the constitutionality of punitive damage awards for the third time in 1988 when it granted certiorari in *Browning-Ferris*. That case presented the question whether a \$6,000,000 punitive damage award was excessive under the eighth amendment.²¹ This Article examines the Court's decision in *Browning-Ferris* and the status of federal constitutional challenges to punitive damages in the aftermath of the decision. After briefly reviewing the Court's eighth amendment jurisprudence, Section II provides a critique of the Court's holding that the excessive fines clause does not apply to punitive damages imposed in purely private suits. Section III addresses the due process issues left open by the Court in *Browning-Ferris*, and Section IV concludes that the punitive damage system permits arbitrary, standardless, and limitless punishment, thereby "mock[ing] our notions of fundamental fairness embodied in the Due Process Clause."²²

II. THE APPLICABILITY OF THE EXCESSIVE FINES CLAUSE TO PUNITIVE DAMAGE AWARDS: *BROWNING-FERRIS* *INDUSTRIES, INC. v. KELCO DISPOSAL, INC.*

A. *The Court's Eighth Amendment Jurisprudence*

Prior to *Browning-Ferris*, the Supreme Court's eighth amendment jurisprudence focused primarily on the cruel and unusual punish-

pressed or passed upon below" rule conclusively precluded appellate jurisdiction. Declining to distinguish whether the rule sets a jurisdictional boundary or merely states a prudential restriction, the Court decided that it was more prudent to decline review of the constitutional issues. *Id.* at 79.

18. *Id.*

19. *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 224 (1983)).

20. *Id.* at 87.

21. Petition for a Writ of Cert. to the United States Court of Appeals for the Second Circuit at i, *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 527 (1988) (No. 88-556). The Court denied certiorari as to the first question in the petition, which raised issues under the federal antitrust laws.

22. *Eichenseer v. Reserve Life Ins. Co.*, 894 F.2d 1414, 1415 (5th Cir. 1989) (Jones, J., dissenting from denial of rehearing *en banc*) (panel opinion reported at 881 F.2d 1355, *petition for cert. filed*, 59 U.S.L.W. 3038 (U.S. Feb. 13, 1990) (No. 89-1303)).

ments clause, with an occasional digression for consideration of the excessive bail clause. On the other hand, the Court has rarely invoked the excessive fines clause, and to this day, has not applied the excessive fines clause to invalidate a monetary punishment in either a civil or criminal case.

Generally, the Court has limited its eighth amendment analysis of excessive punishments to capital cases, refusing to evaluate whether non-capital punishments are constitutionally disproportionate.²³ However, in *Solem v. Helm*²⁴ the Court reviewed and invalidated a sentence of imprisonment, finding it excessive under the cruel and unusual punishments clause.²⁵ This apparent shift in the Court's philosophy, albeit in a sharply divided five-four decision, suggests at least the possibility that the Court might be inclined to engage in an eighth amendment excessiveness analysis of other extreme punishments, including punitive damages pursuant to the excessive fines clause. Of course, some sort of proportionality review was intended by the excessive fines clause if the word "excessive" was to have any meaning. Nonetheless, *Solem* gave some additional impetus to the notion that the eighth amendment limited all forms of excessive punishment.

Another open question in eighth amendment jurisprudence is whether the excessive fines clause limits punishments in civil as well as criminal cases. In the 1977 case of *Ingraham v. Wright*,²⁶ the Court held that corporal punishment of school children did not constitute the kind of punishment limited by the cruel and unusual punishments clause because that clause was concerned only with punishments imposed as a consequence of a criminal proceeding. Nonetheless, the Court noted in *Ingraham* that "[s]ome punishments, though not labeled criminal by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment."²⁷ Because the *Ingraham* Court seemed to leave the door open for application of the eighth amendment to non-criminal punishments which,

23. See, e.g., *Rummel v. Estelle*, 445 U.S. 263 (1980).

24. 463 U.S. 277 (1983).

25. *Id.* at 295-303. On November 5, 1990, the Court heard argument in a case that presents the question whether a sentence of life imprisonment without the possibility of parole for possession of cocaine violates the cruel and unusual punishments clause. *Harmelin v. Michigan*, No. 89-7272 (U.S. argued Nov. 5, 1990).

26. 430 U.S. 651 (1977).

27. *Id.* at 669 n.37. See also *id.* at 685 (White, J., joined by Brennan, Marshall and Stevens, JJ., dissenting).

like punitive damages, serve criminal law purposes, and because *Ingraham* did not involve application of the excessive fines clause, the case did not, on its face, foreclose an eighth amendment challenge to punitive damages. Moreover, the Court had previously assumed that the excessive bail clause is applicable to civil cases,²⁸ indicating that the principles of the eighth amendment are not confined to criminal cases.

In determining the scope of the eighth amendment, the Court has looked primarily to the Framers' original intent in adopting the amendment. In particular, the Court has placed great weight on the Framers' familiarity with and reliance upon the English antecedents of the eighth amendment: chapter twenty of Magna Carta and clause ten of the English Bill of Rights of 1689.²⁹

B. The Court's Decision of the Excessive Fines Clause Question In Browning-Ferris

Browning-Ferris involved a commercial dispute between two competitors in the waste collection business in Vermont. Kelco brought a federal antitrust treble damage action and a pendent state tort suit for compensatory and punitive damages, alleging that Browning-Ferris had attempted to drive Kelco out of business through predatory pricing. Convinced by Kelco's lawyer to "deliver a message" to Browning-Ferris' headquarters in Houston, the jury returned a verdict of \$51,146 in compensatory damages and \$6,000,000 in punitive damages.³⁰ The Second Circuit affirmed the \$6,000,000 punitive damage award, holding that even if the excessive fines clause applied, the punitive damage award was not so disproportionate as to be "'constitutionally excessive.'"³¹

In the Supreme Court, Browning-Ferris contended that punitive damage awards imposed in civil cases to punish and deter are "fines" under the excessive fines clause. Browning-Ferris also argued that it was immaterial that punitive damages are imposed in civil cases because they serve the same purpose as fines do in criminal cases. Therefore, punitive damages are "penal" sanctions subject to the excessive fines clause, regardless of the fact that they are imposed in civil suits. According to Browning-Ferris, the history of the excessive fines clause, including practices under both Magna Carta and the

28. See, e.g., *Carlson v. Landon*, 342 U.S. 524, 544-46 (1952) (on review of habeas corpus proceeding).

29. See, e.g., *Solem*, 463 U.S. at 284-86.

30. *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2913 (1989).

31. *Id.* (quoting *Kelco Disposal, Inc. v. Browning-Ferris Indus. of Vermont, Inc.*, 845 F.2d 404, 410 (2d Cir. 1988)).

English Bill of Rights of 1689, supported this interpretation.³²

The Court, in an opinion authored by Justice Blackmun, rejected each of these contentions. Based upon the Framers' use of the word "fines" in the excessive fines clause, the Court concluded that the clause is inapplicable to an award of punitive damages.³³ The word "fine," the Court explained, "was understood [by the Framers] to mean payment to a sovereign as punishment for some offence. Then, as now, fines were assessed in criminal rather than in private civil actions."³⁴

The Court rejected Browning-Ferris' reading of the historical origins of the excessive fines clause.³⁵ The Court concluded that the historical purpose of the excessive fines clause and its English forerunners—Magna Carta's "amercements" clauses and the excessive fines provision of the English Bill of Rights of 1689—was to limit the sovereign's ability "to use its prosecutorial power, including the power to collect fines, for improper ends."³⁶ Thus, the Court reasoned "that the Excessive Fines Clause was intended to limit only those fines directly *imposed by and payable to, the government*,"³⁷ and that therefore, the clause did not apply to punitive damages awarded to private parties.³⁸

The Court also considered whether "new conditions and purposes"³⁹ required application of the eighth amendment to punitive damage awards even though, in the Court's view, the Framers "did not expressly intend it to apply."⁴⁰ Although punitive damage awards "received their first reported American [judicial] endorsement in 1791—the year of the Eighth Amendment's ratification,"⁴¹ the Court suggested that punitive damages had "solid grounding in pre-Revolutionary days."⁴² The Court relied upon the fact that English statutes had provided for double and triple "damages" as early as the thirteenth century, and that English courts had first recognized

32. Brief for the Petitioners at 13-21, *Browning-Ferris* (No. 88-556).

33. *Browning-Ferris*, 109 S. Ct. at 2915.

34. *Id.* (footnote omitted). However, the Court noted that there was no direct evidence of "the term 'fines' or whether the prohibition [of the excessive fines clause] had any application in the civil context." *Id.*

35. *Id.* at 2914 n.4, 2917.

36. *Id.* at 2916, 2918.

37. *Id.* at 2916 (emphasis added).

38. *Id.*

39. *Id.* at 2919 (quoting *Weems v. United States*, 217 U.S. 349, 373 (1910)).

40. *Id.*

41. Brief for Respondents at 20, *Browning-Ferris* (No. 88-556).

42. *Browning-Ferris*, 109 S. Ct. at 2919.

“exemplary” damages in 1763.⁴³ Because punitive damages are not a “strictly modern creation,”⁴⁴ the Court refused to apply the eighth amendment beyond the scope of its perceived original meaning.

The Court agreed that punitive damage awards, like criminal law, “advance the interests of punishment and deterrence.”⁴⁵ However, the Court rejected the argument that the penal nature of punitive damages was sufficient to distinguish them from ordinary civil damages, which compensate the plaintiff for injuries suffered. The Court explained that because private plaintiffs prosecute the action and collect the monetary punishment, punitive damage awards are “too far afield from the concerns that animate the eighth amendment.”⁴⁶ Therefore, the Court refused to apply the excessive fines clause to limit exorbitant punitive damage awards.⁴⁷

Justice O'Connor, joined by Justice Stevens, dissented from the Court's excessive fines clause holding. In her view, the Court's conclusion that the excessive fines clause does not apply to suits between private parties is “neither compelled by history nor supported by precedent.”⁴⁸

C. *The Court's Historical Analysis*

The majority's determination that the excessive fines clause does not apply to monetary awards made to private plaintiffs, as opposed to those made to governmental entities, overlooks the fact that the identity of the recipient of the fiscal punishment imposed “through the aegis of courts”⁴⁹ was never of dispositive significance in determining the limits on governmental punishments prior to the eighth amendment.

1. The Origins of the Excessive Fines Clause

The Court recognized in *Browning-Ferris* that “the Eighth Amendment was ‘based directly on Art. I, § 9, of the Virginia Declaration of Rights,’ which ‘adopted verbatim the language of the English Bill of Rights.’”⁵⁰ Clause ten of the English Bill of Rights of 1689, like the eighth amendment, expressly prohibits the imposition of “excessive Fines.”⁵¹ In turn, the excessive fines provision of the English Bill of

43. *Id.* at 2919-20.

44. *Id.* at 2919.

45. *Id.* at 2920.

46. *Id.* at 2920-21.

47. *Id.*

48. *Id.* at 2924 (O'Connor, J., joined by Stevens, J., concurring in part and dissenting in part).

49. *Id.* at 2920.

50. *Id.* at 2916 (quoting *Solem v. Helm*, 463 U.S. 277, 285 n.10 (1983)).

51. Clause 10 provides that: “‘excessive Bail ought not be required nor excessive

Rights can be traced directly to chapter twenty of 1215, which prohibited monetary punishments, referred to as "amercements" at the time, "that were disproportionate to the offense or that would deprive the wrongdoer of his means of livelihood."⁵² This concept of proportionality was "repeated" in clause ten of the English Bill of Rights of 1689, written into many colonial charters, and finally incorporated within the eighth amendment.⁵³

The Court in *Browning-Ferris* agreed that the Framers intended the eighth amendment "to provide at least the same protection—including the right to be free from excessive punishments"—as had been afforded under English law.⁵⁴ Nevertheless, the Court rejected the proposition that punitive damages are analogous to the kinds of monetary punishments that were limited by Magna Carta and the English Bill of Rights prior to ratification of the eighth amendment.⁵⁵ However, the Court did not engage in a detailed, chronological analysis of the historical development of monetary punishments under English law that led to the emergence of punitive damages. Such an analysis demonstrates that modern punitive damages would have been regarded by the Framers as precisely the kind of monetary punishment subject to the constraints of the excessive fines clause.

2. The Evolution of Pecuniary Punishments

Prior to the Norman Conquest of 1066, there was no distinction between civil and criminal law; a single system which recognized a class of "wrongs" combined the dual objectives of compensating the victim and punishing the wrongdoer. The victim of a "wrong" could secure financial compensation from the perpetrator of the offense as an alternative to vengeance through retaliation or "bloodfeud."⁵⁶ Such compensatory sums, known as "wers" or "bots," were imposed against the wrongdoer and awarded to the victim.⁵⁷ Additionally, a further payment, known as a "wite," was exacted from the wrongdoer "as a sum[] due to the community, on the ground that every evil

Fines imposed; nor cruel and unusual Punishments inflicted.'" *Id.* (quoting 1 W. & M., ch. 2, 3 Stat. 440, 441 (1869)).

52. *Id.* at 2927 (O'Connor, J., joined by Stevens, J., concurring in part and dissenting in part).

53. See *Solem*, 463 U.S. at 285-86.

54. *Id.* at 286.

55. *Browning-Ferris*, 109 S. Ct. at 2916.

56. See 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 499-50 (2d ed. 1898).

57. *Id.* at 451.

deed inflicts a wrong on society in general, as well as upon its victim."⁵⁸ Centuries later, this theory remains the fundamental justification for the imposition of punitive damages.

After the Norman Conquest, this system was succeeded "by a system, or lack of a system, by which the convicted party was 'in the King's mercy.'"⁵⁹ Under this regime, the wrongdoer's life, limbs, and possessions were put at the King's mercy; the peace was thereafter restored by compensating the victim for his losses, as well as paying the Crown a sum, known as an "amercement," to punish the wrongdoer for the offense against the public.⁶⁰

Over time, the amercement system was recognized by the Crown as an important and lucrative source of revenue. This recognition led to the infliction of increasingly larger amercements. During the reign of King John, these monetary penalties were converted into "instruments of extortion,"⁶¹ which became a major force behind the presentation of Magna Carta by the barons to King John on June 15, 1215.

As noted above, chapter twenty of Magna Carta mandated that an amercement be "in accordance with the degree of the offense."⁶² This concept of proportionality expressed a relationship between the amercement and the "wrong done to the lord or the court, and not the other party to litigation."⁶³ In the fourteenth and fifteenth centuries, imprisonment first emerged as a form of punishment, and "fines" were "voluntary offerings made to the King to obtain some favor or to escape punishment."⁶⁴ An amercement, in sharp contrast,

58. W. McKECHNIE, *MAGNA CARTA* 285 (2d ed. 1914). According to McKechnie, the size of wens and wites was often determined by various codes. *Id.*

59. J. JOLLIFEE, *THE CONSTITUTIONAL HISTORY OF MEDIEVAL ENGLAND* 225 (4th ed. 1961).

60. W. McKECHNIE, *supra* note 58, at 285-86. This payment to the Crown was based on the theory "that offences against the established order were offences also against the King." *Id.* at 80.

61. *Id.* at 22.

62. Chapter 20 of Magna Carta reads as follows:

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

Id. at 284. In addition, courts had the power to pardon amercements altogether; usually this power was exercised on the basis of the "poverty" of the person amerced. *See id.* at 288.

63. *See Novae Narrationes*, 80 SELDEN SOC. cci (E. Shanks ed. 1963). The amercement clauses were popularly regarded as among the most important provisions of Magna Carta. "Very likely there was no clause in Magna Carta more grateful to the mass of the people than that about amercements." F. MAITLAND, *PLEAS OF THE CROWN FOR THE COUNTY OF GLOUCESTER XXXIV* (1884).

64. W. McKECHNIE, *supra* note 58, at 293.

was *itself* a monetary punishment. By the seventeenth century, however, the word "fine" took on its more modern meaning; the terms "fine" and "amercement" were used interchangeably,⁶⁵ and it was assumed that Magna Carta's amercements clauses applied to both, until the word amercement gradually fell into disuse.⁶⁶

The amercements clauses and Magna Carta's principle of proportionality applied to civil and criminal wrongs alike. Blackstone expressly recognized that amercements had historically been imposed as civil punishments regulated by the amercements clauses of Magna Carta in the same fashion as fines had come to be regulated in criminal cases after the separation of criminal and tort law in England had begun:

The reasonableness of fines in criminal cases has also been usually regulated by the determination of Magna Carta, concerning amercements for misbehavior *in matters of civil right*.⁶⁷

The practice of imposing punitive or "exemplary" damages began in the mid-eighteenth century in England in *Huckle v. Money*.⁶⁸ These awards, like amercements, were based upon the egregiousness of the wrong to the public, not the harm done to the plaintiff, and served to inflict "punishment to the guilty, to deter from any such proceeding for the future, and as proof of the detestation of the jury to the action itself."⁶⁹ Initially, the English courts confused the rationale for imposing punitive damages, sometimes deeming them compensation for "intangible injuries,"⁷⁰ such as injury to reputation. However, by the nineteenth century the compensatory damage component had expanded to permit damages for these injuries. Punitive damages were imposed in civil cases solely for the purpose of punishment to redress the injury to society or the "public wrong" compo-

65. See *Griesly's Case*, 77 Eng. Rep. 530 (C.P. 1588). Another form of "penal" sanction developed in the fourteenth century—*qui tam* actions—could be prosecuted in either civil or criminal actions by aggrieved parties or "common informers," who had suffered no personal injury. These private prosecutors divided the penalty with the Crown. See generally Note, *The History and Development of Qui Tam*, 1972 WASH. U.L.Q. 81, 83-91. As with the practice of assessing amercements, the *qui tam* practice proliferated, was abused, and then was reformed. *Qui tam* actions were abolished in England by statute in 1951. *Id.* at 88. They still exist today, however, in the United States, and the Court in *Browning-Ferris* left open the issue whether the excessive fines clause applies to *qui tam* awards. *Browning Ferris Indus. of Vermont Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2920 n.21 (1989).

66. W. McKECHNIE, *supra* note 58, at 293.

67. 4 W. BLACKSTONE, COMMENTARIES *372 (footnote omitted) (emphasis added).

68. 95 Eng. Rep. 768 (C.P. 1763).

69. *Wilkes v. Wood*, 98 Eng. Rep. 489, 498-99 (C.P. 1763).

70. See, e.g., *Tullidge v. Wade*, 95 Eng. Rep. 909 (C.P. 1769).

nent of the defendant's conduct, while compensatory damages were awarded to redress private injuries.

The American punitive damage law developed in a similar fashion. It appears that the first imposition of punitive damages in the United States occurred in 1791.⁷¹ The early cases sometimes announced a dual compensatory and punitive justification for exemplary damage awards.⁷² This gave way in the last half of the nineteenth century to a purely punitive rationale as the concept of actual damages expanded to include elements of intangible injury.⁷³

This historical background demonstrates that punitive damages are the modern equivalent of, and directly descended from, wites, amercements, and fines. Like these punishments, punitive damages are imposed for purposes of retribution and deterrence by a system which simultaneously compensates the victim for his injury, and punishes the defendant for the wrong done to society by his conduct. The modern punitive damage system mirrors the English system, which joined the reparative and punitive functions of the law subject to the amercement clauses of the Magna Carta and later, the English Bill of Rights of 1689, except in one respect: punitive damages are paid to the plaintiff rather than to the State.

The Court in *Browning-Ferris* inferred from this distinction that the excessive fines clause and its English counterparts were intended to limit only monetary punishments that are paid into government coffers. The Court could have easily found that these provisions had a broader purpose: to prevent excessive monetary punishments imposed through governmentally sponsored systems for the societal purposes of retribution and deterrence.

The Court relied upon little more than the fact that, at the time the eighth amendment was adopted, fines were imposed in criminal cases that were prosecuted by public officials, and "damages" were imposed in civil cases that were prosecuted by private plaintiffs. But such an approach failed to take into account the intricate historical evolution of pecuniary punishments discussed above: initially, monetary punishments were imposed in systems that did not distinguish between civil and criminal cases, and in which private parties prosecuted *all* actions. Later, monetary punishments became a facet in

71. See Brief for Respondents at 20, *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989) (No. 88-556).

72. See, e.g., *McNamara v. King*, 7 Ill. (2 Gilm.) 432, 436 (1845).

73. See, e.g., *Fay v. Parker*, 53 N.H. 342, 384 (1872); *Hawk v. Ridgeway*, 33 Ill. 473, 475 (1864). See also W. HALE, *HANDBOOK ON THE LAW OF DAMAGES* 303 (2d. ed. 1912) (in the late nineteenth century, the punitive damage doctrine was "well characterized as 'a sort of hybrid between a display of ethical indignation and the imposition of a criminal fine'").

both civil and criminal law once the division between the civil and criminal justice systems had begun.

The Court also found it significant that "English case law, immediately prior to the enactment of the English Bill of Rights, . . . stressed the difference between civil damages and criminal fines."⁷⁴ But this case law predated the advent of *punitive* damages, which were not recognized under English law until 1763. It is not surprising that English cases in the seventeenth century distinguished between "civil damages"—which at the time were only awarded to compensate—and criminal fines—which were imposed to punish and deter.⁷⁵ However, this hardly sheds light on the question whether the Framers would have viewed punitive "damages," which today serve only to punish, as a monetary punishment subject to the excessive fines clause.

The Court's reliance on the fact that English courts did not invoke Magna Carta or the English Bill of Rights to explain the reduction of excessive civil damage awards in cases decided before the ratification of the eighth amendment in 1791⁷⁶ is similarly misplaced. Absent recognition of the purely punitive purposes of "exemplary" damages, which had not yet occurred in England, the historical link between amercements, fines, and punitive damages would not have been clear. Consequently, English courts of the late 1700s could not have been expected to invalidate such "exemplary" damage awards based upon "constitutional" principles prohibiting excessive monetary punishments.

The Court also explained its holding in *Browning-Ferris* on the ground that modern English cases do not apply Magna Carta or the English Bill of Rights to restrain punitive damages.⁷⁷ However, the

74. *Browning-Ferris*, 109 S. Ct. at 2916 (citing Lord Townsend v. Hughes, 86 Eng. Rep. 994 (C.P. 1677)).

75. Relying upon eighteenth and nineteenth century treatise definitions of the words "fine" and "damages," the Court purported to discover a historical "dichotomy" between fines and punitive damages that was "clear." *Id.* at 2915 & nn.6-7. However, the Court quoted definitions of "damages" that served a *compensatory*, not punitive, function. *See, e.g., id.* at 2915 n.7 ("[Damages] comprehend a recompense for what the plaintiff . . . hath suffered, by means of the wrong done to him by the defendant . . .") (citation omitted). Moreover, the definitions of the word "fine" offered by the Court said nothing about who was entitled to receive payment of a "fine," but rather simply described "'a pecuniarie punishment for an offence . . . committed against the king.'" *Id.* at 2915 n.6 (citation omitted). Of course, this definition of a "fine" could easily be viewed as describing modern day punitive damages, which are monetary punishments imposed for civil "offenses" against the public.

76. *Id.* at 2919.

77. *Id.* at 2919 n.18.

modern English practice cannot be an illuminating source for the intentions of the Framers of the eighth amendment in 1789.

D. *The Court's Precedents*

The Court's own descriptions and applications of the doctrine of punitive damages in previous cases directly undercut its rationale in *Browning-Ferris*. The Court itself has often referred to punitive damage awards as "fines." For example, in *Gertz v. Robert Welch, Inc.*,⁷⁸ the Court characterized punitive damages as "private fines levied by civil juries."⁷⁹ Similarly, in *Silkwood v. Kerr-McGee Corp.*,⁸⁰ Justice Blackmun referred to a \$10,000,000 punitive damage award as a "jury fine,"⁸¹ and a "substantial penal[t]y."⁸² Justice Marshall also has observed that punitive damages "serve the same function as criminal penalties and are in effect private fines."⁸³ Chief Justice Rehnquist has deemed punitive damages "fine[s] . . . [which] should go to the State."⁸⁴ And "[t]he Court's cases abound with the recognition of the penal nature of punitive damages."⁸⁵

Indeed, in *Browning-Ferris*, the Court "agree[d] . . . that punitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law."⁸⁶ And, as the Court stated in 1885 in *Missouri Pacific Railway Co. v.*

78. 418 U.S. 323 (1974).

79. *Id.* at 350.

80. 464 U.S. 238 (1984).

81. *Id.* at 265 (Blackmun, J., joined by Marshall, J., dissenting).

82. *Id.* at 259. *See also id.* at 262 (the trial court instructed the "jury to fashion a fine").

83. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82-83 (1971) (Marshall J., joined by Stewart, J., dissenting).

84. *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting). State court judges have similarly equated punitive damages with fines. *See, e.g.,* *Rosener v. Sears Roebuck & Co.*, 110 Cal. App. 3d 740, 759, 168 Cal. Rptr. 237 (1980) (Elkington, J., concurring) (citations omitted) ("[T]he plaintiff having no right to punitive damages, the award has the nature of a public fine imposed to punish and deter evil intent and acts. It becomes logically indistinguishable from the fine imposed as punishment for a misdemeanor . . . or for a felony.").

85. *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2932 (1989) (O'Connor, J., joined by Stevens, J., concurring in part and dissenting in part). While a judge on the Court of Appeals for the Ninth Circuit, Justice Kennedy referred to punitive damages as "a hybrid of the civil and criminal law," and observed that plaintiffs seeking punitive damages

act as private attorneys general to effect . . . deterrence and retribution functions So far is this opportunity 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 broad discretion, similar to the discretion of a prosecutor.

In re Paris Air Crash, 622 F.2d 1315, 1319-20, 1322 (9th Cir. 1980) (citation omitted), *cert. denied sub nom. Kalinsky v. General Dynamics Corp.*, 449 U.S. 976 (1980).

86. *Browning-Ferris*, 109 S. Ct. at 2920.

Humes,⁸⁷

[t]he additional damages being by way of punishment, . . . it is not a valid objection that the sufferer instead of the State receives them The power of the State to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party, or at the suit of the public, and what disposition shall be made by the amounts collected, are merely matters of legislative discretion.⁸⁸

Moreover, the Court's emphasis on the fact that the government did not receive the fruits of its civil punishment scheme in *Browning-Ferris* is squarely inconsistent with its decisions in other cases involving application of the Bill of Rights to actions between private parties. For example, although the first amendment was clearly intended to protect against *governmental* suppression of free expression, the Court has long recognized that the first amendment restricts private recovery of both punitive and compensatory damages in cases of libel and slander.⁸⁹

In *Gertz v. Robert Welch, Inc.*,⁹⁰ the Court held that the first amendment prohibited recovery of punitive damages for libel absent a showing of actual malice. Although a subsequent decision indicated that the *Gertz* restriction on punitive damages does not apply when the speech in question involves matters of a purely private concern,⁹¹ *Gertz* continues to limit the award of punitive damages for speech on matters of public concern. Just as large damage awards threaten the values protected by the first amendment, excessive punitive damages threaten the values sought to be protected by the eighth amendment's prohibition of excessive fines.

There is no logical reason why the Court's justification for the inapplicability of the eighth amendment to punitive damages would not apply with equal force to the first amendment. For example, the Court assumes that "civil damages" present none of the historical concerns about the abuse of governmental power that led to the

87. 115 U.S. 512 (1885). *Humes* involved a statute that allowed private plaintiffs to recover double damages.

88. *Id.* at 522-23.

89. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

90. 418 U.S. 323 (1974).

91. See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 755-63 (1985) (non-media defamation of a private individual). Justice White, in a separate concurrence in *Dun & Bradstreet*, urged the Court to consider abandoning restrictions on the common-law standard of liability for libel and instead focus on limiting or prohibiting presumed and punitive damages. *Id.* at 772-74 (White, J., concurring).

adoption of the eighth amendment. Even if true,⁹² the same could be said of punitive damages and the first amendment. Similarly, the Court's rationale in *Browning-Ferris* seems to suggest that a jury's assessment of liability and damages against private parties in common law actions is somehow not state action for purposes of the Bill of Rights. Given the general incorporation of the Bill of Rights, such a suggestion is untenable. As the Court's first amendment cases demonstrate, common law recoveries are now subject to scrutiny under the protections contained in the Bill of Rights.⁹³

E. Issues Left Open In Browning-Ferris

Based upon the distinction between monetary punishments paid to private parties and those awarded to the government, the Court in *Browning-Ferris* reserved for future review the issue whether punitive damage awards imposed in civil cases and collected by the government, or by private parties who share some part of the award with the government (for example, *qui tam* actions), are constrained by the excessive fines clause.⁹⁴ Justice O'Connor observed that "by relying so heavily on the distinction between governmental involvement and purely private suits, the Court suggests (despite its claim . . . that it leaves the question open) that the Excessive Fines Clause will place some limits on awards of punitive damages that are recovered by a governmental entity."⁹⁵

The principal issue left undecided by the Court in *Browning-Ferris* was the impact of the due process clause on punitive damages. In its brief on the merits,⁹⁶ *Browning-Ferris* argued that the \$6,000,000 punitive damage award imposed against it was an excessive and fundamentally unfair punishment that violated the due process clause.

92. Although punitive damages were not yet generally recognized when the eighth amendment was adopted, and thus could not have been a specific concern of the Framers or of those who ratified that amendment, the entire history of pecuniary punishments in England demonstrates that the common law antecedents of punitive damages—fines and amercements—were precisely the kinds of abuses of governmental power that led to the adoption of the prototypes of the eighth amendment's excessive fine clause in Magna Carta and the English Bill of Rights.

93. See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46, 56-57 (1988) (in which the Court unanimously held that common law recovery for intentional infliction of emotional distress is subject to first amendment restrictions).

94. *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2920 n.21 (1989).

95. *Id.* at 2932-33 (O'Connor J., joined by Stevens, J., concurring in part and dissenting in part) (citing FLA. STAT. § 768.73(2) (b)(1987)). The Florida statute cited by Justice O'Connor, like a number of other recently enacted provisions, requires that some portion of punitive damage awards be paid to the State. See, e.g., COLO. REV. STAT. § 13-21-102(4) (1987); GA. CODE ANN. § 51-12-5.1(e) (2) (Supp. 1989); IOWA CODE ANN. § 668A.1(2)(b) (West 1987); MO. ANN. STAT. § 537.675 (Vernon 1988); OR. REV. STAT. § 18.540 (1989); UTAH CODE ANN. § 78-18-1(3) (Supp. 1989).

96. Brief for the Petitioners at 8, *Browning-Ferris* (No. 88-556).

However, the Court declined to consider *Browning-Ferris*' due process challenge because it had not been raised in the courts below or in the certiorari petition. Nonetheless, while not deciding the issue, the Court recognized that "[t]here is some authority in our opinions for the view that the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme,"⁹⁷ and reserved for "another day" the "precise question . . . whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit."⁹⁸

Justice Brennan, joined by Justice Marshall, concurred in the Court's opinion expressly "on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties"⁹⁹ and suggested that the Court's scrutiny "of awards made without the benefit of a legislature's deliberation and guidance would be less indulgent than [it's] consideration of those that fall within statutory limits."¹⁰⁰ Justice O'Connor agreed "that nothing in the Court's opinion forecloses a due process challenge to awards of punitive damages or the method by which they are imposed"¹⁰¹ and explicitly adhered to her comments in her concurring opinion in *Bankers Life & Casualty Co. v. Crenshaw*,¹⁰² in which Justice Scalia joined, "regarding the vagueness and procedural due process problems presented by juries given unbridled discretion to impose punitive damages."¹⁰³ These due process issues are discussed in the following section.

III. UNDUE DISCRETION AND DUE PROCESS

In 1986 in *Aetna Life Ins. Co. v. Lavoie*,¹⁰⁴ the Court recognized that the "lack of sufficient standards governing punitive damages awards" raised serious and substantial questions under the due process clause.¹⁰⁵ Two years later, in *Bankers Life*, Justice O'Connor ob-

97. *Browning-Ferris*, 109 S. Ct. at 2921 (citing *St. Louis, Iron Mountain & Southern Railway Co. v. Williams*, 251 U.S. 63, 66-67 (1919)).

98. *Id.* at 2921 (citing *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79-80 (1988) (O'Connor, J., joined by Scalia, J., concurring)).

99. *Id.* at 2923 (Brennan, J., joined by Marshall, J., concurring).

100. *Id.*

101. *Id.* at 2924 (O'Connor, J., joined by Stevens, J., concurring in part and dissenting in part).

102. 486 U.S. 71 (1988). See *supra* note 20 and accompanying text.

103. *Browning-Ferris*, 109 S. Ct. at 2924 (O'Connor, J., joined by Stevens, J., concurring in part and dissenting in part).

104. 475 U.S. 813 (1986).

105. *Id.* at 828-29.

served that the punitive damage doctrine "gives juries discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state [B]ecause of the punitive character of such awards, there is reason to think that this may violate the Due Process Clause."¹⁰⁶ As noted above, the various opinions in *Browning-Ferris* express similar concerns regarding the lack of meaningful legislative standards or limits constraining the award of punitive damages.

This "standardless discretion" of juries to impose punitive damages in "completely indeterminate"¹⁰⁷ amounts is a feature common to most state punitive damage regimes. Although numerous states recently have enacted "tort reform" measures that contain provisions relating to punitive damages, these provisions have done little to address the constitutional problems that were identified in *Aetna*, *Bankers Life*, and *Browning-Ferris*.

Of the nine states that have enacted statutory limits on the size of punitive damages, only one, Virginia,¹⁰⁸ has established a precise maximum dollar amount in all cases. Of the remaining punitive damage "caps," some statutes establish *post hoc* "limits" on the size of the award by relating the punitive damage award to either the defendant's wealth or the amount of the compensatory award.¹⁰⁹ However, neither of these methods provide individuals with *advance* notice of the amount of punishment that may be inflicted, and other methods are so riddled with exceptions that they are rendered virtually meaningless.¹¹⁰ Similarly, legislative attempts to limit or define more precisely the conduct that may give rise to punitive damage liability have resulted in standards that remain far from precise. For example, in 1987 the California Legislature amended its statutory standards to require that conduct be "despicable" as well as "malicious" and "oppressive" to support an award of punitive damages.¹¹¹ Such legislation simply adds new and highly subjective terms to already vague and subjective standards and does not provide sufficient notice to defendants of the conduct that might subject them to punishment.¹¹²

106. *Bankers Life*, 486 U.S. at 87 (O'Connor, J., joined by Scalia, J., concurring).

107. *Id.* at 88.

108. VA. CODE ANN. § 8.01-38.1 (Supp. 1989).

109. See e.g., COLO. REV. STAT. § 13-21-102 (1987) (limiting punitive damages to the amount of compensatory award, or three times that amount if misconduct continues during trial); KAN. STAT. ANN. § 60-3701(e) (Supp. 1989) (limiting punitive award to the lesser of the defendant's gross annual income during the five-year period preceding the misconduct, or \$5,000,000).

110. See e.g., NEV. REV. STAT. § 42.005 (1987) (exempting bad faith, product liability, defamation, and "toxic tort" actions from punitive damage limits).

111. CAL CIV. CODE § 3294(c) (Deering Supp. 1990).

112. In contrast, some states have used tort "reform" to *expand* the right to recover unlimited punitive damages. See, e.g., PA. H.B. 121, § 3, *amending* PA. CODE ch. 83, tit.

The lower federal and state courts have also declined to address and resolve the due process problems of unlimited and excessive punitive damage awards, uniformly refusing to apply federal constitutional principles to the otherwise unfettered discretion of juries to inflict punitive damages, absent a Supreme Court directive to do so.¹¹³ In short, in most American jurisdictions today, individuals can be singled out by civil juries for unpredictable, capricious, and virtually unlimited punitive damage awards based upon violation of a pot-pourri of vague, elastic, and amorphous standards.

Juries are generally permitted to exercise freewheeling judgment as to whether punitive damages are appropriate in a given case. Statutes and jury instructions usually enumerate a wide range of subjective terms to describe the kind of conduct that will support punitive damages, including: "reprehensible," "mere caprice," "wanton," "negligence," "bad faith," "oppression, fraud, or malice," "rudeness," and "willful indifference to the rights and safety of others."¹¹⁴ These terms can be applied, in a jury's discretion, to virtually any conduct that may constitute a wrong in our legal system.

In *Giacco v. Pennsylvania*,¹¹⁵ the Supreme Court rejected the same kind of "loose and unlimiting" terms as a basis for imposing punishment.¹¹⁶ In *Giacco*, the Court held that a state statute that empowered a jury to impose costs upon an acquitted defendant violated the due process clause.¹¹⁷ State court interpretations of the statute indicated that a jury could impose costs under "the statute if the defendant's conduct was 'reprehensible in some respect,' 'improper' [or] outrageous to 'morality and justice.'"¹¹⁸ However, the Court found that these terms did not remedy the deficiencies of the statute because the jury still had "such broad and unlimited power in imposing costs . . . that the jurors must make determinations of the

42 (signed Feb. 7, 1990) (creating a cause of action for "bad faith" against insurers without defining what constitutes "bad faith" conduct and authorizing unlimited punitive damages in such actions).

113. See, e.g., *Racich v. Celotex Corp.*, 887 F.2d 393, 398-99 (2d Cir. 1989) (determining that the constitutionality of punitive damages is "best left for Congress or for higher judicial authority"); *Potomac Electric Power Co. v. Smith*, 79 Md. App. 591, 558 A.2d 768, 790-92 (1989) (noting Supreme Court's "approval" of the punitive damage system in 1851 and stating, "[w]hat the Supreme Court has declared constitutional we may not put asunder") (affirming \$7,500,000 punitive damage award), *rev. denied*, 317 Md. 393, 564 A.2d 407 (1989).

114. See generally L. SCHLUETER & K. REDDEN, *PUNITIVE DAMAGES* (2d ed. 1989).

115. 382 U.S. 399 (1966).

116. *Id.* at 403-04.

117. *Id.* at 402.

118. *Id.* at 403-04.

crucial issue upon their own notions of what the law should be instead of what it is.”¹¹⁹ The Court stated:

[O]ne of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with . . . valid laws . . . that [carry] an understandable meaning with legal standards that courts must enforce. This state Act as written does not even begin to meet this constitutional requirement.¹²⁰

The *Giacco* Court added that “whether labeled ‘penal’ or not [such a provision] must meet the challenge that it is unconstitutionally vague.”¹²¹

The Court has not yet had an occasion to apply these due process standards to the “vagueness problems”¹²² posed by the state punitive damage systems flourishing throughout the United States. But those systems inflict the very same deprivations of property through the imposition of punishment by civil juries under “ill-defined”¹²³ standards that fail to provide meaningful notice to defendants of the circumstances that may subject them to monetary punishment. If it is unconstitutional to extract a \$230 penalty for “reprehensible” conduct as it was in *Giacco*, it cannot conceivably be constitutional to extract multi-million dollar penalties for conduct that is “despicable” or “wanton.”

Punitive damages are often retrospectively assessed in cases in which a new standard of conduct has been formulated and announced for the first time.¹²⁴ The evolving common law of torts is often “a predator lurking in the shadows to pounce on the unsuspecting” with extreme and unjustified monetary punishment.¹²⁵ While it may not in the long run be unreasonable to require a person to pay damages for the consequences of his actions even under a new standard of liability, the imposition of a penalty for deviating from a previously unrecognized standard is another matter. The Court in other contexts has stated that it “would . . . hesitate to approve the retrospective imposition of liability on any theory of deterrence . . . or

119. *Id.* at 403.

120. *Id.*

121. *Id.* at 402.

122. *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2924 (1989) (O'Connor, J., joined by Stevens, J., concurring in part and dissenting in part).

123. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 780 n.4 (1985) (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ., dissenting). *See also* *Smith v. Wade*, 461 U.S. 30, 59-65 (1983) (Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting) (recognizing the vague, overlapping nature of punitive damage liability standards).

124. *See, e.g.*, *Hodder v. The Goodyear Tire & Rubber Co.*, 426 N.W.2d 826 (Minn. 1988), *cert. denied*, 109 S. Ct. 3265 (1989). *See also* *Eichenseer v. Reserve Life Ins. Co.*, 881 F.2d 1355 (5th Cir. 1989), *petition for cert. filed*, 59 U.S.L.W. 3038 (U.S. Feb. 13, 1990) (No. 89-1303).

125. *Eichenseer v. Reserve Life Ins. Co.*, 894 F.2d 1414, 1420 (5th Cir. 1990) (Jones, J., dissenting from denial of rehearing *en banc*).

blameworthiness,"¹²⁶ and it has been swift to apply the due process clause to prohibit judicial enlargement of obligations imposed by the criminal law.¹²⁷

The *amount* of the allowable punishment in punitive damage cases is similarly unconstrained by any fixed standards or limitations.¹²⁸ The determination of how large the punitive damage award should be in a given case is generally "peculiarly left to the discretion of the jury as the degree of punishment to be inflicted must always be dependent on the circumstances of each case, as well as upon the demonstrated degree of malice, wantonness, oppression, or outrage found by the jury from the evidence."¹²⁹ Moreover, the general societal purposes of punishment—retribution and deterrence—which are not routinely invoked in punitive damage statutes and jury instructions, do not provide any meaningful restriction on the discretion of the jury to administer punishment. These purposes themselves "possess inadequate self-limiting principles"¹³⁰ and do not constitute "discernible limits," but rather allow juries to assess punitive damages "in almost any amount."¹³¹

In most jurisdictions, "juries are left largely to themselves in making this important, and potentially devastating, decision."¹³² As Justice Brennan accurately observed in *Browning-Ferris*, in cases in which no statutory (or common law) standards regarding the appropriate level of maximum punishment exist, "punitive damages are imposed by juries guided by little more than an admonition to do

126. See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17-18 (1976) (citations omitted). Such claims are also cognizable under the contracts clause, article I, section 10, clause 1, in cases involving the interpretation of a contract, such as bad faith insurance cases. See *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986) (a claim that the "retrospective imposition of punitive damages under a new [judicially created] cause of action violates . . . the Contracts Clause . . . raise[s] [an] important issue").

127. See, e.g., *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

128. "Upon deciding to grant punitive damage[s], little if any guidance is given the jury as to the appropriate size of the award." *Taylor v. Superior Court*, 24 Cal. 3d 890, 902, 598 P.2d 854, 861, 157 Cal. Rptr. 693, 701 (1979) (Clark, J., dissenting).

129. *Winn & Lovett Grocery Co. v. Archer*, 126 Fla. 308, 327, 171 So. 214, 221-22 (1936).

130. *Tison v. Arizona*, 481 U.S. 137, 180 (1987) (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ., dissenting).

131. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82-83 (1971) (Marshall, J., joined by Stewart, J., dissenting).

132. *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2923 (1989) (Brennan, J., joined by Marshall, J., concurring). One jury even returned a "punitive damage" verdict that sentenced the defendant to one to five years imprisonment. *Arnett v. Fuston*, 53 Tenn. App. 24, 378 S.W.2d 425 (1963) (affirming trial court's decision to discard the prison sentence as surplusage).

what they think is best.”¹³³

The Supreme Court has expressed serious concerns about the consequences of unchecked jury discretion to impose punitive damages. For example, in *Int’l Bhd. of Elec. Workers v. Foust*,¹³⁴ the Court observed:

Because juries are accorded broad discretion both as to the imposition and amount of punitive damages, the impact of these windfall recoveries is unpredictable and potentially substantial.¹³⁵

Similarly, in *Gertz v. Robert Welch, Inc.*,¹³⁶ the Court noted that “juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused.”¹³⁷ In his dissenting opinion in *Rosenbloom v. Metromedia, Inc.*,¹³⁸ Justice Marshall commented that punitive damages,

[u]nlike criminal penalties, . . . are not awarded within discernible limits but can be awarded in almost any amount [T]hese damages are the direct product of the ancient theory of unlimited jury discretion The manner in which unlimited discretion may be exercised is plainly unpredictable.¹³⁹

Judges exercising essentially the same untrammelled discretion to punish may be expected to produce the same arbitrary results. For example, in *Eichenseer v. Reserve Life Ins. Co.*,¹⁴⁰ a federal district judge imposed a \$500,000 punitive damage award against the defendant for negligently mishandling an insurance claim. As Judge Jones of the Fifth Circuit stated in her dissent from denial of an application for rehearing *en banc*, “the fact finder possess[ed] unbridled discretion to punish,”¹⁴¹ and this “punishment without moorings”¹⁴² re-

133. *Browning-Ferris*, 109 S. Ct. at 2923 (Brennan, J., joined by Marshall, J., concurring).

134. 442 U.S. 42 (1979).

135. *Id.* at 50 (citations omitted). *Cf. Browning-Ferris*, 109 S. Ct. at 2925 (O’Connor, J., joined by Stevens, J., concurring in part and dissenting in part) (“The threat of such enormous awards has a detrimental effect on the research and development of new products.”).

136. 418 U.S. 323 (1974).

137. *Id.* at 350.

138. 403 U.S. 29 (1971).

139. *Id.* at 82-84 (Marshall, J., joined by Stewart, J., dissenting) (“the essence of the discretion is unpredictability and uncertainty”). *See also* *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 283 (1984) (Powell, J., joined by Burger, C.J., Marshall, and Blackmun, JJ. dissenting) (“It is not reasonable to infer that Congress[,] [through its legislation to regulate nuclear facilities,] intended to allow juries of lay persons, selected essentially at random, to impose unfocused penalties solely for the purpose of punishment and some undefined deterrence.”); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270-71 (1981) (“The impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial”); *In re Paris Air Crash*, 622 F.2d 1315, 1319-20 (9th Cir. 1980) (Kennedy, J.) (noting the “clearly noncompensatory purpose and the serious and often unpredictable effects of allowing actions for punitive damages”), *cert. denied sub nom. Kalinsky v. General Dynamics Corp.*, 449 U.S. 976 (1980).

140. 881 F.2d 1355 (5th Cir. 1989), *petition for cert. filed*, 59 U.S.L.W. 3038 (U.S. Feb. 13, 1990) (No. 89-1303).

141. *Eichenseer v. Reserve Life Ins. Co.*, 894 F.2d 1414, 1415 (5th Cir. 1990) (Jones, J. dissenting from denial of rehearing *en banc*).

142. *Id.* at 16.

sulted in an arbitrary punitive fine that violated the due process clause.

It seems clear that principles of due process require that persons who are subjected to potentially severe punishment be informed in advance of at least the range of punishments available under applicable law for specifically defined conduct. For example, the Supreme Court has observed in the context of punishment imposed after criminal proceedings that "vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute."¹⁴³ Thus, due process requires that "the range of penalties" be specified in advance so as to "inform[] the courts, prosecutors, and defendants of the permissible punishment alternatives available."¹⁴⁴ Indeed, it is a basic principle of our criminal law that the government can only prosecute a person under a criminal statute that "fairly and clearly define[s] the conduct made criminal and the punishment which can be administered."¹⁴⁵

As the Court observed in *Gore v. United States*,¹⁴⁶ "views . . . regarding severity of punishment . . . are peculiarly questions of legislative policy."¹⁴⁷ In most punitive damage cases, however, the quintessentially legislative task¹⁴⁸ of determining the punishment to which an individual can be subjected is impermissibly delegated to the jury and the trial court "for resolution on an *ad hoc* and subjective basis,"¹⁴⁹ leading to arbitrary and unpredictable results.

It is no longer open to debate that punitive damages serve society's penal goals and that "the labels 'criminal' and 'civil' are not of paramount importance."¹⁵⁰ "The notion of punishment . . . cuts across

143. *United States v. Batchelder*, 442 U.S. 114, 123 (1979).

144. *Id.* at 126.

145. *Berra v. United States*, 351 U.S. 131, 139-40 (1956) (Black, J., joined by Douglas, J., dissenting). The due process requirement that a person of ordinary intelligence have fair notice as to what the law commands or forbids is equally applicable in civil proceedings. *A.B. Small Co. v. American Sugar Ref. Co.*, 267 U.S. 233, 239 (1925) ("It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all."). See generally *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

146. 357 U.S. 386 (1958).

147. *Id.* at 393. Accord *Rosenberg v. United States*, 346 U.S. 273, 306 (1953) (Frankfurter, J., dissenting) ("Congress and not the whim of the prosecutor fixes sentences.")

148. See *United States v. Evans*, 333 U.S. 483, 386-87 (1948); *United States v. Grimaud*, 220 U.S. 506, 522 (1911). Cf. *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 32-34 (1812).

149. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

150. *United States v. Halper*, 109 S. Ct. 1892, 1901 & n.8 (1989).

the division between the civil and the criminal law"¹⁵¹ Due process, at its core, means that "[t]he citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions."¹⁵²

The imposition of punitive damages inevitably involves the application of uncertain and malleable standards to impose punishment in capricious and unlimited amounts. The due process clause was intended to protect citizens from either form of arbitrariness; it should certainly restrain the imposition of both in a single remedy.¹⁵³

IV. CONCLUSION

The punitive damage phenomenon produces troubling distortions in our civil justice systems by fostering unpredictable, capricious, and anomalous results in civil litigation. These arbitrary and massive punitive windfalls have the cumulative effect of transforming our courthouses into carnival casinos where punishments and rewards are distributed seemingly at random. While the Supreme Court has apparently concluded that the eighth amendment's prohibition of excessive governmental punishments does not restrain punitive damages, the due process clause may yet be found to prohibit these unlimited fines awarded for deviation from obscure and ineffable standards.¹⁵⁴

151. *Id.* at 1901.

152. *Connally v. General Construction Co.*, 269 U.S. 385, 393 (1926).

153. Punitive damages raise other due process questions as well. For example, a federal district court has recognized that the multiple imposition of punitive damages for the same conduct (for example, in asbestos cases) is fundamentally unfair and may violate the due process clause. *See Juzwin v. Amtorg Trading Corp.*, 718 F. Supp. 1233, 1234-36 (D.N.J. 1989). In addition, a few states, such as Alabama, continue to permit joint and several liability for punitive damages, a practice that can result in defendants being punished in arbitrary and unlimited amounts, not only for their own misconduct, but for the misconduct of others. *See, e.g., Clardy v. Sanders*, 551 So. 2d 1057, 1060-62 (Ala. 1989), *cert. denied*, 110 S. Ct. 376 (1989). The Court long ago noted that "there is no justice" in imposing joint liability for punitive damages. *Washington Gas Light Co. v. Landsden*, 172 U.S. 534, 553 (1899).

154. On October 3, 1990, the Supreme Court heard argument in *Pacific Mutual Life Ins. Co. v. Haslip*, No. 89-1279, which provides the Court with the opportunity to consider these issues. The certiorari petition in *Pacific Mutual* presents the following questions:

1. Whether Alabama Law, as applied below, violates Due Process by allowing the jury to award punitive damages as a matter of "moral discretion," without adequate standards as to the amount necessary to punish and deter and without a necessary relationship to the amount of actual harm caused.
2. Whether Alabama law violated Pacific Mutual's right to Due Process under the Fourteenth Amendment by allowing punitive damages to be awarded against it under a *respondeat superior* theory.
3. Whether the amount of punitive damages in this case was excessive, in violation of Pacific Mutual's Due Process right to be free of grossly excessive, disproportionate damages awards.
4. Whether the suit below, although nominally civil, must be considered criminal in nature as to the punitive damages awarded therein entitling Pa-

cific Mutual to protection under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

5. Whether Alabama law discriminates against those defendants subjected to open-ended punitive damages which may be awarded against other classes of defendants, without rational basis.

6. Whether the constitutional defects in the award of punitive damages against Pacific Mutual were cured by judicial review and the potential for a remittur [sic].

Petition for Writ of Cert. at i, *Pacific Mutual Life Ins. Co. v. Haslip*, (No. 89-1279).

