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CIVIL PUNISHMENT AND THE PUBLIC GOOD

DAVID G. OWEN*

For thousands of years, in many diverse civilizations, the law has provided for "damages" in addition to compensation for actual losses to persons injured by certain types of highly antisocial behavior.¹ Sometimes wearing the thin disguise of multiple damages,² "punitive" or "exemplary" damages have established a secure home in the legal system prevailing in this nation. Professor Ellis' article, *Fairness and Efficiency in the Law of Punitive Damages*,³ makes a major contribution to the understanding of this area of the law. His study demonstrates convincingly that an unbridled, expansive application of punitive damages is undesirable on grounds of fairness and efficiency.

In the following Comment, I shall briefly reexamine some of the principle issues of fairness and efficiency in the law of punitive damages. My analysis assumes the existence and limits of the current legal system, in which compensatory damages (in civil actions) and formal punishment (in criminal prosecutions) are complementary legal tools. Yet I also take as an established fact that the coverage of the criminal law is spotty, to say the least, and that it leaves virtually untouched, properly perhaps, certain broad areas of serious misbehavior.⁴

I shall first examine the essence of the misconduct that gives rise to punitive damages assessments and shall isolate certain contexts in which such claims are made and sometimes sustained. After a capsule inquiry into the primary purposes (benefits, one might say) of punitive damages, I shall look briefly at some of their principal costs—in partic-

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1. See Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1262 nn.17-18 (1976).

2. *Id.* at 1262 n.17.

3. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1 (1982).

4. Manufacturing decisions, for example, are largely beyond the reach of the criminal law. See Owen, *supra* note 1, at 1288 & n.156.

ular, some of the implications of uncertainty in this area of the law. Finally, I shall suggest certain methods for increasing fairness—without significantly sacrificing efficiency—in punitive damages law.

I. NATURE OF PUNISHABLE MISCONDUCT

A. A POWER PERSPECTIVE

The study of legal principles is often advanced by a consideration of the power relationships between the parties.⁵ Such an analysis is particularly helpful in reaching the essence of the conduct for which punitive damages may be warranted. As in much of tort law, the proscribed behavior that will support a punitive award involves at bottom an abuse of power, particularly one which is extreme. The defendant's position of power over the plaintiff's welfare may derive from most any type of relationship, from the most formal and direct—such as a doctor to his patient—to the most tenuous and remote—such as a component part manufacturer to a bystander injured by a defective product. In instances when punitive damages appear most appropriate, the amount of power held by the defendant (and commensurate vulnerability of the plaintiff) often is great and its abuse, for one reason or another, extreme. One might picture a giant boulder perched at the top of the defendant's hill—and the plaintiff's little cottage and family nestled among the daffodils in the valley below. One should then be able to envision a variety of situations in which the defendant would be highly blameworthy if the boulder were to careen down the hill, through the daffodils, and into the plaintiff's house.

The type of power held by the defendant and the type of vulnerability suffered by the plaintiff may vary; the integrity of the plaintiff's body, mind, or financial affairs may be at stake. The abuse of power in many cases, however, involves the abuse of information vital to the plaintiff—the deliberate misstatement of information, the failure to convey the information to the plaintiff, the defendant's failure to act properly upon it, or in some cases the defendant's failure to acquire it. Whether the cases are considered in terms of information costs, cost avoidance, fairness, or efficiency, the law does have some appropriate role to play—quite possibly more than simply assigning compensatory damages responsibility, yet sometimes less than imposing criminal re-

5. See generally M. SHAPO, *THE DUTY TO ACT—TORT LAW, POWER, & PUBLIC POLICY* xv-xvi, 7-42 (1977) (relationships such as economic, personal, or physical provide bases of power which often explain the imposition of tort liability).

sponsibility—both before and after the boulder's static energy is unleashed upon the little house at the bottom of the hill.

B. TYPES OF DEFENDANTS, STATES OF MIND, AND NATURE OF MISDEEDS

An understanding of the punitive damages remedy is facilitated by isolating the contexts in which the remedy may be applied. At least three classifications are deserving of special scrutiny: (1) the type of defendant involved; (2) the defendant's state of mind; and (3) the nature of the defendant's misdeed. The implications for fairness and efficiency will be seen on occasion to differ considerably depending on where the particular case fits within these three classifications. Some general observations will be offered here on the importance of variations within the categories, and the differing effects of these variations on fairness and efficiency will be examined further in later contexts.

1. *Types of Defendants*

There is very little discussion in the cases or commentary on punitive damages addressing whether and how the standards of misconduct for which punitive damages are justified should be altered to fit the type of defendant in the case. Nevertheless, at least three types of defendants stand out as possibly deserving separate treatment: (1) individual defendants; (2) professional defendants; and (3) institutional defendants. The kinds and amounts of power a person holds over the welfare of another will vary among these types of defendants, as will the social expectations as to how the power should be controlled by each person. Surely the forms of power and motivations of a drunk driver⁶ are different in substantial measure from those of a malpracticing doctor⁷ or stock broker,⁸ and are different in turn from misconduct by a power company⁹ or an automotive manufacturer.¹⁰

6. See, e.g., *Taylor v. Superior Court*, 24 Cal. 3d 90, 598 P.2d 854, 157 Cal. Rptr. 693 (1979) (drunk driver held liable for punitive damages).

7. See, e.g., *Nelson v. Gaunt*, 125 Cal. App. 3d 623, 178 Cal. Rptr. 167 (1981) (doctor guilty of malpractice held liable for punitive damages).

8. See *Miley v. Oppenheimer & Co.*, 637 F.2d 318 (5th Cir. 1981) (stockbroker held liable for punitive damages for "churning" of account).

9. See, e.g., *Hall v. Consolidated Edison Corp.*, 104 Misc. 2d 565, 428 N.Y.S.2d 837 (N.Y. Sup. Ct. 1980) (power company that wrongfully terminated electrical services liable for punitive damages).

10. See, e.g., *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (manufacturer held liable for punitive damages for design of Pinto). For a discussion of punitive damages in the context of automobile product liability cases, see generally Owen, *Crashworthiness Litigation and Punitive Damages*, 4 J. PROD. LIAB. 221 (1981) [hereinafter cited as *Crashworthi-*

In our boulder hypothetical, for example, one might well expect different things from the defendant—and punishment might well be more or less deserved and more or less effective—depending on whether the stone, at the time it started to roll, was under the control of a private homeowner who owned the lot at the top of the hill, a professional contractor hired to move the stone to safety, or a stone quarry company with hundreds of stones on the tops of hundreds of hills. In general, retribution might often be the more important goal when the private landowner is the culprit, and deterrence might often be more effective against the stone company. The punitive damages remedy therefore should be tailored to the type of defendant in the case.

2. *States of Mind*

The defendant's apparent state of mind, as Professor Ellis makes clear,¹¹ has always been of appropriately central importance in defining liability for punitive damages. One would do well, in the search for clarification of this area of the law, to inquire past the conventional verbiage ("malicious," "reckless," "oppressive," "willful and wanton") into the essential mental conditions that properly might support a punitive award. For present purposes, there appear to me to be three basic classifications for a defendant's mental state: (1) deliberate (or malicious); (2) evaluative (or reflective); and (3) inadvertent (or impulsive). The culpability of a defendant's abuse of power, and the appropriateness of punitive damages for that abuse, will be seen to vary with the different states of mind.

Deliberate (or malicious) conduct may be defined as conduct intended to cause harm for no good reason, which thus is known by the actor to be wrong. This sort of behavior can be engaged in by all three of the types of defendants discussed above. For example, a spectator at an athletic event punches the nose of another whose loud cheering is annoying; a doctor performs unnecessary surgery for financial gain;¹² or a drug manufacturer advertises its new drug as being free of side effects, knowing that it is not in order to improve its sales.¹³ Assessments of punitive damages in these situations, involving deliberately

ness]; Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1 (1982) [hereinafter cited as *Problems*].

11. Ellis, *supra* note 3, at 21 (definition of standards by which punitive damages may be awarded based on defendant's state of mind). See generally *id.* at Section III (criteria for the assessment of punitive damages).

12. See *Cotgreave v. Public Admin.*, 111 Misc.2d 274, 443 N.Y.S.2d 971 (N.Y. Sup. Ct. 1981).

13. See *Toole v. Richardson-Merrell Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967).

inflicted harm, generally would be regarded as appropriate without much argument about either fairness or efficiency.

Evaluative (or reflective) conduct supposes that the defendant knowingly sets in motion the instrument of harm only after considered evaluation of the risks and benefits involved. Unlike the "deliberate" actor, who knows that no good reason supports the action, the "evaluative" actor has considered—and ultimately has chosen to advance—certain real increases in welfare expected to result from the chosen behavior. For punitive damages properly to lie in this context, the choice must be "wrong" (i.e., immoral or cost-*in*effective) and, in addition, the defendant must know or "recklessly" fail to discover its wrongfulness before acting.

The facts and issues in this area of evaluative states of mind are very apt to slip and slide in murky waters that should give one pause before imposing quasi-criminal liability. The doctor, for example, who truly believes in the patient's need for surgery may choose to withhold crucial information from the patient in order to obtain "consent" to perform the operation. While plainly (and in a sense "deliberately") wrong under principles requiring informed consent (even if the operation be successfully performed), one should want considerably more facts about the transaction—including the type and implications of the operation—before a judgment properly could be made on punitive damages in this type of reflective conduct case.

Inadvertent (or impulsive) misconduct supposes that no real thought was given to the wrongful act or to its implications, but the conduct was still for some reason very wrong. Drunk driving sometimes might fall within this category,¹⁴ as might a doctor's neglect in attending to his seriously ill patient,¹⁵ and perhaps also the failure of a manufacturer to consider testing the safety of a new product in a hazardous situation that consumers will frequently confront.¹⁶ The failure to give thought to the fact that one's actions (or inactions) may be very harmful usually does not call for punishment. On occasion, however,

14. See *Taylor v. Superior Court*, 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979) (drunk driver held liable for punitive damages).

15. Cf. *Rennewanz v. Dean*, 114 Or. 259, 229 P. 372 (1924) (consideration by jury of punitive damages against defendant physician proper where his treatment of plaintiff patient constituted gross and reckless negligence).

16. See *Leichtamer v. American Motors Corp.*, 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981) (defendant had not tested for the type of roll-over which occurred, although it was a predictable event).

this state of mind may support a punitive award, particularly if an institution (or perhaps a professional) is the defendant.

3. *Nature of Misdeeds*

The final classification of significance involves the question of whether the defendant's fault was active or passive—whether the charge is one of misfeasance or nonfeasance. Although this once-proud distinction no longer holds much sway in determining liability for compensatory damages,¹⁷ perhaps that trend principally reflects the shift away from fault in developing compensation schemes. Once compensation is out of the picture, as it generally is said to be for the punitive damages issue, and once fault returns as the principal matter of inquiry, we may well wish to look afresh at the active/passive distinction.¹⁸ While on occasion a defendant's failure to energize his power to protect the plaintiff may be flagrant and extreme, his purposeful activation and release of that power physically upon the plaintiff will more often involve the kind of existential choice for which punishment is in order.

Consider once again the boulder. I think that questions of both just desert and the effectiveness of deterrence should be examined very differently depending on whether the boulder person physically pushed it from its earthen perch atop the hill—even if it were aimed other than at the house below—or failed instead to guard against the crumbling of the perch under the boulder's weight. In the first instance, the boulder pusher made two choices—first, to put the little house at risk; and second, the significant decision to put his body behind that choice and thus to change the course of nature to the detriment of the plaintiff below. Failing only to prop up the boulder or to build a wall downhill may instead involve only the first such choice and thus represents a very different level of irresponsibility.¹⁹ As with the other two categories discussed above, the active/passive distinction may thus provide useful insights in the punitive damages inquiry.

II. RECONSIDERING THE PURPOSES AND EFFECTS OF PUNITIVE DAMAGES

Although the functions (or benefits) of punitive damages have been fair game for courts and commentators for many years, Professor Ellis in

17. W. PROSSER, HANDBOOK ON THE LAW OF TORTS 338-40 (4th ed. 1971).

18. *But see* *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 922 (Tex. 1981) (disapproving any distinction between active and passive conduct in determining whether such conduct constituted gross negligence).

19. *See infra* text accompanying note 31.

his *Fairness and Efficiency* article has provided the most helpful general inquiry into the important other side—the effects (or costs) of the remedy. The purposes and effects of such assessments are of course different sides of the same scales, and so they profitably may be examined side by side as Professor Ellis has done. This section first examines in the abstract certain aspects of the logic, fairness, and utility underlying the principal rationales for the punitive damages remedy, and then turns briefly to the implications for fairness and efficiency that result when the theory is transported to a court for adjudication.

A. THE FUNCTIONS RECONSIDERED

Broadly speaking, punitive damages serve three principal objectives: punishment, deterrence, and compensation.²⁰ Each objective may be splintered into various subgoals. Within the term “punishment,” I include the notions of retribution, moral desert, private and public vengeance, vindication, and the moral education of the offender.²¹ While this category is broader than Professor Ellis’ “retribution” category (in that I include some instrumentalist goals),²² it usefully leaves the more starkly “economic” objectives to be considered under the “deterrence” goal. The second category, “deterrence,” includes its little sister, “law enforcement.”²³ Included within the third category, “compensation,” are all the costs of restoring the plaintiff to his pre-injury position in financial terms, including payment of his attorneys’ fees.²⁴

1. *Fairness*

Although I share Professor Ellis’ view that the fairness of punishment generally centers on the notion of desert, the desert analysis may tend to focus too narrowly on the defendant in a vacuum. In considering whether punishment imposed by social authority is fair, I prefer to move back a step to examine how, why, and to whom the defendant’s conduct was very wrong. There are three notions that I believe to be particularly important in determining the fairness of the punishment imposed: theft, power, and social expectations.

Punishable misconduct—conduct that is very wrong—often ap-

20. A fourth goal, law enforcement, may be subsumed within deterrence. See Owen, *supra* note 1, at 1287 n.152.

21. *Id.* at 1279-81.

22. Compare Ellis, *supra* note 3, at 4-8 (defining punishment in noninstrumentalist terms) with *id.* at 8-10 (defining deterrence as an instrumentalist objective).

23. See Owen, *supra* note 1, at 1287 n.152.

24. See *id.* at 1295-97.

pears to me to involve a form of theft. The object of the theft may take any form of value, such as wealth, bodily security, or mental security—including happiness and its underlying values such as privacy, reputation, freedom of choice and locomotion, and other such intangibles. The diminution in these values may be said to result from “theft” when the actor knows before his choice to act or not to act that the losses which are likely to result to others will most likely exceed the benefits likely to be achieved. The defendant’s choice, although it may “only” reflect a subconscious (or institutional) election not to consider more fully the implications of the contemplated action for loss to others, is in this respect a decision to “steal” some limited resources from the group. Such actions are plainly in opposition to the fundamental ethic of the group fairly to protect its resources from waste.²⁵

Every person has the power to waste the resources of the group. As the power to do so increases, so too does the opportunity to cause waste, and the duty so to restrain.²⁶ The group grants operating licenses to professionals and businesses for the accumulation of extra power (in the form of information and resources) to be used in providing services and products to members of the group. An underlying expectation is that the licensee will exert its power fairly and efficiently for the general good, and should so deserve a little extra chunk of resources in the form of profit as its reward. When this permitted power base is abused, however, through the squandering of our resources, the ethic of the group is fractured. If the person (or licensee) responsible for the fracture exercised even a passive choice in causing waste, then punishment of the offender may be required to mend the fabric of the social rules, to restore a sense of balance to the social compact. The more aware a person is that his contemplated action (or inaction) is wasteful, and the more wasteful that it is, the more likely it will be that the act is one of “theft” and that punishment will be deserved.²⁷

Another window on the matter looks through the eyes of a member of the group and asks what expectations he may fairly have concerning his protection by the group from other members. Such a rights perspective must involve at least the expectations that the group will take all “reasonable” steps to protect each member against “theft”—against an unprovoked punch in the nose, against surgery known by

25. See generally Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681, 690, 694 (1980) (duty of members of group to avoid waste).

26. Although it may be that persons should have the right to waste resources belonging solely to themselves, that issue falls outside of the present inquiry.

27. See Owen, *supra* note 25, at 690, 694.

the surgeon to be unnecessary, or against the sale of drugs known by the manufacturer to cause more damage than they cure. To put the matter another way, in exchange for surrendering his own freedom to steal from others, one might well expect the group to provide by law a disincentive against such waste and "theft" by others and to impose a detriment (punishment) on members guilty of such wrongs. Punishment of such offenses might thus be thought to be a fair result of "knowing" damage to the public good, and fairness from this perspective can be seen to run quite close to principles of efficiency as well.

Deterrence and law enforcement for similar reasons appear to be fair objectives for the law. If one now agrees that "theft" or "knowing" waste should be discouraged, then one has made the fairness case for deterrence and law enforcement as well as for punishment. Deterrence looks at theft from a starting point that views the act as wrong, and then considers methods that the group may use to discourage persons from committing such acts. Law enforcement, while including also a strong preventive aspect, includes as well a retrospective side providing retribution for the members and the group who ask that their anti-theft rules be obeyed or, if not, that some commensurate sacrifice be extracted from the thief.²⁸

The preventive goal is a crucial one for an economic justification of punitive damages. Yet whether such awards in fact deter the types of thefts described, and if so the degree of such deterrence, is a monumental problem which to date has received far too little study.²⁹ Professor Ellis' analysis provides a very sound beginning for this type of inquiry, but the issue is so fundamental to punitive damages theory that it requires many years of work by many persons.

Perhaps the isolation of categories, along the lines begun above,³⁰ will provide a helpful starting place. To use the boulder situation, the risk of incurring liability for punitive damages may have little impact on the conduct of the homeowner atop the hill. However, if the risk did alter his behavior, it might be more likely to encourage him more to act carefully in shifting the boulder from one perch to another than to get him to act affirmatively to build a wall below the boulder to protect the little house.³¹ I also believe that the contractor and, perhaps even

28. For a general discussion of the law enforcement function of punitive damages, see Owen, *supra* note 1, at 1287-90.

29. In the products liability context, for example, I have my doubts as to how much of a deterrent effect punitive damages really have. See Owen, *supra* note 1, at 1285-86.

30. See *supra* notes 6-19 and accompanying text.

31. See *supra* text accompanying note 19.

to a greater extent, the stone quarry company, would in general be more sensitive to the deterrent threat of punitive awards than the hill-top homeowner.³² Yet the analysis of these issues needs further treatment which I hope will follow someday soon.

The final goal, compensation, including payment of the victim's costs of litigation (including attorneys' fees), is the easiest objective to state in terms of fairness in a scheme of punitive damages.³³ One might comfortably posit that, once the group has discovered a theft, the stolen resources (or a monetary equivalent) should be returned to the rightful owner—that the thief be forced to make the owner truly "whole." Surely any transaction costs of accomplishing this restoration should not fall upon the rightful owner but should be placed instead upon the thief—to be internalized as one cost of his misbehavior.

For all these reasons, civil punishment (in some amount proportioned to the wrong) appears to accord with the fair expectations of the group on the limits of the use of the power and resources of its members and the consequences of gross abuse.

2. *Efficiency*

Assuming here that punitive damages effectively deter the proscribed misconduct, their use (in properly measured amounts) should in general promote efficiency. This follows from the above conclusion that such assessments are fair largely because they punish knowingly wasteful behavior. Efficiency as well as fairness thus is served by decreasing waste.

Professor Ellis limits the types of cases where efficiency is promoted by punitive damages to three: (1) where liability is less probable than the loss; (2) where legal damages are less in amount than the actual loss; and (3) where the actual loss avoidance costs are less in amount than those perceived by the actor.³⁴ Although I agree that in theory the use of punitive damages in each of these situations (as known beforehand to the actor) may be efficient, I do not see why the case for efficiency should be limited by these categories. Assuming that such damages are shown to deter effectively—to prevent the waste of more resources than are consumed by application of the rule—and as-

32. This is because of my assumption that business enterprises more than private individuals are in general better advised on the legal consequences of their activities.

33. See generally Owen, *supra* note 1, at 1295-97 (punitive damages can help restore plaintiff to emotional and financial position enjoyed before litigation).

34. See Ellis, *supra* note 3, at 25.

suming that punitive damages liability is properly defined and applied, such a remedy should promote efficiency in nearly *every* case.

This conclusion flows from my belief that each of Professor Ellis' categories seems all-inclusive or almost so: none of the categories appears to exclude many, if any, cases. As for the first category, the real-world probability that an actor will be caught and held liable for any loss he causes should always be somewhat less than one. Even the most flagrant breaches of the social order do not *always* result in civil liability being imposed on the actor for the victim's loss. Thus, upon the (admittedly sometimes bold) assumption that punitive damages effectively do deter, no case appears to fall outside of the first category.

The all-inclusiveness of the second category is even simpler to see. For one thing, plaintiffs in this nation are only rarely awarded their litigation costs (including their attorneys' fees).³⁵ Moreover, rarely, if ever, does a defendant pay in damages for truly all the losses caused by his wrongful act. Although today the plaintiff may often receive a judgment sufficient (before attorneys' fees and other costs) to recompense quite fully his resources that were lost, his family, friends, and employer will likely lose certain other resources beyond the scope of law. In addition, the public generally may suffer a sense of fear or demoralization from wrongdoing that is not vindicated beyond requiring payment for the loss. I believe this form of social loss derives much more broadly than from "street crime" offenses alone,³⁶ and includes any type of "theft" of resources of the type described above. If, for example, consumers learn that a leading manufacturer of mouthwash has deceived them concerning the supposed medicinal qualities of the product,³⁷ truthful advertising information may thereafter be less likely to be believed, with a commensurate decrease in the efficiency of the market (and loss of welfare to the public) for goods of at least that type. A wrongdoer virtually never pays in compensatory damages for all the losses he has caused, particularly in cases of extreme wrongdoing for which punitive damages may be awarded.

Finally, the third category appears far broader, if not all-inclusive, than Professor Ellis' description would indicate. A "thief" must almost always perceive a greater benefit from his conduct than would the law. The nose puncher most certainly places a higher value than the law on

35. See RESTATEMENT (SECOND) OF TORTS § 914(1) (1979).

36. Professor Ellis takes a narrower view. See Ellis, *supra* note 3, at 28.

37. Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977) (contrary to the company's advertising, "Listerine will not help prevent colds or sore throats or lessen their severity").

his own emotional cost in constraining his instinctive violence; the doctor who forgets his bleeding patient in the waiting room when the doors are locked on Friday night has placed a higher value than has the law on the cost or trouble of assuring all the time that his patients have been provided with proper care; a manufacturer that fails to test a product for probable hazards from a likely use may have placed a higher value on the costs and trouble saved than might the rules of social economics and the law. And so even category three appears to cover at least most cases of flagrant misbehavior.

In conclusion, if the normal rules of good behavior are themselves defined in terms of cost efficiency, and if the threat of punitive damages will steer persons toward compliance with the rule, then a "proper" amount of punitive damages should be efficient as a general proposition rather than in only limited situations. Yet, these factual assumptions frequently are missing in real cases, and there are serious deficiencies in the formulation of the legal rules—and in their administration—that serve to frustrate the quest for fairness and efficiency in this area of the law.

B. UNCERTAINTY IN DEFINITION AND ADMINISTRATION

The most serious difficulty in translating the theory of punitive damages into practice may well concern the uncertainty that surrounds their use. Uncertainty both in the meaning and in the application of punitive damages "rules" diminishes substantially their fairness as well as their utility, increasing the social costs involved. Professor Ellis has highlighted perhaps the principal causes of the uncertainty problem—the vagueness in the definition of the liability rules³⁸ which, in turn, is exacerbated by the very broad discretion accorded to the jury.³⁹

I share the view that the infliction of punishment upon a person for the commission of a vaguely defined offense normally appears both unfair and inefficient.⁴⁰ In the context of punitive damages, I would be uncomfortable with a standard such as "very bad," "very, *very* bad," or "terribly bad," even though these phrases actually comport quite closely to my intuition as to the type of act that properly calls for a punitive assessment. With the possible exception of the words "outrageous," "malicious," and perhaps "oppressive," the various "bad" formulations just set forth in fact probably define or limit the proscribed

38. See Ellis, *supra* note 3, at 34-37.

39. See *id.* at 37-39.

40. See *Problems*, *supra* note 10, at 36-38; Owen, *supra* note 25, at 695.

misconduct at least as accurately as the often hollow (and sometimes very misleading) words and phrases generally used to describe the misconduct, such as "deliberate," "conscious," "reckless," and "willful and wanton."⁴¹ Although Professor Ellis recognizes that greater verbal certainty regarding the bounds of punitive damages liability is needed, he stops short of proposing specific improvements in the current verbal standards.⁴²

As difficult as the linguistic task may be, some improvement must be made in the choice of words used to define the boundaries of punitive damages liability. As has been seen, a most important generic concept underlying the goals discussed above involves the notion of a gross deviation from the social norm. Phrases such as "flagrant disregard" of the plaintiff's rights and "extreme departure" from the relevant norm thus express quite well this central thread among many of the cases.⁴³

FIGURE 1

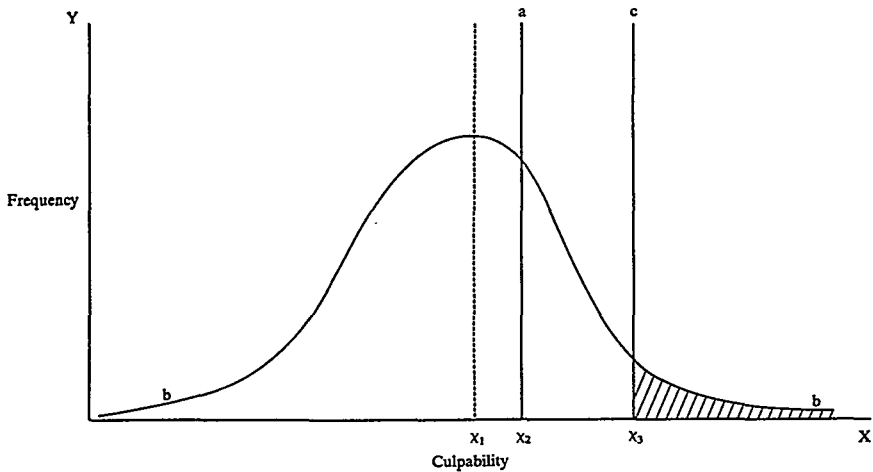


Figure 1 illustrates this point. The horizontal axis, X , represents the culpability scale, beginning at the origin at completely innocent or nonculpable (very roughly "selfless") and moving toward completely culpable (very roughly "selfish") behavior at the right. Equilibrium is set at the point x_2 , where the utility of an act is equal for the individual actor and the group. This point may be assumed as well to be the point of efficiency, and of the underlying rules of law (as in the Hand ap-

41. See *Problems*, *supra* note 10, at 20-26.

42. See Ellis, *supra* note 3, at 51-53.

43. See *Problems*, *supra* note 10, at 20-28.

proach),⁴⁴ where the actor's pursuit of his own welfare is maximized with "due" regard for the welfare of others in the group. The curve itself, however, represents conduct culpability, not efficiency, for an important assumption of this essay is that culpability may be a function of more than efficiency alone. The vertical axis, Y , represents the frequency of the type of conduct in society and for normal individuals over time. The rule of law (for compensatory damages), ax_2 , thus runs through the equilibrium point to optimize the freedom (or welfare) of the individual and of the group. The normal individual and social "action curve" should look something like curve b ; given the assumptions made above. The curve centers at x_1 , rather than x_2 , because of the assumption that most persons try most of the time to maximize their personal welfare within the law rather than at the very point of illegality (where "excess" damage to the group begins).

Punishment becomes appropriate at point x_3 , set at an "extreme" distance from the norm, where the conduct has become clearly flagrant. Action to the right of the cx_3 line may be considered "theft" as that term is used above. The cx_3 line thus defines the form of behavior which may properly support a punitive damage award, which is conduct represented by the shaded area to the right. Between x_2 and x_3 , an actor's conduct will either derive from a good faith mistake or, if known to be wrong, will only be a minor theft for which the payment of compensatory damages will be punishment enough. If in this way only "extreme" and "flagrant" departures from accepted conduct are punished, at least fairness should be improved.

Professor Ellis' suggestion as to the need to specify more carefully the *categories* of misconduct for which punitive damages are in order⁴⁵ is very sound. The various defendant, state of mind, and active/passive classifications discussed above were a modest attempt to begin the formulation of certain categories of this kind. Once the contours of logical categories begin to take shape from further fairness and utility analysis within particular contexts, the choice of words and phrases to define the proscribed misconduct should prove more practicable and more helpful. The word "malicious," for example, is virtually meaningless as applied to passive, institutional failures to consider the implications of their activities, yet the word applies quite well to an individual defendant who deliberately and by affirmative action inflicts harm upon another for no good reason. Categorical definitions of this

44. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

45. See Ellis, *supra* note 3, at 39-53.

type, within generic contexts such as those discussed above, should assist in limiting fairly the scope of activity which is subject to punitive damages.

Efficiency is indeed reduced as legal standards become more vague.⁴⁶ At the very least, I agree that litigation costs are increased by uncertainty in the possibility and amount of punitive damages.⁴⁷ In addition, these costs may also increase from uncertainty in how the evidence and argument on punitive damages will affect the underlying worth of the case on compensatory damages. It would seem as well that efficiency would suffer too as more "innocent" persons suffered punishment from vagueness in the rules, and as more "guilty" ones escaped. Moreover, if one accepts the premise that more persons (and perhaps more institutions) are risk-averse than are risk-takers, uncertainty in this area of the law will reduce the amount of socially useful behavior as it approaches the compensatory liability "line."

III. IMPROVING FAIRNESS AND EFFICIENCY

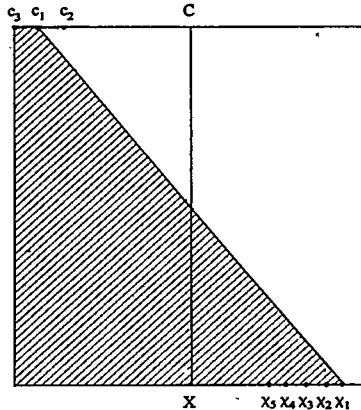
There are at least three ways in which the fairness, and efficiency in some respects, of punitive damages law can be improved. First, as discussed above, precision in defining the standards of misconduct needs to be improved. Second, the courts (or legislatures) need to impose various rules of law to reduce these vagueness costs. Third, there needs to be a significant reallocation of judicial power in this area of the law from the jury to the judge.

46. *See id.* at 43-53.

47. *See id.* at 43-46.

While an extended examination of these three approaches must be deferred, their general effects may be illustrated by reference to Figure 2 below.⁴⁸

FIGURE 2



Culpability decreases from left to right on the horizontal axis, and the line XC separates conduct properly calling for punitive damages (on the left) from that which does not (on the right). The shaded area represents conduct that is in fact subject to punitive damages under the prevailing rules. The system improves in fairness and efficiency with decreases in the unshaded area to the left of XC and in the shaded area to the right. These areas where the legal results are “wrong” are indeed quite large, as Professor Ellis indicates,⁴⁹ because of the significant uncertainty in this area of the law.

The trend toward more expansive use of punitive awards may indeed decrease somewhat the number of guilty persons who escape fair punishment (the unshaded area to the left), but one must recognize as well that there is a commensurate increase in the number of innocent persons who are thereby punished by mistake (the shaded area to the right). The ratio of “innocent” to “guilty” parties punished by expansion of this remedy, at least in products cases, may well be unfairly high.⁵⁰ The remarks that follow, therefore, should be considered

48. Figure 2 is based closely upon the version of Professor Ellis' Figure 5 presented at the Liberty Fund Seminar on Punitive Damages in Atlanta, Georgia on February 12-14, 1982. The earlier form of the figure was retained since it well illustrates this Comment's points.

49. See Ellis, *supra* note 3, at 40-43.

50. For a general discussion of the fairness and logic of applying punitive damages in prod-

against the assumption that fairness in the punitive damages system needs more improvement than efficiency at the present time. Yet efficiency is a crucial goal and should not be permitted to suffer much from efforts to improve the fairness in application of the doctrine.

A. PRECISION IN STANDARDS

Precision in the legal standards of liability should indeed "improve" the system, as discussed above, and hence reduce the area of wrong results. The left ray in Figure 2 should thus shift to c_2 , and the right ray to x_2 .

If one is willing to sacrifice a little efficiency for a little fairness, a "clear and convincing" evidentiary test could be imposed, analogous to the criminal law's higher burden of proof, to assure that close cases are resolved in favor of the accused.⁵¹ At least in the case of institutional defendants, where a jury's bias may often lean toward guilt,⁵² such a standard should serve roughly to balance at least the efficiency scales. This higher burden of proof will serve to relieve some guilty persons of liability, and hence to shift the left ray back perhaps to c_1 , but it also will assure that fewer innocents are wrongly punished, and thereby shift the right ray to x_3 .

B. RULES OF LAW

Another helpful change in the administration of punitive damages law would be to establish rules of law to govern recurring patterns of conduct and the nearly intractable problems in determining the "optimal" amount for such damages in every case. For example, an arbitrary floor might be placed on such awards, guaranteeing the plaintiff full recompense for the costs of litigation, and an arbitrary cap as well.⁵³ The cap for punitive awards might be, for example, the greater of (1) double the compensatory damages, or (2) the costs of litigation plus \$10,000. While some particularly guilty (and wealthy) persons would thereby escape some punishment that was deserved, shifting the left ray to c_3 , that cost, I think, would be at least offset by the increased fairness and efficiency of protecting innocents against undeserved punishment, shifting the right ray to x_4 .

ucts liability cases, see *Crashworthiness*, *supra* note 10; Owen, *supra* note 1, at 1268-77; *Problems*, *supra* note 10, at 15-16, 44-68.

51. See *Problems*, *supra* note 10, at 58-59.

52. See *id.* at 10-12.

53. Cf. *id.* at 48 (suggesting a possible punitive damage limit of \$1,000,000 per plaintiff).

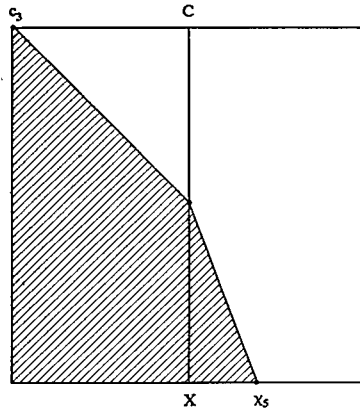
C. REALLOCATING JUDICIAL POWER

A final alteration that should strengthen the system in many respects would be to make a major shift of power from the jury to the judge. Improper claims for punitive damages would thus more likely be screened out at an early stage of litigation—typically on motion for summary judgment—with substantial savings in fairness, litigation costs, and the risk of a final wrong result. Judges have more familiarity than do juries with distinguishing “wrong” from “very wrong” behavior (and fixing the appropriate level of punishment therefor) upon a formal social scale, and judges should have in general less rigid preconceptions that may bias the result. This firmer judicial hold on the punitive damages issue should be made throughout the case, from early pretrial rulings to the final issues on appeal.⁵⁴ While very few more guilty persons would be found liable from this approach, I do not think that many clearly guilty would thereby be let go, and so the left ray in Figure 2 should not shift significantly. There should result, however, a major shift in the right-hand ray, to point x_3 , protecting many innocents from punishment not deserved, with substantial savings in fairness and efficiency alike.

Once reforms of the type sketched above are thought through and put in place, the final punitive damages system should look like Figure 3.

54. See generally *id.* at 50-59 (discussing means of increasing judicial control over punitive damages assessments). For a helpful analysis arguing for tightening judicial control in products liability litigation generally, see Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. REV. 521 (1982).

FIGURE 3



This figure illustrates a scheme where a fair proportion of guilty are permitted to escape, but where the risk of punishing innocents is quite low. While fairness would most clearly benefit from these reforms, efficiency on balance should likely move forward too. This balance seems appropriate for a nation that seeks to accommodate both justice and efficiency, but that casts the final vote for fairness.

CONCLUSION

Fairness and efficiency are slippery notions, and many complex issues lurk deep within. Yet the legal system to be sound must struggle to achieve both goals as much as possible. As the law of punitive damages has been developed and applied, much in both fairness and efficiency has been left aside. Yet the defects in this remedy call not for its general abolition, because it can serve well both fairness and utility. Although these goals could be achieved to some extent, and sometimes better, by a wider application of the criminal law, the public penal law appears to me too rigid, too expensive, and too threatening to our freedoms to expand it further to fill the gap. And so I think that punitive damages are for the best, and that they are here to stay. Many serious problems remain, however, in their definition and application, and one may hope for further efforts at improvement of this important area of the law.

