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PUNITIVE DAMAGES: A CAT'S CLAVICLE IN MODERN CIVIL LAW

Just as the clavicle in a cat only tells us of the existence of some earlier creature to which the collarbone was useful, precedents survive in the law long after the use they once served is at end and the reason for them has been forgotten. It is revolting to have no better reason for a rule of law than that it was so laid down in the time of Henry V. It is still more revolting if the grounds upon which it was laid down have vanished long since and the rule simply exists from blind imitation of the past.

Oliver Wendell Holmes.¹

Punitive damages exist as a cat's clavicle in modern civil law. Courts have blindly adhered to precedent which recognizes punitive damages as recoverable in civil actions. This adherence introduces the criminal remedy of punishment into civil law, inconsistent with the compensatory theory of civil damages. The recent increase in the number and size of punitive awards only accentuates the need to break with precedent and consider alternatives to the current punitive damages system.²

Punitive damage awards have come under greater scrutiny as their amounts and frequency rise to unprecedented levels.³ The doc-

1. Holmes, *Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

2. In *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839-40 (2d Cir. 1967), Justice Henry Friendly discussed the increased allowance of punitive damages in civil law. The court identified two problems with allowing punitive damages in civil actions. First, punitive awards may well surpass the maximum authorized criminal penalties, and exceed the level of civil sanctions which might serve any legitimate purpose. *Id.* at 839. Second, juries do not have at their disposal a meaningful guideline to aid them in their determination of what affect, either punitive or overkill, their judgment might have on the defendant in light of what other juries may subsequently award. *Id.* at 839-40. Consequently, the court explained that it was time for a responsible court to halt the rise in punitive damage awards in the hope that other courts would follow. *Id.*

3. In Cook County, Illinois, the average punitive damages award increased from \$4,000 during 1960-64, to a more than one hundred-fold increase of \$489,000 during 1980-84. M. PETERSON, PUNITIVE DAMAGES: PRELIMINARY EMPIRICAL FINDINGS 11 (1986). In San Francisco, California, during the period of 1980-84 approximately one out of every seven verdicts finding for the plaintiff included a punitive damage award. Geller & Levy, *The Constitutionality of Punitive Damages*, 73 A.B.A. J. 88, 90 (Apr. 1987). Juries in these San Francisco cases awarded punitive damages in more than twenty percent of the verdicts in favor of the plaintiff. *Id.* One source reports that between the years of 1983 to 1985, California juries awarded 38 punitive damage awards which exceeded \$1 million. Tarnoff, *Leap in Punitive Damages Cited*, BUS. INS., Dec. 2, 1985, at 58. In 1985, California courts awarded punitive damages totaling \$242 million. *Id.* See also *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (punitive damages awarded for \$125,000,000). Even these star-

trine of punitive damages, therefore, receives increased attention in treatises and other legal commentary.⁴ Critical commentary is generally limited to constitutional attacks upon punitive damages.⁵ Commentators pose suggested reforms ranging from the abolition of punitive awards,⁶ to a development of increased procedural

tlings sums appear insignificant in light of the \$3 billion punitive award assessed in the Pennzoil/Texaco litigation. Wall St. J., Dec. 11, 1985, at 3, col. 3. The United States Court of Appeals for the Second Circuit, however, recently affirmed a district court's granting of a preliminary injunction to stay the enforcement of the Texas state court's judgment. *Texaco Inc. v. Penzoil Co.*, 784 F.2d 1133 (2d Cir. 1986).

4. Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 143 (1986). In L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* (1984), a comprehensive treatise on products liability law, updated editions have given increased attention to punitive damages. A discussion of punitive damages which first appeared in the 1980 edition was relatively short, totalling 11 pages and citing 30 cases. *Id.* at ch. 10A. The 1987 revision found the discussion of punitive damages totalling 113 pages and citing hundreds of cases. *Id.* at §§8.01-.05 [3]. Additionally, one source cites over 40 recent books and articles which give attention to punitive damages. K. REDDEN, *PUNITIVE DAMAGES* §4.2 (A)(2) (a)-(b) (1985).

5. See Beckman, *Constitutional Issues in Insurance Claim Litigation*, 22 TORT & INS. L.J. 244 (1987) (punitive damages violative of defendant's fourth, fifth, sixth, and eighth amendment rights); Geller & Levy, *supra* note 3, at 89-90 (punitive damages violate eighth amendment's excessive fines clause); Jeffries, *supra* note 4, at 140 (punitive damages violate both eighth and fourteenth amendments); Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233 (1987) (punitive damages violate excessive fines clause of eighth amendment); Schmidt, *The Constitutionality of Punitive Damages: A Challenge for the Judiciary*, 27 FOR THE DEFENSE 20 (Feb. 1985) (punitive damages violative of fifth, sixth, and fourteenth amendments); Note, *The Constitutionality of Punitive Damages under the Excessive Fines Clause of the Eighth Amendment*, 85 MICH. L. REV. 1699 (1987) [hereinafter Note, *Excessive Fines*] (punitive damages violate excessive fines clause of eighth amendment).

6. The Defense Bar has recommended that the doctrine of punitive damages be abolished. Duffy, *Punitive Damages: A Doctrine Which Should be Abolished*, 28 (Def. Research Inst., 1969). The Defense Bar submits the following statute which would abolish the doctrine of punitive damages in its entirety: "*Punitive Damages*. (1) Exemplary or punitive damages shall not be recovered in any civil action. (2) This act shall not apply to causes of action which arise prior to its becoming law. (3) This act shall take effect immediately upon its becoming law." *Id.*

In the absence of complete abolition, the Defense Bar poses an alternative statute which would allow the theory of punitive damages to remain in limited use. However, the money recovered from a punitive award would not be paid to the plaintiff. *Id.* Instead, the state treasury would receive the award for credit towards its education fund. *Id.* That alternative statute provides in pertinent part:

Punitive Damages. (1) All exemplary or punitive damages recovered in any civil action shall be paid into the state treasury for credit of the school fund. (2) The provisions of this act shall not be construed to grant the state or any political subdivision thereof a cause of action to recover exemplary or punitive damages nor may the state or any political subdivision thereof by a party to any action in which punitive or exemplary damages are sought; except, however, the state shall have a right to an action to collect such damages after they are determined payable by the judgment of a court of record. (3) This act shall not apply to a cause of action which arises prior to its becoming law. (4) This act shall take effect immediately upon its becoming law.

Id. For a more complete discussion of the Defense Bar's proposals, see J. GHIARDI & J. KIRCHER, *PUNITIVE DAMAGES LAW AND PRACTICE* § 21.02 (1987). At least one other commentator has argued for the abolition of punitive damages. Sales, *Punitive Dam-*

safeguards.⁷

This comment explores the numerous criticisms of punitive damages, and concludes that courts must abandon the current system of awarding punitive damages. Part I examines the history and development of punitive damages. Part II sets forth the constitutional criticisms of punitive awards. Part III contends that punitive damages, as a quasi-criminal remedy, are inconsistent with a systematic theory of compensatory civil reparation.⁸ Part IV poses the principle of aggravated damages as a suggested reform model in an attempt to satisfy both of these criticisms. Finally, part V provides guidance to Illinois courts and jurors when applying the aggravated damages theory.

I. HISTORICAL PERSPECTIVE

In order to understand the context from which various criti-

ages: *The Doctrine of a By Gone Era*, 1, 4 (Washington Legal Foundation 1984). This commentator argues that the doctrine of punitive damages is "theoretically unsound, legally insupportable, economically unnecessary for plaintiffs, and economically disastrous for both defendant's and innocent consumers." *Id.*

7. The Alliance of American Insurers "Alliance", like the Defense Bar's proposal, suggests a statutory model which would severely limit the availability of punitive damages. *Alliance of American Insurers, Current Issues: Civil Justice*, 1, 70 (Schaumburg, Ill., 1984). That model statute provides in pertinent part:

Proposed Model Legislation - Punitive Damages-Statutory Authorization Required. Sec. 1. As used in this paragraph, "punitive damages" includes exemplary damages. Sec. 2. No common law right to recover punitive damages is available to civil actions. Sec. 3. There is no right to recover punitive damages in any civil action unless such right is provided by statute.

Id.

The Alliance also drafted an alternative statute which would limit the amount recoverable for punitive damages:

Alliance Model Legislation - Punitive Damages - Limitations of Recovery.
 Sec. 1. As used in this paragraph, "punitive damages" includes exemplary damages. Sec. 2. In any civil action where counts for punitive damages are included, or in any separate action for punitive damages, the plaintiff shall have the burden of proving the defendant's liability for such damages beyond a reasonable doubt. Sec. 3. In any civil action the amount of punitive damages shall be an amount not to exceed any one of the following amounts:
 (a) Twenty-five percent of the actual or compensatory damages which the court finds that the plaintiff is entitled to recover exclusive of all costs; or
 (b) \$5,000.
 Sec. 4. No attorney may collect a contingency fee based on any award for punitive damages.
 Sec. 5. Punitive damages can be awarded against a master or other principal because of an act by an agent, only if the principal or a managerial agent of the principal ratified or approved the act.
 Sec. 6. No common law right to recover punitive damages other than as herein provided is available in civil actions.

Id. at 69. For a more complete discussion of other suggested reforms, see *infra* notes 71-74 and accompanying text.

8. Reparation is defined as: "Payment for an injury; redress for a wrong done." BLACK'S LAW DICTIONARY 1167 (5th ed. 1979).

cisms directed against punitive damages have arisen, it is first necessary to explore how the doctrine of punitive damages developed. The use of punitive damages in civil law can be traced back to the Babylonian Code of Hammurabi of 2000 B.C.⁹ In Anglo-American history, the theory of punitive damages arose during the infancy of the English common law, prior to the eventual separation of criminal and civil law.¹⁰

For example, under the Saxon system of law in England, courts did not distinguish between criminal and civil remedies.¹¹ The Saxons compensated all injuries through a system of money payments.¹² The purposes behind these payments were both to compensate the victim's injuries and punish the offender's wrongful conduct.¹³ The Saxon system, while initially quite simple, became increasingly more burdensome and complex.¹⁴ Eventually every injury, including the loss of a toenail, required a specific money payment.¹⁵ As a result,

9. G. DRIVER & J. MILES, *THE BABYLONIAN LAWS* 500-01 (1952); Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1267 n.41 (1976); Sales & Cole, *Punitive Damages: A Relic that has Outlived its Origins*, 37 VAND. L. REV. 1117, 1119 (1984). One commentator also traces the early origins of punitive damages to the Hittite law of 1400 B.C. and the Hindu Code of Manu of 200 B.C. K. REDDEN, *supra* note 4, at § 2.2(A)(1). Moreover, the bible evidences the usage of punitive remedies in Mosaic law which provided for multiple recovery of damages resulting from stealing, adultery, and usury. *Id. See, e.g.*, Exodus 22:1 (King James) ("If a man shall steal an ox, or a sheep, and kill it, or sell it, he shall restore five oxen for an ox, and four sheep for a sheep."); Exodus 22:9 (King James):

For all manner of trespass, whether it be for ox, for ass, for sheep, for raiment, or for any manner of lost thing, which another challengeth to be his, the cause of both parties shall come before the judges; and whom the judges shall condemn, he shall pay double unto his neighbor.

Sales & Cole, *supra* at 1119 n.4.

10. 2 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 43 (7th ed. 1956); Jeffries, *supra* note 4, at 154.

11. Saxon law did not distinguish between criminal and civil law. Massey, *supra* note 5, at 1257. An elaborate system of money payments was used as the sole form of remedy. *Id.*

12. The money payment was classified into three categories known as the *wer*, *wite*, and *bote*. 1 F. POLLACK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 48 (2d ed. 1968). The *Wer* was the monetary value placed on a person's life. *Id.* The *Wite* was a public fine paid to the king or a public officer. *Id.* The *Bote* was compensation for all other injuries. *Id.*

13. Money payments were made to both the victim, or the victim's family, as well as to the King or lord. 2 W. S. HOLDSWORTH, *supra* note 10, at 50-51.

14. The Saxons created new categories of payments such as the *manbote* and *blodwite*. 2 F. POLLACK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 453-58 (2d ed. 1968). The *manbote* was considered compensation paid for murder. J. COWEL, *A LAW DICTIONARY OR THE INTERPRETER OF WORDS AND TERMS* 238 (1727). A *boldwite* was the payment made for shedding or drawing blood. J. COWEL, *supra*, at 116. For a single offense, a wrongdoer had to make compensatory payments to the injured person, while also paying a fine to the king. 2 F. POLLACK & F. MAITLAND, *supra* note 12, at 451.

15. See *LAW OF EARLIER ENGLISH KINGS* 15 (F. Attenborough ed. & trans. 1922) (money payments so detailed as to establish the price of compensation for loss of a toenail). See also 2 F. POLLACK & F. MAITLAND, *supra* note 14, at 451 (every kind of wound had a specific price for compensation).

money payments evolved from a small fee into often times huge awards.¹⁶

The Norman conquest led to the demise of money payments in England.¹⁷ The "amercement"¹⁸ replaced the use of money payments. Like the money payment, the amercement was a singular award which was given while criminal and civil law remained intermingled. In addition, the amercement also served both compensatory and punitive purposes.¹⁹ Contrary to the money payments, however, an amercement would require a wrongdoer to surrender himself and his property to the King. In effect, the offender was put at the mercy of the crown.²⁰ The King would, in turn, determine an appropriate financial sanction, paid both to the victim and the crown, and protect the offender from a victim seeking revenge.²¹

Amercements were initially created to relieve the offender of the heavy burden that existed with the earlier money payment. In theory, the amercement was a less onerous penalty, because the King could proportion the size of the amercement to the severity of the offense.²² Unfortunately, the King and his officers abused the system and arbitrarily assessed amercements.²³ This abuse resulted in a complete failure of the amercement system.²⁴

In 1215, the Magna Carta eliminated the abuse in the use of amercements by imposing two limitations on monarchial power.²⁵

16. One commentator suggests that with the complexity and development of the feudal system, the payments owed became increasingly more burdensome. W. MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 285 (2d rev. ed. 1914). Eventually it became "practically impossible" for a defendant to "buy back the peace once it had been broken." *Id.*

17. Massey, *supra* note 5, at 1251.

18. Amercements are defined as "[a] money penalty, in the nature of a fine, imposed upon an officer for some fault or misconduct, or neglect of duty." BLACK'S LAW DICTIONARY 75 (5th ed. 1979).

19. See Massey, *supra* note 5, at 1259 (amercement both a monetary penalty payable to the king, as well as the judgment paid by a defendant to an injured plaintiff).

20. Massey, *supra* note 5, at 1260.

21. *Id.* at 1261.

22. See *id.* (principle advantage of amercement over money payment was the ability to tailor size of amercement to severity of offense).

23. 2 F. POLLOCK & F. MAITLAND, *supra* note 14, at 524.

24. Massey, *supra* note 5, at 1251.

25. Jeffries, *supra* note 4, at 155. Included within the Magna Carta are some of the earliest Anglo-American expressions of liberty and justice. PLEAS OF THE CROWN FOR THE COUNTY OF GLOUCESTER, 1221 at xxxiv (F. Maitland ed. 1884). In chapter 20 of the Magna Carta, the King was caused to accept that:

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 'merchandize'; 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.

First, the Magna Carta required that amercements be a reasonable and proportionate punishment for an offense.²⁶ The second limitation the Magna Carta imposed required that the penalty resulting from an amercement could not be overly burdensome, or destroy an offender's means of supporting himself.²⁷ Consequently, for the first time in common law history, the Magna Carta required a penalty to be reasonable and tailored to the related offense.²⁸

The amercement was widely used in England until courts began to distinguish criminal and civil remedies. The fine, which arose as a voluntary payment made by an offender to the King to prevent imprisonment,²⁹ replaced the amercement as a means of punishing a criminal wrongdoer.³⁰ In addition, the theory of compensatory damages evolved in civil actions, replacing the amercement as the means of compensating a victim.³¹ The introduction of these theories caused a dramatic decline in the use of amercements during the seventeenth and eighteenth centuries.³² Once the use of amercements waned, English courts began to award punitive damages in common law actions.³³

Three justifications existed for these early English punitive damages awards. First, English courts were reluctant to interfere with English juries' decisions to award excessive damages which had a punitive effect. This reluctance was due in part to the English courts' acknowledgment that juries consisted of local townspeople who were more knowledgeable about the facts of a case than the judge.³⁴ Second, some early courts viewed punitive damages as a way to compensate a plaintiff's intangible injuries of mental pain and suffering, which were not yet recoverable.³⁵ Finally, the courts uti-

W. McKECHNIE, *supra* note 16, at 285.

26. Jeffries, *supra* note 4, at 156.

27. *Id.*

28. *Id.*

29. 2 F. POLLACK & F. MAITLAND, *supra* note 14, at 517; Brief for Petitioner at 7-8, 21, *Kelco Disposal v. Browning-Ferris Indus. of Vermont, Inc.*, 845 F.2d 404 (2d Cir. 1988), *aff'd*, *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 57 U.S.L.W. 4985 (U.S. June 26, 1989) (No. 88-556).

30. See Massey, *supra* note 5, at 1264 (fine replaced amercement as means of punishing a criminal offense).

31. See *id.* at 1265 (common law judges began to permit compensatory damages leading to the decline of amercement's usage).

32. *Id.* at 1264.

33. *Id.* at 1266-67.

34. Duffy, *supra* note 6, at 4.

35. *Id.* at 5; see also J. GHIARDI & J. KIRCHER, *supra* note 6, at § 1.037 (early punitive awards carried both compensatory and punitive purposes). "Smart money" was used as an analogous term for punitive damages. Cole, *Can Damages Properly be Punitive?*, 6 J. MARSHALL L.Q. 477, 478 (1941). The "smarting" nature of the award referred to the plaintiff's suffering because of the willful manner the wrongdoer inflicted the plaintiff's injury. *Id.* at 478-79. The award reflected compensation for mental anguish, insult, or humiliation resulting from a willful, or maliciously caused

lized punitive damages in an attempt to redraft a criminal remedy into a civil proceeding after criminal and civil law had separated.³⁶

The English courts first recognized the availability of punitive damages in the eighteenth century case of *Huckle v. Money*.³⁷ In *Huckle*, the plaintiff sued the King's officers for an illegal trespass, assault, and false imprisonment.³⁸ The court upheld the jury's punitive verdict, and awarded the plaintiff over ten times his actual damages.³⁹

The first American punitive damages verdict was granted by the New Jersey Supreme Court in *Coryell v. Colbaugh*.⁴⁰ The *Coryell* court instructed the jury that they should not estimate damages to compensate an actual injury, but rather should award "damages for *example's sake*."⁴¹ The purpose of the punitive damages in this case was to punish the wrongdoer and to deter others from similar conduct in the future.

By the late twentieth century, a majority of jurisdictions⁴² within the United States agree with the *Coryell* court's justification for punitive damages. In these jurisdictions, the accepted rationale for punitive awards continues to be the concepts of punishment and deterrence.⁴³ Despite the majority view, however, there are eight

injury. *Id.* at 479.

36. Massey, *supra* note 5, at 1265.

37. 95 Eng. Rep. 768 (C.P. 1763).

38. *Id.* at 769.

39. In *Huckel*, the court allowed a jury verdict awarding the plaintiff 300 lbs. for "exemplary damages" when the plaintiff's actual damages amounted to only 20 lbs. *Id.* In *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763), a factually related case, Justice Pratt explained that:

[The] jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.

Wilkes, 98 Eng. Rep. at 498-99.

40. 1 N.J.L. 77 (1791).

41. *Id.* (emphasis supplied by court).

42. J. GHIARDI & J. KIRCHER, *supra* note 6, at § 4.01-.16.

43. Sales & Cole, *supra* note 9, at 1124-25. In at least 38 states, the justification for punitive awards includes both punishment of the wrongdoer and deterring others from similar conduct. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981); *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. 357 (D.C. Pa. 1982) (applying Pennsylvania law); *Pitts v. Kee*, 511 F. Supp. 497 (D. Del. 1981) (applying federal law); *O'Connor v. Keller*, 510 F. Supp. 1359 (D.C. Md. 1981) (applying Maryland law); *Trahan v. Cook*, 288 Ala. 704, 265 So.2d 125 (1972); *Acheson v. Shafter*, 107 Ariz. 576, 490 P.2d 832 (1971); *Ray Dodge, Inc. v. Moore*, 251 Ark. 1036, 479 S.W.2d 518 (1972); *Ford Motor Co. v. Home Ins. Co.*, 116 Cal. App. 3d 374, 172 Cal. Rptr. 59 (1981); *Beebe v. Pierce*, 185 Colo. 34, 521 P.2d 1263 (1974); *Campbell v. Government Employees Ins., Co.*, 306 So.2d 525 (Fla. 1975); *Laver v. Young Men's Christian Ass'n of Honolulu*, 57 Haw. 390, 557 P.2d 1334 (1976); *Beaver v. Country Mut. Ins., Co.*, 95 Ill. App. 3d 1122, 420 N.E.2d 1058 (1981); *Indiana & Michigan Elec. Co. v. Stevenson*, 173 Ind. App. 329, 363 N.E.2d 1254 (1977); *Berenger v. Frink*, 314 N.W.2d 388 (Iowa 1982); *Henderson v. Hassur*, 225 Kan. 678, 594 P.2d 650 (1979); *Bissent v. Goss*, 481

states which either partially or totally prohibit punitive damages.⁴⁴

In contrast to the majority view, three states allow punitive awards under the unique rationality of additional compensation to the plaintiff.⁴⁵ In these three jurisdictions, the term punitive dam-

S.W.2d 71 (Ky. 1972); *Kirschbaum v. Lowrey*, 165 Minn. 233, 206 N.W. 171 (1925); *Standard Life Ins. Co. of Indiana v. Veal*, 354 So.2d 239 (Miss. 1977); *Keenoy v. Sears, Roebuck & Co.*, 642 S.W.2d 665 (Mo. Ct. App. 1982); *Johnson v. Murray*, 201 Mont. 495, 656 P.2d 170 (1982); *Lermgruber v. Claridge Associates, Ltd.*, 73 N.J. 450, 375 A.2d 652 (1977); *Christman v. Voger*, 92 N.M. 772, 595 P.2d 410 (1979); *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 353 N.E.2d 793 (1976); *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 229 S.E.2d 297 (1976); *Arnold v. Wylie*, 20 Ohio App. 10, 157 N.E. 571 (1927); *Hicks v. Herring*, 246 S.C. 429, 144 S.E.2d 151 (1965); *Huckey v. Spangler*, 563 S.W.2d 555 (Tenn. 1978); *City Nat. Bank of Paris v. Haybes*, 614 S.W.2d 605 (Tex. 1981); *Goldsmith's Admin. v. Joy*, 61 Vt. 488, 17 A. 1010 (1889); *F.B.C. Stores, Inc. v. Duncan*, 214 Va. 246, 198 S.E.2d 595 (1968); *Bond v. City of Huntington*, 166 W. Va. 581, 276 S.E.2d 539 (1981); *John Mohr & Sons, Inc. v. Jahnke*, 55 Wis. 2d 402, 198 N.W.2d 363 (1972); *Danculovich v. Brown*, 593 P.2d 187 (Wyo. 1979).

Awards for punitive damages are codified in several states. Punitive awards in these states are also granted for the purpose of punishment and deterrence. *See, e.g.*, NEV. REV. STAT. § 42.010 (1973) (punitive damages in Nevada to punish and deter wrongful conduct); N.D. CENT. CODE § 32-03-07 (1977) (North Dakota allows punitive damages for purposes of punishment and deterrence); OKLA. STAT. ANN. tit. 23, § 9 (1955) (Oklahoma law allows punitive damages to punish and deter wrongful conduct); S.D. CODIFIED LAWS ANN. § 21-3-2 (1967) (punitive damages awarded in South Dakota for purposes of punishment and deterrence).

In Delaware, the rationale for punitive damages is solely to punish the defendant. *Riegel v. Aastad*, 272 A.2d 715 (Del. 1970). In seven states, the rationale for punitive damages is solely to deter others from similar conduct. *See, e.g.* *Alaska Glacier Co. v. Lee*, 553 P.2d 54 (Alaska 1976); *Westview Cemetery, Inc. v. Blanchard*, 234 Ga. 540, 216 S.E.2d 776 (1975); *Gavia v. Hanson*, 101 Idaho 58, 608 P.2d 861 (1980); *Bradley v. Berkshire Mut. Ins. Co.*, 440 A.2d 359 (Me. 1982); *Lewis v. Devil's Lake Rock Crushing Co.*, 274 Ore. 293, 545 P.2d 1374 (1976); *Norel v. Grochowski*, 51 R.I. 376, 155 A. 357 (1931); *Behrens v. Raleigh Hills Hosp., Inc.*, 675 P.2d 1179 (Utah 1983). For a more complete discussion of the rationality for awarding punitive damages see J. GHIARD & J. KIRCHER, *supra* note 6, at §§ 4.13-16.

44. *See Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 106 Wash. 2d 826, 726 P.2d 23 (1986) (punitive damages prohibited unless expressly authorized by statute); *Husted v. McCloud*, 450 N.E.2d 491 (Ind. 1983) (prohibits punitive damage awards where defendant is also subject to criminal prosecution); *Killebrew v. Abbott Laboratories*, 359 So.2d 1275 (La. 1978) (punitive damages only allowed when expressly authorized by statute); *Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 684 (1960) (punitive damages completely prohibited); *City of Lowell v. Massachusetts Bonding & Ins. Co.*, 313 Mass. 257, 47 N.E.2d 265 (1943) (punitive damages not allowed unless expressly authorized by statute); GA. CODE ANN. § 105-2003 (1987) (prohibits punitive damages in cases involving injury solely to plaintiff's peace, happiness or feelings); ILL. REV. STAT. ch. 85, § 2-102 (1986) (prohibits punitive damages against a local public entity or public official); ILL. REV. STAT. ch. 110, § 2-1115 (1985) (prohibits punitive damage awards in legal and medical malpractice actions); N.H. REV. STAT. ANN. § 507.16 (1986) (punitive damage awards completely prohibited).

45. In *Fay v. Parker*, 53 N.H. 342 (1872), the New Hampshire Supreme Court initially expressed its disfavor with the rationale which awards punitive damages to punish or deter. In *Fay*, the court explained that "[t]he idea [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." *Id.* at 382. The court went on to hold, however, that punitive damages may be awarded for the purpose of compensating the plaintiff for the increased injury caused by the defendant's outrageous and willful conduct: "[In] cases where the acts complained of were wanton, malicious, or

ages is a misnomer because the focus of the remedy is not upon punishing the wrongdoer's conduct.⁴⁶ Under the majority view, a jury will consider whether a defendant's conduct warrants *punishing* and *detering* when assessing punitive damages.⁴⁷ In these three states, a jury will also consider the nature of the defendant's conduct when awarding punitive damages. The difference, however, lies in that a jury will assess punitive damages as *additional compensation* for the injured victim's heightened suffering created by the willful, malicious, or outrageous conduct of the defendant.⁴⁸ Since the term punitive damages in this context confuses the actual compensatory purpose of the remedy, this comment will refer to these awards as aggravated damages.⁴⁹

There exists several serious criticisms with the punitive theory of exemplary damages. Many courts and commentators agree that the system of punitive damages should be abandoned or severely reformed.⁵⁰ To point out the necessity for reform this comment will raise a two-prong argument. The first argument considers the issue of whether punitive damages violate constitutional provisions.

II. CONSTITUTIONAL ATTACKS AND SUGGESTED REFORMS

The rationale behind punitive damage awards is premised on the punishment and deterrence of a civil defendant. This logic, however, generates serious constitutional challenges because it interjects fines of a criminal nature into a civil action.⁵¹ These challenges re-

oppressive, the compensatory damages for the resulting actual material loss can be increased to compensate for the vexation and distress caused the plaintiff by the character of defendant's conduct." *Id.* See also *Vratsenes v. N.H. Auto, Inc.*, 112 N.H. 71, 289 A.2d 66 (1972) (punitive damages not recoverable in civil actions, instead, liberal compensatory damages are awarded to compensate victim's aggravated injuries); *Peisner v. Detroit Free Press, Inc.*, 68 Mich. App. 360, 364, 242 N.W.2d 775, 780 (1976) ("exemplary" damages awarded to specifically compensate for the nature of injuries caused by defendant's outrageous conduct).

46. See *Aubert v. Aubert*, 129 N.H. 422, 529 A.2d 909 (1987) (punishment of a civil defendant prohibited, instead, compensatory damages awarded to reflect aggravating circumstances).

47. *Peisner*, 68 Mich. App. at 364, 242 N.W.2d at 780.

48. See *Waterbury Petroleum Products, Inc. v. Canaan Oil & Fuel Co., Inc.*, 193 Conn. 208, 477 A.2d 988 (1984) (punitive damages awarded to compensate plaintiff for expenses of litigation); *Wise v. Daniel*, 221 Mich. 229, 190 N.W. 746 (1922) (exemplary damages awarded to compensate plaintiff for aggravated injuries caused by defendant's outrageous and willful conduct).

49. For a more complete discussion of aggravated damages, see *infra* notes 112-134 and accompanying text.

50. For a discussion of those commentators who urge reform see *supra* notes 6 & 7, and *infra* notes 71-74 and accompanying text.

51. In *Bankers Life & Casualty Co. v. Crenshaw*, 108 S. Ct. 1645 (1988), Justice O'Connor, in her concurrence, expressed some serious reservations with allowing punitive awards in civil actions. Justice O'Connor's attention focused on whether punitive damages violate the due process clause of the constitution. *Crenshaw*, 108 S. Ct. at 1655 (O'Connor, J., concurring). The Judge explained that the arbitrary amounts

veal many inherent flaws within the theory of punitive damages. This comment will utilize three constitutional amendments to formulate an attack against punitive damages; namely, the fifth, eighth, and fourteenth amendments.

A. Fifth Amendment

Two prevalent arguments against awarding punitive damages are based on the fifth amendment. First, the fifth amendment entitles a defendant in a criminal proceeding to procedural due process.⁵² Punitive damages, which punish a defendant rather than compensate a plaintiff's injury, are identical to the purpose of fines in criminal law.⁵³ In both instances, the remedy seeks to punish the

that juries may award for punitive damages creates the basis for a due process concern. *Id.* Justice O'Connor noted specifically that:

Mississippi law give juries discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state. In my view, because of the punitive character of such awards, there is reason to think that this may violate the due process clause. . . . This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process. The Court has recognized that 'vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute.

Id. at 1655-56. Justice O'Connor nevertheless noted that the court should not decide the due process issue in *Crenshaw* because it was not properly raised, or the principle argument appellant submitted to the Court. *Id.* at 1656. While this due process argument may have been decided on the theory that the argument was a "mere enlargement" of the due process arguments raised below, Justice O'Connor concluded that it "would not be prudent" to assert jurisdiction over this issue in this case. *Id.* The Court also declined to decide appellant's eighth amendment issue holding that it too was not properly raised in the proceedings below. *Id.* at 1651.

52. See U.S. CONST. amend. V which provides in pertinent part: "[N]or shall any person be subject to the same offense to be twice put to jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ." *Id.*

53. Grass, *The Penal Dimensions of Punitive Damages*, 12 HASTINGS CONST. L.Q. 241, 242 (1985). This argument would be unpersuasive, however, in jurisdictions which award punitive damages for compensatory purposes. J. GHIARDI & J. KIRCHER, *supra* note 6, at § 3.02. One source has applied the test as set forth by the United States Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), and affirmed in *United States v. Ward*, 448 U.S. 242, *reh. denied*, 448 U.S. 916 (1980) to determine whether punitive damages are penal in nature, therefore requiring criminal procedural safeguards for a defendant. Grass, *supra*, at 245-48.

In *Ward*, the Court presented a two-tiered test to determine whether to activate procedural safeguards when presented with a statute which allows for punitive awards. First, the Court will consider whether the legislature either expressly or impliedly intended the statute's purpose to be criminal or civil in nature. 448 U.S. at 248. If the Court finds that the legislature's intent appears to have enacted the statute to serve a civil purpose, it will then determine whether "the statutory scheme [is] so punitive either in purpose or effect as to negate that intention." *Id.* at 248-49. This question of legislative intent is answered by an examination of whether the sanction has a punitive effect which cannot be justified by any remedial purpose. If the effect is punitive without a remedial purpose, the penalty will be viewed as criminal in nature. *Id.* at 249; Grass, *supra*, at 246.

The *Kennedy* Court addressed this purpose and effect consideration. In *Ken-*

wrongdoer.⁵⁴ Therefore, punitive damages should activate the same criminal procedural due process safeguards under the fifth amendment, which are available to a defendant in a criminal proceeding.⁵⁵

The second reason punitive awards violate the fifth amendment is that an award for punitive damages may subject a defendant to double jeopardy.⁵⁶ For example, a defendant will stand trial twice if

nedey, the Court enunciated seven factors to determine whether a statute should be considered so punitive in effect as to qualify as a form of criminal punishment. 372 U.S. at 168-69. The Court set forth the factors as:

- [1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as punishment, [3] whether it comes into play only on a finding of *scienter*, [4] whether its operation will promote the traditional aims of punishment-retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned.

372 U.S. at 168-69. Any single factor of the *Kennedy* test may be conclusive to the Court's determination. Grass, *supra*, at 247. For example, the *Ward* Court utilized only the fifth factor presented in *Kennedy* in its analysis of a penalty's effect. *Ward*, 448 U.S. at 249-50.

Various commentators have contended that under the tests, as set out in *Ward* and *Kennedy*, courts must view traditional punitive damages awards as penal "in nature, spirit, and jurisprudence." Grass, *supra*, at 247. The sources conclude, therefore, that criminal procedural safeguards must be provided under the fifth amendment. *Id.* See also Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269 (1983) (punitive damages are criminal in substance, requiring criminal procedural protections granted under fourth, fifth, and sixth amendments); Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U. L. REV. 1158 (1966) [hereinafter Note, *Imposition of Punishment*] (like criminal fines, punitive damages perform functions of general deterrence, special deterrence, and retribution); Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408 (1967) [hereinafter Comment, *Criminal Safeguards*] (punitive damages awarded for purposes of punishment and deterrence, require that a defendant be provided constitutional procedural protections). For a complete application of the *Kennedy* and *Ward* tests to punitive damages, see Grass, *supra*, at 248-313.

54. Grass, *supra* note 53, at 247.

55. Courts should afford at least two criminal procedural safeguards to a punitive damages defendant under the fifth and sixth amendments. First, the fifth amendment protects a defendant in a criminal action from self-incrimination. U.S. CONST. amend. V. A criminal defendant shall, therefore, not be required to be a witness against himself. In a civil action, a defendant routinely is required to testify regarding matters which may establish liability. Schmidt, *supra* note 5, at 21. Second, under the due process clause of the fifth amendment, in addition to the protections of the sixth amendment, the standard of evidence required to convict a defendant in a criminal action is proof beyond a reasonable doubt. *Id.* This standard of evidence is more scrutinizing than proof by a preponderance of the evidence standard which is required to establish liability in a civil action. *Id.* In order to justify an imposition of punitive damages in a civil action, a plaintiff must establish beyond a reasonable doubt that the offender engaged in conduct warranting a punitive award. *Id.*

56. Beckman, *supra* note 5, at 251-53. The prohibition against double jeopardy has historically applied only to subsequent criminal proceedings. See *North Carolina v. Pearce*, 395 U.S. 711 (1969) (double jeopardy protection applies to solely subsequent criminal proceedings seeking punishment for one singular offense). Several courts, therefore, have held that the rule against double jeopardy is inapplicable in a civil action which seeks punitive damages. See, e.g., *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. 357 (E.D. Pa. 1982); *Grimshaw v. Ford Motor Co.*, 119 Cal. App.

accused of the same act in both a criminal proceeding and a civil action. If the civil proceeding includes a claim for punitive damages, the defendant may be punished twice for one offense. This duplicate punishment, through punitive damages and a criminal conviction, violates the fifth amendment protection against double jeopardy.⁵⁷

3d 757, 174 Cal. Rptr. 348 (1981); *E.F. Hutton & Cos., Inc. v. Anderson*, 42 Colo. App. 497, 596 P.2d 413 (1979); *cf.* *In re Northern Dist. of Cal. "Dalkon Shield" I.U.D. Prod.*, 526 F. Supp. 887 (N.D. Cal. 1981) (multiple punitive awards not double jeopardy, but do violate fundamental fairness guaranteed by due process clause). One commentator has argued that in order for a defendant to be assured protection against double jeopardy, the defendant must establish that punitive damages are criminal in nature. K. REDDEN, *supra* note 4, at § 7.2(A)(1).

57. This double jeopardy argument was most successful in Indiana where the courts had traditionally held that the possibility of a criminal action bars a subsequent civil action seeking punitive damages. *Taber v. Hutson*, 5 Ind. 322 (1854). In *Taber*, the Indiana Supreme Court explained its position on whether punitive damages subject a defendant to double jeopardy:

The constitution declares, that 'no person shall be twice put in jeopardy for the same offense;' and though that provision may not relate to the remedies secured by civil proceedings, still it serves to illustrate a fundamental principle inculcated by every well-regulated system of government, viz., that each violation of the law should be certainly followed by one appropriate punishment and no more.

Id. at 325. The Indiana legislature has, however, recently responded to the "Taber" rule. Specifically, the legislature reversed its state's prior position by enacting a statute which holds that the rule of double jeopardy will not bar a subsequent civil action seeking punitive damages. IND. CODE ANN. § 34-4-30-1 (West 1986). For a complete discussion of this recent Indiana statute, see Note, *Punitive Damages for Crime Victims: New Possibilities for Recovery in Indiana*, 18 IND. L. REV. 655 (1985).

A majority of jurisdictions allow for punitive awards against a civil defendant who is also a defendant in a criminal action for the same offense. For a list of caselaw from these jurisdictions, see J. GHIARDI & J. KIRCHER, *supra* note 6, at § 3.02 n.3. Some scholars present three arguments to justify punitive damages awards in light of a double jeopardy attack. First, many jurisdictions rely upon the "great weight of authority" or *stare decisis* to support awards of punitive damages. J. GHIARDI & J. KIRCHER, *supra* note 6, at § 3.02 n.4. Second, the court's attention has focused on the nature of the proceeding. Generally, courts apply protection against double jeopardy in solely subsequent criminal proceedings. *E.F. Hutton & Co., Inc. v. Anderson*, 42 Colo. App. 497, 596 P.2d 413 (1979). A subsequent civil action, therefore, will not cause the defendant to be subject to double jeopardy. *Anderson*, 42 Colo. App. at 499, 596 P.2d at 415.

The response to this position counters by arguing that to rely upon the nature of the proceeding rather than the nature of the remedy, as a basis for interpreting the constitution's double jeopardy provision, would be violative of the spirit and intent of the fifth amendment. J. GHIARDI & J. KIRCHER, *supra* note 6, at § 3.03. *See also* *Boyer v. Barr*, 8 Neb. 68 (1878) (punitive damages subject defendant to double jeopardy); *Fay v. Parker*, 53 N.H. 342 (1872) (punitive damages violate spirit of fifth amendment protection against double jeopardy); *Austin v. Wilson*, 58 Mass. 273 (1849) (punitive damages violate defendant's fifth amendment right to not be subject to double jeopardy).

The final justification for rejecting the double jeopardy argument is based upon the theory that in a criminal action the wrong done is directed against the state or general public. However, in a civil action the wrongful act is directed against the plaintiff or private individual. J. GHIARDI & J. KIRCHER, *supra* note 6, at § 3.02. The courts maintain that the civil action does not cause the defendant to be subject to double jeopardy because the two actions are separate and concurrent proceedings. *Id.* For a list of jurisdictions and case law which adheres to this view, see *Id.* at n.6.

B. Eighth Amendment*

The eighth amendment provides that an individual shall not be subject to excessive fines.⁵⁸ Courts should find excessive punitive awards unconstitutional and in violation of the eighth amendment.⁵⁹ In fact, the historical origins of the eighth amendment's excessive fines clause demonstrates that the clause was not intended solely to avoid excessive criminal fines, but rather, to also assure proportionality in civil punishment.⁶⁰

Courts disregard this clear intent, however, choosing instead to reject the historical origins of the eighth amendment. Traditionally, courts focus on the nature of the proceeding, holding that eighth amendment protection applies only to criminal proceedings.⁶¹ When

The response to this position contends that any right to inflict a penalty against a defendant belongs to the public in a criminal proceeding. *Id.* at § 3.03. The plaintiff in a civil action should not, therefore, be permitted to the windfall of a punitive award because such right of punishment belongs solely to the state. Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1196 (1931). Punitive damages do not reflect an award of compensation for an injury received by the plaintiff which is the sole right of recovery in a civil action. *Id.*

* As this issue went to print, a sharply divided United States Supreme Court ruled that punitive damages may not violate the excessive fines clause of the eighth amendment. *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 57 U.S.L.W. 4985 (U.S. June 26, 1989) (No. 88-556). While this holding negates much of the constitutional attacks arising under the eighth amendment, the decision does not close the door on the issue of whether punitive damages are unconstitutional. In fact, the opinion seems to invite further attacks framed under the fourteenth amendment. *Id.* at 4990. Consequently, the issue of whether punitive damages are constitutional will most likely be litigated for several years to come.

58. See U.S. CONST. amend. VIII which provides in pertinent part: "[E]xcessive bail shall not be required, nor excessive fines imposed." *Id.*

59. *Bankers Life & Casualty Co. v. Crenshaw*, 108 S. Ct. 1645, 1654-56 (1988) (O'Connor, J., concurring); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828-29 (1986). The *Lavoie* Court passed on the issue of whether punitive damages constitute excessive fines under the eighth amendment. Nevertheless, the Court noted the issue's importance and the necessity that, when raised in the proper setting, the issue be resolved. *Lavoie*, 475 U.S. at 828-29. The *Lavoie* Court remanded that case to the Alabama Supreme Court. *Id.* at 829. On remand, two justices from the Alabama Supreme Court addressed the eighth amendment issue. One justice held that the United States Supreme Court would soon expressly consider the issue. *Aetna Life Ins. Co. v. Lavoie*, 505 So. 2d 1050, 1059 n.1 (Ala. 1987) (Maddox, J., concurring specially). The other justice accepted the argument that punitive damages may violate the excessive fines clause of the eighth amendment. *Id.* at 1060-61 (Houston, J., concurring specially). Several commentators have also considered whether punitive damages violate the eighth amendment. *E.g.*, Jeffries, *supra* note 4 (repetitive punitive damages award violate the eighth amendment and the requirement of due process of law).

60. Note, *Excessive Fines*, *supra* note 5, at 1702. For a complete discussion of the historical antecedents to the eighth amendment's excessive fines clause, see Massey, *supra* note 5, at 1240-64.

61. Brief for Petitioner at 7-8, 21, *Kelco Disposal, Inc. v. Browning-Ferris Indus. of Vermont, Inc.*, 845 F.2d 404 (2d Cir. 1988), *aff'd*, *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 57 U.S.L.W. 4985 (U.S. June 26, 1989) (No. 88-556). See *Ingraham v. Wright*, 430 U.S. 651 (1977) (eighth amendment protections apply solely to criminal proceedings).

determining whether eighth amendment protection is warranted, courts should heed the intentions of the framers and consider the broader issue of whether a punitive award is penal in nature and disproportionate to the related offense.⁶² The eighth amendment functions as a guarantee that any form of punishment, civil or criminal, must be proportionate to the severity of the offense.⁶³ An excessive punitive award, therefore, is in violation of the eighth amendment of the United States Constitutional.⁶⁴

C. Fourteenth Amendment

Punitive damages also violate protections afforded under the fourteenth amendment. The due process clause of the fourteenth amendment requires laws to provide clear guidelines to notify individuals of what constitutes punishable conduct.⁶⁵ Statutes which provide for punitive awards are unconstitutionally vague and violate the due process clause of the fourteenth amendment.⁶⁶ This argument rests upon the standards juries utilize to determine whether a defendant has exhibited conduct which justifies a punitive award.⁶⁷ Among the jurisdictions, there are numerous standards of liability for punitive damages.⁶⁸ These various standards themselves consist

62. Note, *Excessive Fines*, *supra* note 5, at 1702-03.

63. *Id.* at 1702.

64. *Id.* at 1702-03.

65. See *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (due process requires that standard which merits punishment be clearly defined to notify an individual of what conduct warrants punishment).

66. *Beckman*, *supra* note 5, at 258-60; *Schmidt*, *supra* note 5, at 21. In *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the Court explained that the void for vagueness rule requires laws to provide clear standards for what constitutes punishable conduct. *Id.* at 108. The Court set forth two reasons why courts should not enforce laws which are unconstitutionally vague, explaining:

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Id. at 108-09.

67. *Beckman*, *supra* note 5, at 259.

68. Prosser has commented on what conduct generally merits a punitive award. W. KEETON, PROSSER & KEETON ON TORTS § 2, at 9-10 (5th ed. 1984). The noted scholar explains that in order to award punitive damages, the wrongdoer's conduct must be aggravated by circumstances of outrage, malice, fraudulent or evil intent, or conscious and deliberate conduct classified as willful and wanton. *Id.* Mere negligence is generally not sufficient to warrant a punitive damages award. *Id.* This well accepted definition of what conduct merits punitive damages is clearly not precise in

of vague, imprecise, and overlapping definitions of what conduct merits a punitive award. As a result, juries are provided insufficient guidelines to determine liability. Because these standards are unconstitutionally vague, they deprive individuals of their right to due process of law, as guaranteed by the fourteenth amendment of the United States Constitution.⁶⁹

D. Reform Models

Courts may employ various reform models to satisfy the constitutional criticisms directed against punitive damages. These reforms range from a complete abolition of punitive damages⁷⁰ to a variety of procedural protections. One procedural protection is to bifurcate the issue of liability for the underlying offense, from liability for punitive damages. The punitive damage issue is then adjudicated under different procedural standards.⁷¹

nature. The jurisdictions which allow punitive damages exhibit even more diverse guidelines for the assessment of punitive awards. For a complete discussion of the standards employed by the jurisdictions to determine whether to award punitive damages, see J. GHIARDI & J. KIRCHER, *supra* note 6, at § 5.01.

69. In *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Cal. App. 3d 381, 202 Cal. Rptr. 204 (1984), the court applied the void for vagueness rule to the awarding of punitive damages holding that the guidelines used to assess punitive damages are inadequate. 155 Cal. App. 3d at 388, 202 Cal. Rptr. at 208. Specifically, the court explained:

The process through which a fact finder finds punitive damages is somewhat contradictory. On the one hand, the court or jury must be sufficiently disturbed to conclude the defendant must be punished. On the other hand, although outraged, the factfinder cannot be vindictive. The channeling of just the correct quantum of bile to reach the correct level of punitive damages is, to put it mildly, an unscientific process complicated by personality differences. Conduct which one person may view as outrageous another may accept without feeling, depending on such diverse characteristics as an individual's background, temperament and societal concerns. The process is further complicated by the lack of objective criteria from either the Legislature or the courts as to 'how much' is necessary to punish and deter.

Id. Cf. *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1060-64 (D.N.J. 1989) (multiple awards of punitive damages for same conduct violates due process clause of fourteenth amendment.).

70. For a complete discussion of those commentators who support the abolition of punitive damages, see *supra* notes 6 & 7.

71. Generally, parties may not split a cause of action and try it in various parts. Federal Rules of Civil Procedure and various state procedural rules, however, allow for bifurcation of trial issues where it is necessary to further justice, convenience, or to avoid prejudice. FED. R. CIV. P. 42 (b). For a list of various state statutes which provide for bifurcation of trial issues, see J. GHIARDI & J. KIRCHER, *supra* note 6, at § 21.02.

Parties may accomplish several purposes by bifurcation of trial issues in cases involving punitive damages. First, defendants are granted different procedural safeguards when the issue of punitive damages is tried. Wheeler, *supra* note 53, at 321. Second, bifurcation of issues would reduce the parties' litigation costs and the case load of the already burdened courts. *Id.* For a further discussion of bifurcation of trial issues in claims involving punitive damages, see J. GHIARDI & J. KIRCHER, *supra* note 6, at §§ 12.01-13.

In addition to bifurcation, courts may require a higher standard of evidence in order to establish liability for punitive damages.⁷² Another suggested reform includes allowing the court, instead of the jury, to determine liability and the appropriate measure of punitive damages.⁷³ Still another theory involves imposing legislative or judicial caps on the amount recoverable for punitive damages.⁷⁴ These various reforms seek to cure the constitutional attacks

72. Commentators often argue, in conjunction with bifurcation of trial issues involving punitive damages, that a defendant is entitled to various procedural safeguards. One such safeguard is the imposition of a higher standard of evidence in claims involving punitive damages. Courts should impose the criminal standard of proof beyond a reasonable doubt in an action involving punitive damages. For a discussion urging courts to utilize the reasonable doubt standard in punitive damages actions, see *supra* note 55 and accompanying text. A minority of state legislatures and courts raise the standard of evidence required to establish liability for punitive damages. These states utilize a clear and convincing standard of evidence, in an apparent compromise to ensure a defendant's procedural rights while not overburdening a plaintiff to establish liability for punitive damages. *Acosta v. Honda Motor Co. v. Mull*, 717 F.2d 828 (3rd Cir. 1983); *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675 (1986); *Tuttle v. Raymond*, 494 A.2d 1353 (Me. 1985); *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349 (Ind. 1982); *Gavica v. Hanson*, 101 Idaho 58, 608 P.2d 861 (1980); *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437 (1980); *Town of Jackson v. Shaw*, 569 P.2d 1246 (Wyo. 1977). A few states have statutorily required an imposition of the clear and convincing standard in cases seeking a punitive award. *E.g.*, CAL. CIVIL CODE § 3294 (a) (1987) (California law requires clear and convincing standard to establish claim for punitive damages); IND. CODE § 43-4-34-2 (1984) (clear and convincing evidence required in Indiana to establish liability for punitive damages); MINN. STAT. ANN. § 549.30 (1983) (Minnesota law requires plaintiff to show, by clear and convincing evidence, defendant liable for punitive damages); OR. REV. STAT. § 30.925 (1981) (in Oregon a plaintiff must show, by clear and convincing evidence, that defendant is liable for punitive damages). See also Owen, *Civil Punishment and the Public Good*, 56 S. CAL. L. REV. 103, 118-19 (1982) (argues for clear and convincing standard of evidence); Note, *Criminal Safeguards*, *supra* note 52 (defendant in action seeking punitive damages should be afforded clear and convincing standard of evidence). If punitive damages amount to a quasi-criminal penalty, however, the proffered standard of evidence to satisfy constitutional muster remains the beyond a reasonable doubt standard of proof. Sales & Cole, *supra* note 9, at 1167.

73. Several commentators argue in favor of taking the determination of punitive damages from the jury. See, e.g., Sales & Cole, *supra* note 9, at 1167-68 (determination of liability and measure of punitive damages should be reserved for court, rather than jury); Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37, 60-61 (1983) (court, rather than jury, should determine amount of punitive damages award); Note, *The Punitive Damage Class Action: A Solution to the Problem of Multiple Punishment*, 1984 U. ILL. L. REV. 153, 160-62 (1984) (court, rather than jury, should determine amount of punitive award). For a complete discussion of this suggested reform, see Sales & Cole, *supra* note 9, at 1167-68.

74. Both courts and commentators argue for establishing a maximum level of recoverable punitive damages. See *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 840 (2d Cir. 1967) (Justice Friendly posed the suggestion that punitive damages awards in mass litigation be limited to \$5,000 to \$10,000). The California legislature introduced a bill (A.B. 600) in 1979 which would have limited the amount of recoverable punitive damages in a products liability action to \$1 million dollars or ten percent of the defendant's net worth. *The Recorder*, Feb. 28, 1979, at 12, col. 8. A House Resolution posed in 1981 would have limited a plaintiff's punitive damages recovery to the lesser of twice the compensatory damages or \$1 million dollars. H.R. 5212, 97th

directed against punitive damages. None of these reforms, however, address the second argument this comment raises against the doctrine of punitive damages, which is that punitive awards violate the compensatory theory at the foundation of civil remedies.

III. COMPENSATORY THEORY OF CIVIL DAMAGES

Courts must abandon the use of punitive damages in order to maintain clarity between the roles of criminal and civil laws. The criminal remedy of punishment and the civil remedy of compensation should remain separate and distinct. The theory of punitive damages, therefore, is legally insupportable because punishment in a civil action violates the compensatory theory at the foundation of all civil remedies.

It is a basic premise of civil law that damages awarded to an individual should represent compensation for injuries suffered.⁷⁵ An injured person should be placed, as near as possible, into the condition she would have been in had the injury not occurred.⁷⁶ A victim in a civil action who suffers physical pain, emotional suffering, or any other cognizable injury, has a legitimate claim to compensation for her injuries.⁷⁷ It does not follow, however, that an injured person should have a right to inflict punishment upon the offender in a civil action.

A fundamental distinction between compensatory and punitive remedies is that a jury assesses compensatory damages in accord with how much a plaintiff should be paid to compensate her injuries.⁷⁸ However, a jury assesses punitive damages by determining how much a defendant should be punished for her wrongful conduct.⁷⁹ Therefore, a punitive award grants the plaintiff a windfall profit at the expense of punishing the defendant because punitive

Cong., 1st Sess. (1981). The cap on punitive damages may be accomplished either statutorily or judicially. Note, *Mass Liability and Punitive Damages Overkill*, 30 HASTINGS L.J. 1797, 1804-05 (1979). For a complete discussion of the statutory and judicial reform models to cap punitive awards, see Wheeler, *supra* note 53, at 298-300, 302-03, 314-20.

75. 2 GREENLEAF ON EVIDENCE § 253, at 235 n.2 (13th ed. 1876); W. KEETON, PROSSER & KEETON ON TORTS § 2, at 7 (5th ed. 1984); Cole, *supra* note 37, at 475; Hall, *Interrelation of Criminal Law and Torts*, 43 COLUM. L. REV. 753, 756-60 (1943); Note, *Tuttle v. Raymond: An Excessive Restriction Upon Punitive Damages Awards in Motor Vehicle Tort Cases Involving Reckless Conduct*, 48 OHIO ST. L.J. 551, 556 n.46 (1987).

76. C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 137, at 560 (1935).

77. Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CALIF. L. REV. 773, 775 (1985).

78. See *Cassell & Co. Ltd. v. Broome*, 1 All E.R. 801, 839 (1972) (compensatory damages are assessed to make plaintiff whole; punitive damages assessed to punish wrongdoer).

79. *Id.*

damages fail to reflect compensation for an actual injury.⁸⁰

Punitive damages have been allowed in civil actions as an exception to the rule of compensation.⁸¹ However, merely because precedent recognizes punitive damages as recoverable does not warrant their continued use. As the law changes over time, the purpose that a doctrine once served may cease to exist.⁸² In such instances, reconsideration of the effect and application of a rule of law is warranted.⁸³ The rationale for not permitting punitive recoveries in a civil proceeding flows from the modern distinctions between the purposes and remedies of civil and criminal law.

Crimes violate public law, while tortious conduct violates private rights.⁸⁴ Simply stated, a crime is a wrong committed against the public,⁸⁵ while a tort is a wrong committed against a person.⁸⁶ A crime does not, therefore, require injury or damage to a specific individual.⁸⁷ The function of criminal law is to protect the interests of society by maintaining established standards of conduct. Therefore, criminal law protects society's interests through the remedies of punishment and deterrence.⁸⁸ Unlike civil punitive awards, criminal fines do not compensate an injured victim. Instead, fines are awarded to benefit the public at large.⁸⁹

The right to punish wrongful acts belongs solely to society because it is only the violation of society's standards which has histori-

80. Note, *Imposition of Punishment*, *supra* note 53, at 1162.

81. See Grass, *supra* note 53, at 242 (punitive damages an anomaly in tort law, punishing rather than compensating plaintiffs). See also Cole, *supra* note 35, at 480 (punitive damages inconsistent with rationale of civil damages because establishment of liability requires assessment of wrongdoer's state of mind, and allowing private individual to punish defendant).

82. Beckman, *supra* note 5, at 246.

83. In *Williams v. Illinois*, 339 U.S. 235 (1970), the United States Supreme Court explained that merely because precedent has followed a legal doctrine, does not mean that as society changes, there can not be a departure from a once followed rule of law. *Id.* at 239-40. In *Williams*, the Court invalidated a long held practice of extending a prison term for incarceration when a criminal is not able to pay fines or court costs. *Id.* In so holding, the Court explained:

[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack. . . . The need to be open to reassessment of ancient practices other than those explicitly mandated by the Constitution is illustrated by the present case since the greatly increased use of fines as a criminal sanction has made non-payment a major cause of incarceration in this country.

Id.

84. W. BLACKSTONE, COMMENTARIES, Bk. III, 2; Bk. IV, 5 (1803).

85. Walther & Plein, *Punitive Damages: A Critical Analysis: Kirk v. Combs*, 49 MARQ. L. REV. 369, 383 (1965).

86. *Id.* For instance, it is a crime, but not a tort, for an individual to unlawfully sell firearms. See ILL. REV. STAT. ch. 38, ¶ 24-3 (1987).

87. See *id.*

88. Walther & Plein, *supra* note 85, at 382-83.

89. Note, *Excessive Fines*, *supra* note 6, at 1704; cf. Seltzer, *supra* note 73, at 43 (punitive damages, unlike criminal fines, are payable to injured victim).

cally justified punishment and deterrence.⁹⁰ Because the right to punish belongs to society, prosecution which seeks punishment in a civil action should not be left to a private plaintiff. Therefore, an individual should be precluded from seeking punitive damages in a civil action.⁹¹ Some commentators, however, contend that society has a protectable interest in civil actions which may warrant the use of punitive damages.⁹²

In tort law, only a victim injured by the "fault" of a defendant will receive compensation.⁹³ Arguably, fault is a violation of society's established standards of conduct.⁹⁴ If the fault is particularly wrongful, society may justifiably seek to impose sanctions in a civil action to punish the wrongdoer and deter others from similar conduct.⁹⁵ However, this argument only further confuses the roles of civil and criminal law.

Civil remedies seek to compensate an injury and not to punish wrongful conduct.⁹⁶ In a civil action, it is the private individual that has suffered injury, not society.⁹⁷ Moreover, if a defendant has violated the laws of society, then criminal law is better developed and equipped to redress society's interest in punishing the defendant's wrongful conduct.⁹⁸ If no criminal law is available to provide a basis

90. Walter & Plein, *supra* note 85, at 382-83.

91. See Brandwen, *Punitive-Exemplary Damages in Labor Relations Litigation*, 29 U. CHI. L. REV. 460, 467 (1962) (plaintiff has no legal right to punitive damages).

92. See SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 39 (1947) (interests of society and victim justifiably blend together to merit punitive awards when wrongdoer's conduct is malicious, willful, or outrageous); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 522 (1957) [hereinafter Note, *Exemplary Damages*] (no need for rigid distinctions between criminal and civil remedies).

93. Note, *Exemplary Damages*, *supra* note 92, at 523. Even in torts which do not require fault to find liability, damages are awarded on sound public policy grounds. *Id.* at n.52.

94. *Id.* at 523.

95. One commentator has argued that "all offenses affect the community, and all offenses affect the individual," explaining that society has an interest in protecting a victim from the tortfeasor, F. AUSTIN, LECTURES ON JURISPRUDENCE 282 (4th ed. 1875). In addition, French law allows civil and criminal remedies to be brought contemporaneously in the same proceeding. Specifically, French law provides that criminal penalties may be assessed in conjunction with an award of compensatory damages in a civil action. Miller, *Modernization of Criminal Procedure*, 9 J. AM. JUD. SOC'Y 135 (1926); Walther & Plein, *supra* note 85, at 382; Note, *Exemplary Damages*, *supra* note 92, at 522-23. At least one commentator has argued that criminal sanctions should be permitted, rather than punitive damages, in product liability actions. Comment, *Punitive Damages in Mass Tort Litigation: Fround v. Celotex Corp.*, 32 DE PAUL L. REV. 457, 477-79 (1983).

96. See *supra* note 75 for a list of authorities holding that purpose of civil damages is compensation not punishment.

97. See Cole, *supra* note 35, at 482 (defendant's oppressive or malicious conduct causes injury to plaintiff and not society as a whole).

98. See Ford, *The Constitutionality of Punitive Damages*, 15 (Def. Research Inst., 1969) (criminal law better equipped to protect society's interests in retribution and deterrence of wrongful conduct); Long, *Punitive Damages: An Unsettled Doc-*

for punishing the wrongdoer, then the correct response is to enact applicable criminal laws. Courts should not utilize civil law with its compensatory purpose, however, in an attempt to create a basis for punishment. Therefore, because society has not suffered, and existing criminal laws may provide sufficient remedies, punishment in a civil proceeding is entirely without justification.⁹⁹ However, punitive damages may have once served a justifiable purpose in civil law.

In early common law, courts permitted punitive damages to compensate an injured victim for intangible injuries which were not yet recognized as recoverable.¹⁰⁰ Courts allowed the injured party to receive additional compensation under the heading of punitive damages because of the harsh rule that actual damages did not encompass intangible injuries.¹⁰¹ For example, in *Lunch v. Knight*¹⁰² the English court held that the intangible injury of mental pain and suffering was not recoverable.¹⁰³ The *Lunch* court reasoned that while an actual injury had occurred, the law could not value, nor could a jury estimate, what amount to award as fair compensation for mental pain.¹⁰⁴

Courts no longer accept this view of intangible injuries. Today, the scope of compensatory damages continues to increase as judges and jurors recognize that various intangible injuries warrant compensation.¹⁰⁵ In modern civil law, courts recognize that the intangible injuries of insult, fear, humiliation, and mental suffering may be considered as part of the plaintiff's compensatory damages.¹⁰⁶ The

trine, 25 *DRAKE L. REV.* 870, 889 (1975-76) (criminal law best suited to protect society's interests in punishing and deterring wrongful conduct).

99. Assuming punitive damages are justified in civil actions to protect society's interest, one must ask why fines are the only form of punishment allowed? For instance, should a defendant also be subject to incarceration if the true goal of punitive remedies in civil actions is to efficiently punish and deter wrongful conduct? Possibly the severity of incarceration points out that punishment must be reserved for criminal law. See Cole, *supra* note 35, at 480 (incarceration in civil actions disappeared from use in civil actions centuries ago). However, can one conclude that a multi-million or even billion dollar punitive award in a civil action is any less severe a punishment than incarceration? See *Pennzoil/Texaco* litigation, Wall. St. J., Dec. 11, 1985, at 3, col. 3 (trial court awarding \$3 billion in punitive damages). Simply because punitive damages seem a less offensive or shocking remedy than incarceration in civil actions, should not mean they are more legally defensible. Punitive damages still represent an insupportable intermingling of criminal and civil remedies.

100. Sales & Cole, *supra* note 9, at 1121-22; Walter & Plein, *supra* note 85, at 370-71; Comment, *Zen and the Art of Exemplary Damages Assessment*, 72 *KY. L.J.* 897, 900 (1983-84) [hereinafter Comment, *Damages Assessment*].

101. Sales & Cole, *supra* note 9, at 1121-22.

102. 9 H.L.C. 577, 11 Eng. Rep. 854 (1861).

103. 9 H.L.C. at 598.

104. *Id.*

105. Sales & Cole, *supra* note 9, at 1122. This source recognizes that modern civil law compensates a variety of intangible injuries ranging from mental pain and suffering to loss of consortium. *Id.*

106. See *Fry v. Dubuque & S.W. Ry. Co.*, 45 *IOWA* 416, 417 (1877) (intangible

courts reason that emotional suffering is no harder for a jury to determine and compensate, than physical pain which civil law already considers compensable.¹⁰⁷

It is not uncommon for civil judgments today to include compensation for injuries that were at one time non-compensable.¹⁰⁸ Accordingly, the rationale that punitive damages compensate otherwise non-compensable injuries ceases to exist. It has been said, "It is a well settled maxim of the common law that where the reason of a law ceases to exist, that the law itself ceases with the reason."¹⁰⁹

The doctrine of punitive damages should be abandoned for three reasons. First, punitive damages violate a defendant's fifth, eighth, and fourteenth amendment rights.¹¹⁰ Second, punitive awards reflect a criminal remedy of punishment and deterrence. Therefore, punitive damages are unacceptably inconsistent with the compensatory theory of civil remedies. In order to insure a clear and sensible application of the law, the civil theory of damages should remain distinct from existing criminal remedies, and systematic in its compensatory scheme. Finally, willful or outrageous conduct, which traditionally warrants an award of punitive damages, may also give rise to unique intangible injuries which courts have not yet recognized as compensable.¹¹¹ Courts should compensate a victim's unique injuries which may result from the defendant's outrageous conduct.

The principle of aggravated damages presents the best reform alternative to the current system of punitive damages. Aggravated damages cure the constitutional attacks by removing from civil law the punitive nature of exemplary damages. In addition, aggravated damages fully compensate an injured party for all of the individual's intangible injuries.

IV. AGGRAVATED DAMAGES

In 1964, the English courts formally recognized the principle of aggravated damages in *Rookes v. Barnard*.¹¹² In *Rookes*, the House

injury of mental pain and suffering recoverable in civil action); *Craker v. Chicago N.W. R.R. Co.*, 36 Wis. 657, 678 (1875) (intangible injuries of insult, fear, and humiliation recoverable as part of plaintiff's compensatory damages).

107. *Craker*, 36 Wis. at 678.

108. *Sales & Cole*, *supra* note 9, at 1122.

109. *McKinney v. People of Illinois*, 7 Ill. 540, 550 (1845).

110. For a more complete discussion of how punitive damages violate a defendant's fifth, eighth, and fourteenth amendment rights, see *supra* notes 52-69 and accompanying text.

111. For a more complete discussion of the unique intangible injuries created by malicious or outrageous conduct, see *infra* notes 112-134 and accompanying text.

112. 1 All E.R. 367 (1964).

of Lords severely limited the availability of punitive damages.¹¹³ In their place, English law adopted aggravated damages. The court explained that aggravated damages are *not* intended as a form of *punishment* for the defendant's willful or outrageous conduct.¹¹⁴ Instead, aggravated damages are awarded as additional *compensation* to the injured party.¹¹⁵ An award of aggravated damages reflects actual damages based upon a determination of the plaintiff's physical and mental suffering.¹¹⁶ Aggravated damages will be awarded when the plaintiff suffers injury as a result of the defendant's willful or outrageous conduct.¹¹⁷ Aggravated damages are intended to compen-

113. *Id.* at 410-11. The court set out three circumstances which would warrant the use of punitive damages. *Id.* First, where public officials engage in oppressive, arbitrary or unconstitutional acts. *Id.* at 410. Second, where the defendant's conduct was calculated to make a profit for himself in excess of the compensation payable to the plaintiff. *Id.* at 410-11. The court explained that this category was not limited to solely financial gain, but also extends to punish a defendant's conduct motivated to unlawfully acquire real or personal property. *Id.* The purpose of punitive awards in this instance is to teach the wrongdoer that "tort does not pay." *Id.* Finally, the court allowed punitive damages where expressly authorized by statute. *Id.*

The court explained its decision by noting that in most instances, where the focus of punitive damages is placed on the defendant's conduct characterized as willful or malicious, the defendant's acts will also be punishable under criminal law. *Id.* at 412. The three exceptions which the court carved out, however, are not punishable under English criminal law. *Id.* Specifically, the court explained:

[A]ssaults and malicious injuries to property can generally be punished as crimes, whereas the objectionable conduct in the categories in which I have accepted the need for exemplary damages are not, generally speaking, within the criminal law and could not, even if the criminal law was to be amplified, conveniently be defined as crimes. I do not care for the idea that in matters criminal an aggrieved party should be given an option to inflict for his own benefit punishment by a method which denies to the offender the protection of the criminal law.

Id. The *Rookes* court held that in these exceptions it may be justifiable to introduce into civil law the quasi-criminal remedy of punitive damages. *Id.* at 410.

114. *Id.* The *Rookes* court explained that punitive damages are an anomaly in civil law, confusing the functions of civil and criminal law. *Id.* at 407. Aggravated damages are awarded not to punish a defendant, but rather, to compensate the plaintiff. *Id.*

115. *Id.* The court reasoned that the purpose of aggravated damages is to compensate the plaintiff for the injury to the plaintiff's dignity and pride. *Id.* The plaintiff's injury results from the malicious and outrageous character of the defendant's conduct. The court explained its reasoning in the following terms:

[I]t is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing the appropriate compensation

Id.

116. *Id.* See Friedman, *Punitive Damages in Tort*, 48 CAN. B. REV. 371, 379 (1970) (aggravated damages are actual damages, unlike punitive damages, which are fictional or judicial damages, awarded to indicate court or jury's displeasure with defendant's conduct).

117. *Rookes*, 1 All E.R. at 407.

sate the plaintiff's injury resulting from a heightened sense of outrage, insult, fear, or humiliation from having suffered an outrageous and willfully caused injury.¹¹⁸

A minority of American jurisdictions adhere to a view of punitive damages which is similar in theory to the English doctrine of aggravated damages.¹¹⁹ In *Veselenak v. Smith*,¹²⁰ the Michigan Supreme Court expressed its view on exemplary¹²¹ or aggravated awards.¹²² The *Veselenak* court explained that aggravated damages are awarded in cases where the plaintiff suffers humiliation, outrage, and indignation because of the defendant's conduct characterized as willful, malicious, and in disregard of the plaintiff's rights.¹²³

Similarly, in *Vratsenes v. N.H. Auto, Inc.*,¹²⁴ the New Hampshire Supreme Court explained its theory of aggravated damages.¹²⁵ In *Vratsenes*, the court held that punitive damages should be prohibited because they are awarded for the purpose of punishment and deterrence.¹²⁶ The court explained that only compensatory damages are permitted in a civil action.¹²⁷ Nevertheless, the court held that where the wrongdoer's conduct is wanton, malicious, or oppressive, a jury may award damages in order to specifically compensate the victim for the aggravating circumstances of the defendant's conduct.¹²⁸

The theory of aggravated damages is supported by logic and human experience. If a person carelessly and unintentionally strikes

118. *Id.* See also 12 HALSBURY'S LAW OF ENGLAND 1189, at 472-73 (3rd ed.) (aggravated damages awarded to compensate plaintiff's wounded feelings caused by defendant's malicious, insulting, or aggressive behavior); Friedman, *supra* note 116, at 379 (aggravated damages awarded as actual damages intended to compensate for physical or mental suffering). In *Cassell & Co., Ltd. v. Broome*, 1 All E.R. 801 (1972), the House of Lords affirmed its position on aggravated damages as announced in *Rookes. Id.* at 830. Other commonwealth countries, however, have declined to accept the aggravated damages doctrine. See *Australian Consol. Press, Ltd. v. Uren*, 1 A.C. 590 (P.C.), 3 All E.R. 523 (1969) (Australia rejects aggravated damages); *McElroy v. Cowper-Smith & Woodman*, 62 D.L.R.2d 65 (1967) (Canada declines to accept the aggravated damages doctrine); *Greville v. Wiseman*, N.Z.L.R. 795 (1967) (New Zealand rejects aggravated damages).

119. For a further discussion of the United States minority position on exemplary damages, see *supra* note 45 and accompanying text.

120. 414 Mich. 567, 327 N.W.2d 261 (1982).

121. Courts in Michigan distinguish exemplary from punitive damages. *Association Research & Dev. Corp. v. CNA Fin. Corp.*, 123 Mich. App. 162, 333 N.W.2d 206 (Mich. App. 1983). Michigan permits exemplary damages for the purpose of compensation. *Association Research*, 123 Mich. App. at 171, 333 N.W.2d at 211. Michigan law prohibits punitive damages awarded for the purpose of punishment. *Id.*

122. *Veselenak v. Smith*, 414 Mich. 567, 68-69, 327 N.W.2d at 263, 64.

123. *Id.*

124. 112 N.H. 71, 289 A.2d 66 (1972).

125. 289 A.2d at 67.

126. *Id.* at 67-68.

127. *Id.* at 68.

128. *Id.*

us, we suffer injury. This injury may cause physical or mental pain. Our sense of indignation, fear, or humiliation, however, will be low in comparison to when an individual maliciously and willfully strikes us. An individual's sense of outrage and indignation from a willful injury can be significantly greater.¹²⁹ A compensatory award should reflect this additional suffering. Aggravated damages are intended to compensate this unique injury of heightened insult, fear, or humiliation.¹³⁰

When an individual suffers an injury as a result of a willful act, they may also experience feelings of anger and vengefulness.¹³¹ These emotions create a "loss of equilibrium"¹³² which can traumatize a person's life. A plaintiff who is enraged or experiencing a deep desire for revenge, rather than insulted or humiliated by a defendant's outrageous or malicious conduct, also deserves additional compensation to restore them to their original emotional condition.¹³³ Loss of equilibrium, therefore, is an additional intangible injury that juries may recognize and compensate through aggravated damages.¹³⁴

Aggravated damages as a reform model achieve two purposes. First, aggravated damages do not violate the constitution. Aggravated damages, by their very nature, are not a form of punishment. Therefore, aggravated damages do not require criminal procedural safeguards,¹³⁵ subject a defendant to double jeopardy,¹³⁶ or amount to excessive fines in violation of the eighth amendment.¹³⁷ Second, aggravated damages are awarded for the purpose of compensation so they remain consistent with the compensatory theory of civil damages.¹³⁸ Thus, aggravated damages eliminate the constitutional chal-

129. See *Ledbetter v. Brown City Sav. Bank*, 141 Mich. App. 692, 696, 368 N.W.2d 257, 262 (Mich. App. 1985) (permitting award to compensate plaintiff's outrage, mortification, humiliation, and indignity caused by defendant's outrageous conduct, in addition to sum already awarded to compensate for mental suffering).

130. For a more complete discussion of the compensatory purpose of aggravated damages, see *supra* notes 112-129 and *infra* notes 131-134 and accompanying text.

131. Comment, *Damages Assessment*, *supra* note 100, at 906.

132. "Loss of equilibrium" is a term of art which refers to an injury to the plaintiff resulting from the experience of severe anger and vengefulness. *Id.* at 906 n.59. A plaintiff may experience discomfort and debilitation as a result of vengeful and spiteful feelings caused by a defendant's outrageous or malicious conduct. *Id.* at 907.

133. *Id.* at 906-07.

134. *Id.* at 907.

135. For a discussion of criminal procedural safeguards required when punitive damages are awarded, see *supra* notes 52-55 and accompanying text.

136. For a discussion of whether punitive damages subject a defendant to double jeopardy, see *supra* note 56 & 57 and accompanying text.

137. For a discussion of whether punitive damages violate the eighth amendment's excessive fines clause, see *supra* notes 58-64 and accompanying text.

138. For a more complete discussion of the compensatory purpose of aggravated damages, see *supra* notes 112-134 and accompanying text.

lenges against punitive damages yet allow recovery for a specific harm.

For these reasons, aggravated damages present a vastly superior alternative to the current system of punitive damages. It is only left to consider how the theory of aggravated damages may function when adopted. This comment will use Illinois as a representative jurisdiction to consider how courts and jurors can utilize the doctrine of aggravated damages.

V. APPLICATION IN ILLINOIS

Illinois currently allows punitive damages¹³⁹ for the purpose of punishment and deterrence.¹⁴⁰ The standard of conduct which warrants punitive damages is, "actual malice, deliberate violence or oppression, or the defendant acts willingly, or with such gross negligence as to indicate a wanton disregard of the rights of others."¹⁴¹ If Illinois adopted the theory of aggravated damages, courts should require plaintiffs to plead and prove two elements in order to establish aggravated injuries; namely, conduct and injury.

First, Illinois should require a plaintiff to plead and prove a requisite conduct which merits aggravated damages. Illinois may continue to utilize its current standard for punitive damages,¹⁴² or it may adopt a standard utilized by either the English court,¹⁴³ or an American state which currently permits aggravated damages.¹⁴⁴ A plaintiff, under either standard, must initially plead and prove that the defendant's conduct merits an aggravated damages award.

Not every plaintiff who is injured due to mere negligence suffers mental pain and suffering. Only those plaintiffs that can establish a mental injury are compensated for their pain and suffering.¹⁴⁵ Likewise, jurors should not award aggravated damages in every case in

139. *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978).

140. 74 Ill. 2d at 177, 384 N.E.2d at 359.

141. *Id.*

142. *See supra* note 141 and accompanying text for Illinois' required standard of conduct to warrant punitive damages.

143. England permits aggravated damages in instances where the defendant's conduct can be characterized as willful or outrageous. *Rookes*, 1 All E.R. at 407.

144. Michigan permits exemplary damages when a defendant's conduct can be characterized as voluntary, malicious, willful and wanton, or demonstrates reckless disregard for the plaintiff's rights. *Veselenak*, 414 Mich. at 570, 327 N.W.2d at 264. New Hampshire permits aggravated damages when the defendant's conduct amounts to wanton, malicious or oppressive behavior. *Vratsenes v. N.H. Auto, Inc.*, 112 N.H. 71, 73, 289 A.2d 66, 68 (1972).

145. *See Woodill v. Parke Davis & Co.*, 79 Ill. 2d 26, 402 N.E.2d 194 (1980) (complaint alleging strict products liability failed to state cause of action for emotional distress or establish mental suffering); *Swanson v Swanson*, 121 Ill. App. 2d 182, 257 N.E.2d 194 (1970) (emotional suffering compensated only where defendant's conduct actually precipitates emotional pain).

which the defendant's conduct is characterized as outrageous, willful, or malicious. A plaintiff seeking aggravated damages must, therefore, also plead and prove that the defendant's outrageous conduct was the proximate cause of the plaintiff's aggravated injuries.¹⁴⁶ Only after a plaintiff has satisfied both of these elements, should a jury award aggravated damages.¹⁴⁷

In the case of an intentional tort such as battery, Illinois law currently allows a jury to assess punitive damages.¹⁴⁸ Under this system, a punitive remedy is awarded to the plaintiff in order to punish the defendant for his wrongful conduct.¹⁴⁹ The punitive damages amount is usually quite severe so that the award has a punitive effect.

The following illustrates the dramatic economic effect aggravated damages can have on civil judgments. A defendant intentionally and maliciously commits a battery, shooting the plaintiff at close range. A jury assesses compensatory damages in the amount of \$500,000. In this example, a jury may conceivably award punitive damages for as much as two-times the plaintiff's actual damages or one million dollars.¹⁵⁰

146. See *Birkenshaw v. City of Detroit*, 110 Mich. App. 500, 313 N.W.2d 334 (1981) (damage to feelings of tavern owner needed for exemplary damages).

147. A jury deciding whether aggravated damages should be awarded, must have adequate guidelines to make its determination. Illinois courts may utilize the following suggested jury instruction to aid a jury in its decision:

Aggravated damages are awarded to compensate the plaintiff for the effect of the way in which the injury was inflicted:

(a) if you find that the defendant's conduct may be characterized as willful and wanton;

(b) and, if you find that the defendant's conduct was the proximate cause of intangible injuries for which the plaintiff should be, but has not been compensated;

(c) then, you may determine a monetary figure which would compensate the plaintiff for those injuries.

Comment, *Damages Assessment*, *supra* note 100, at 915-16.

In F. SACKETT, *INSTRUCTIONS IN JURY TRIALS* 328 (2d ed. 1888), the following has been posed as a guideline for instructing juries on aggravated damages in cases involving assault and battery:

That, in an action of assault and battery, the insult and indignity inflicted upon a person, by giving him a blow with anger, rudeness or insolence, constitute an element of damages. And in this case, if the jury believe, from the evidence, that the defendant committed an assault upon the plaintiff, as charged in the declaration, then the jury, in assessing damages, may consider, as an aggravation of the wrong, the mental suffering and mortification of feeling of the plaintiff, arising from the insult and indignity of the defendant's blow.

Id.

148. See *Hough v. Mooningham*, 139 Ill. App. 3d 1018, 487 N.E.2d 1281 (1986) (\$30,000 punitive damage award for assault and battery with shovel).

149. See *Kelsay*, 74 Ill. 2d at 177, 384 N.E.2d at 359 (Illinois awards punitive damages for the purposes of punishment and deterrence).

150. See *Douglas v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985) (punitive damages amounting to \$1.5 million awarded in privacy action for publication of

A jury, applying the aggravated damages doctrine, may grant aggravated damages in this case. Unlike punitive damages, however, aggravated damages would make up only a fraction of the plaintiff's total compensatory damages. The aggravated award in this instance would specifically compensate the unique and particular injury of fear, insult or humiliation resulting from the defendant's willful and malicious act. Consequently, while the exact amount of damages remains for the jury to determine, the aggravated damages would undoubtedly be far less than two-times the actual damages award. It is quite reasonable to estimate that the aggravated award would not surpass \$100,000, thus making the plaintiff's total compensatory damages in this case \$600,000.

Accordingly, aggravated damages serve to compensate the plaintiff for their full and complete actual damages in cases where an injury is caused by willful or outrageous conduct. Moreover, aggravated damages do not carry the disastrous economic effect of current punitive awards.¹⁵¹ This result is a fair and reasonable balance between a plaintiff's right to complete compensation, and a defendant's right to not be punished in a civil action.

nude photos without consent of model); *Stambaugh v. Int'l Harvester Co.*, 106 Ill. App. 3d 1, 435 N.E.2d 729 (1982) (\$750,000 in punitive damages awarded in products liability action against manufacturer of defective tractor). *See also* *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565 (6th Cir. 1985) (punitive damages amounting to \$1.5 million awarded in products liability action against manufacturer of asbestos-containing insulation product); *Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152 (10th Cir. 1981) (\$3 million in punitive damages awarded for fraudulent actions of brokerage firm); *Bemer Aviation, Inc. v. Hughes Helicopter, Inc.*, 621 F. Supp. 290 (D.C. Pa. 1985) (\$1 million in punitive damages awarded in products liability action against manufacturer of defective helicopter); *O'Gilvie v. Int'l Playtex, Inc.*, 609 F. Supp. 817 (D.C. Kan. 1985) (punitive damages amounting to \$1.3 million awarded in products liability action against manufacturer of tampons); *Hasson v. Ford Motor Co.*, 185 Cal. Rptr. 654, 650 P.2d 1171 (1982) (\$4 million in punitive damages awarded in products liability action against manufacturer of defective automotive brake); *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187 (Colo. 1984) (punitive damages amounting to \$6.2 million awarded in products liability action against manufacturer of defective intrauterine device); *Plains Resources, Inc. v. Gable*, 235 Kan. 580, 682 P.2d 653 (1984) (\$1 million in punitive damages awarded against oil drilling contractor for intentional sabotaging of oil well); *Deltan Drilling Co. v. Cruz*, 707 S.W.2d 660 (Tex. Ct. App. 1986) (\$6 million in punitive damages awarded against employer for failure to inspect elevator).

151. *See* *Cadillac Vending Co. v. Haynes*, 156 Mich. App. 423, 402 N.W.2d 31 (1987) (reversing \$10,000 aggravated damages award for tortious interference with contract relations); *Ledbetter v. Brown City Sav. Bank*, 141 Mich. App. 692, 368 N.W.2d 257 (1985) (\$50,000 in aggravated damages assessed for intentional infliction of emotional distress); *Ray v. City of Detroit, Dep't. of St. Ry.*, 67 Mich. App. 702, 242 N.W.2d 494 (1976) (\$2,500 aggravated damages awarded for injuries sustained by assault and battery). In New Hampshire, a jury does not assess a separate aggravated damage award. Instead, a jury will grant "liberal" compensatory damages which reflect, in part, compensation for the plaintiff's aggravated injuries. *See* *Aubert v. Aubert*, 129 N.H. 422, 529 A.2d 909 (1987) (liberal compensatory damages of \$343,000 awarded in intentional tort action brought by husband against wife who shot husband in face from close range resulting in severe and permanent injuries).

CONCLUSION

The current system of punitive damages must be abandoned. Punitive damages violate a defendant's fifth, eighth, and fourteenth amendment rights. In addition, punitive damages create an unacceptable inconsistency within the compensatory theory of civil law. Aggravated damages cure these defects in the punitive damages doctrine. Furthermore, aggravated damages, unlike punitive damages, are not awarded as a windfall profit to the plaintiff at the expense of unjustifiably punishing the defendant. Instead, aggravated damages afford injured parties fair compensation for the intangible injuries they may suffer as result of the defendant's willful or outrageous conduct. Accordingly, all courts are urged to follow the lead of a minority of American jurisdictions and the House of Lords, in abandoning the doctrine of punitive damages, replacing such awards with aggravating damages.

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