The Future of Punitive Damages After *Browning-Ferris Industries v. Kelco Disposal*

I. INTRODUCTION

In *Browning-Ferris Industries v. Kelco Disposal*,[1] the United States Supreme Court upheld against an eighth amendment challenge a jury award of six million dollars in punitive damages, despite the fact that the award was one hundred twenty times larger than the compensatory damages awarded in the case.[2] The Court's opinion, however, left open other questions concerning the constitutionality of punitive damages.[3] The most notable of these open questions is whether the vast discretion given to juries to award punitive damages violates the due process clause.[4] This term, the Court heard arguments on that issue, in a case which could lead to a dramatic change in the use of punitive damages.[5]

Concern about the constitutionality of punitive damage awards is rooted in the perception of both the legal community and the general public that such awards are becoming excessive and counterproductive.[6] The extremely high economic and social costs of unusually disproportionate punitive damage awards raise the issue of what limitations can and should be placed on jury awards of this type. This Note argues that the answer lies in interjecting the protections of the due process clause into the awarding of punitive damages, in order to curtail the unbridled discretion currently held by the jury.

Part II of this Note will examine the recent *Browning-Ferris* decision in some detail. It will explore the majority opinion's analytical and historical approach as well as highlighting the arguments of Justice O'Connor's dissent that may provide a foundation for the necessary change in the punitive damages law. Part III will discuss the underlying principles and theories of punitive damages and present the social and economic impact of high jury awards. Part IV will analyze a due process challenge to an award of punitive damages under the "void for vagueness" doctrine and propose a variety of devices to correct the infirmities. In conclusion, this Note will briefly discuss the likelihood of success of a due process challenge in the Supreme Court or at trial.

---

1. 109 S. Ct. 2909 (1988).

2. *Id.* For the amounts of the damages, *see infra* note 12 and accompanying text.

3. *Id.* at 2923 (Brennan, J., concurring).

4. *Id.* at 2924-25 (O'Connor, J., dissenting). The other open questions include whether the eighth amendment reaches actions in which the government prosecutes or has any right to share in the proceeds and whether a *qui tam* action would implicate the eighth amendment. *Id.* at 2914, 2920.

5. Pacific Mut. Life Ins. Co. v. Haslip, 553 So. 2d 537 (Ala. 1989), *cert. granted*, 110 S. Ct. 1780 (1990). The Court heard oral arguments on October 3, 1990. 59 U.S.L.W. 3307 (Oct. 23, 1990.)

6. *See* Sheehy, Lazare & Lindseth, *Punitive Damages, Uncertainty and Regulating First Party Insurer Conduct*, in BAD FAITH LITIGATION AND INSURER VS. INSURER DISPUTES (PLI) 145, 148 (1988); Geller & Levy, *The Constitutionality of Punitive Damages*, 73 A.B.A. J., Dec. 1987, at 88. *See also infra* text accompanying notes 63-78.

II. THE *BROWNING-FERRIS* DECISION

A. *Facts of the Case*

In an antitrust claim filed in Vermont, Browning-Ferris Industries (BFI) was found in violation of section 2 of the Sherman Act for engaging in predatory price cutting and interference with Kelco Disposal, Inc.'s contractual relations.[7] Joseph Kelley, a former employee of Browning-Ferris, had started a competing waste disposal business, Kelco, and carved a niche into BFI's business in Burlington.[8] BFI then aggressively sought to run Kelley out of business, telling its sales force to "[s]quish him like a bug."[9]

BFI was also found liable on a state law claim of interference with contractual relations.[10] The jury was instructed to award punitive damages on the state law claim if they found by clear and convincing evidence that BFI's conduct " 'revealed actual malice, outrageous conduct, or constituted a willful and wanton or reckless disregard of the plaintiff's rights.' "[11] The jury found BFI liable on both counts, awarding Kelco only $51,146 in compensatory damages on the federal and state claims combined but $6,000,000 in punitive damages.[12] The district court denied BFI's post-trial motions for remittitur, new trial, and judgment notwithstanding the verdict, and awarded Kelco $153,438 in treble damages and $212,000 in attorney's fees under the antitrust claim, or in the alternative, $6,066,082.74 in compensatory and punitive damages on the state law claim.[13] The Second Circuit affirmed the decision on both liability and damages.[14] The Supreme Court granted certiorari based on the punitive damages issue.[15]

B. *The Supreme Court Decision*

The Court, by a seven to two majority, affirmed the lower court's decision. Justice Blackmun authored the majority opinion, which held that the eighth amendment's prohibition on excessive fines did not apply to awards of punitive damages in a civil case.[16] The majority did not reach the issue of whether such

---

7. *Browning-Ferris*, 109 S. Ct. at 2913.

8. *Id.* at 2912-13.

9. *Id.* The shocking language revealed by BFI's internal memoranda makes it easier to understand the harsh reaction of the jury. In addition to the aforementioned quotation, BFI's sales force was instructed to " '[d]o whatever it takes' . . . to put Kelco out of business and told if 'it meant give the stuff away, give it away.' " *Id.* at 2912. However understandable the jury reaction may be, it also dramatically demonstrates the risks of such unfettered discretion. *See infra* notes 116-28 and accompanying text.

10. *Id.*

11. *Id.* No punitive damages were awarded on the federal claim. The Sherman Act provides that the victorious plaintiff "shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee." 15 U.S.C. § 15 (1987). This is one approach to limiting excessive punitive damage awards. *See infra* notes 143-45 and accompanying text.

12. *Browning-Ferris*, 109 S. Ct. at 2913.

13. *Id.* This alternative was due to the limitations of the Sher man Act on damage awards. *See supra* note 11.

14. Kelco Disposal, Inc. v. Browning-Ferris Indus., 845 F.2d 404, 411 (2d Cir. 1988).

15. Browning-Ferris Indus. v. Kelco Disposal, Inc., 488 U.S. 980 (1988).

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

an award violated the due process clause, as the issue was not properly preserved on appeal.[17] Justice Brennan, joined by Justice Marshall, filed a concurring opinion, specifically leaving open the due process issue.[18] Justice O'Connor, joined by Justice Stevens, filed a dissent arguing that the award did violate the eighth amendment.[19] O'Connor's dissent also expressly left open the due process issue.[20]

1. *The Majority Opinion*

Justice Blackmun began his analysis with an examination of the historical purposes of the eighth amendment. The amendment's primary purpose was to place limits upon the prosecutorial power of the government.[21] The amendment reads, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[22] For the purposes of this case, Justice Blackmun focused on the excessive fines clause. The clause was a result of the abuse of the thirteenth-century practice of amercements, "payable to the crown after a legal action,"[23] and has its origins in the Magna Carta.[24] The amercements clause of the Magna Carta prohibited payments to the crown which were not proportionate to the wrong, or were so high as to deprive the party of his livelihood.[25] In *Browning-Ferris*, the petitioners argued that large punitive damage awards were the functional equivalent of amercements.[26] When viewed in the context of the social and economic costs that such awards exact,[27] these payments violate the Magna Carta antecedents of the eighth amendment, and thus should be stricken.[28]

The majority, opting for a formalistic rather than a more pragmatic approach, rejected this argument.[29] Justice Blackmun, noting that both the eighth

---

17. *Id.* at 2921 n.23. Failure to properly preserve this issue is a recurring problem in punitive damage appeals, and poses a substantial barrier to a judicial resolution of the due process issue. *See infra* note 98 and accompanying text.

18. *Id.* at 2923. Justice Brennan's language strongly suggests that the Court would be receptive to the argument proposed by this Note. "I for one would look longer and harder at an award of punitive damages based on such skeletal guidance than I would at one situated with a range of penalties as to which responsible officials had deliberated and then agreed." *Id.* See *infra* Part IV for a discussion of due process issues.

19. *Browning-Ferris*, 109 S. Ct. at 2924.

20. *Id.* Justice O'Connor was the first member of the Court to recognize the constitutional infirmities of the present system. *See* Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 86 (1988) (O'Connor, J., concurring). Justice Scalia joined in that opinion, and at oral argument seemed quite interested in the due process issue. *See* Jeffries & Freeman, *Constitutional Issues in Punitive Damages Litigation: an Agenda for Defense Counsel*, FOR THE DEF., Jan., 1989, at 9, 15.

21. *Id.* at 2915. *See also* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833); Weems v. United States, 217 U.S. 349, 371-72 (1910).

22. U.S. CONST., amend. VIII.

23. *Browning-Ferris*, 109 S. Ct. at 2917 n.13.

24. *Id.* at 2917-18.

25. *Id.* at 2918.

26. *Id.* This view also has found substantial academic support. *See* Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233, 1259-61 (1987); Note, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 MICH. L. REV. 1699, 1714-19 (1987).

27. *See infra* text accompanying notes 72-98.

28. *Browning-Ferris*, 109 S. Ct. at 2918 n.17.

29. *Id.* at 2918-19.

amendment and the Magna Carta were controls on the prosecutorial power of the government, refused to extend eighth amendment protections to civil cases, saying "[t]hese concerns are clearly inapposite in a case where a private party receives exemplary damages from another party, and the government has no share in the recovery."[30] The Court left open, however, the question of whether the eighth amendment would therefore apply to an action in which the state was litigating a civil matter or a *qui tam* action.[31] The Court also declined to reach the due process issue because the matter had not been properly preserved on appeal.[32]

Three major criticisms of the majority opinion exist. First, while acknowledging that "[t]he [a]mendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,"[33] the Court spends virtually the entire opinion discussing the historical antecedents of punitive damages as justification for their modern stand. This flows directly into the next criticism, which is that the Court ignores the social and economic impact of such disproportionately large punitive awards. If it is true that "[t]ime works changes, brings into existence new conditions and purposes" and "a principle to be vital must be capable of wider application than the mischief which gave it birth,"[34] then it seems foolish to ignore the modern impact of such awards and decide the case solely on historical antecedents. Finally, as Justice O' Connor's dissent ably demonstrates, the historical analysis, standing alone, could be used to support an application of the eighth amendment to the law of punitive damages. Accordingly, the reasoning of the majority opinion is insufficient, particularly in light of the impact of the law on modern society.[35]

2. *Justice O'Connor's Dissent*

In contrast to the majority, Justice O'Connor acknowledges that awards of punitive damages have grown rapidly in the past few years, with unfortunate social and economic consequences.

> Awards of punitive damages are skyrocketing. As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case

30. *Id.*

31. *Id.* at 2914. See also *id.* at 2920 n.21, where the Court discusses United States v. Halper, 490 U.S. 435 (1989). In *Halper*, the Court held that the double jeopardy clause applied to civil actions brought by the federal government after the defendant had been punished through the criminal process. The Court noted that this was not applicable to private parties. *Id.* at 1903. This distinction, which also is used in *Browning-Ferris*, seems incongruous. If punitive damages serve the purpose of punishment, then the damage to the rights of the defendant are jeopardized no matter who brings the suit. Nevertheless, the Court maintains this distinction, providing a substantial ideological barrier to a due process challenge. *See infra* notes 99-107 and accompanying text.

32. *Browning-Ferris*, 109 S. Ct. at 2921. *See also* note 17 and accompanying text. The failure of defendants to properly preserve this issue for appeal has been a major impediment to the development of the due process challenge. *See infra* note 98 and accompanying text.

33. *Id.* at 2914 n.4 (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)).

34. *Id.* at 2919 (quoting Weems v. United States, 217 U.S. 349, 373 (1910)). Indeed, the Court in *Weems* continued, "[i]n the application of a constitution . . . our contemplation cannot be only of what has been but of what may be." *Weems*, 217 U.S. at 373. By ignoring the social and economic costs of excessive jury awards of punitive damages (*see infra* notes 72-93 and accompanying text) and clinging to historical arguments, the Court adopts the same short-sighted approach which their own precedent condemns.

35. *See infra* notes 72-93 and accompanying text.

> was $250,000. . . . Since then, awards more than 30 times as high have been sustained on appeal. . . . The threat of such enormous awards has a detrimental effect on the research and development of new products. [36]

Noting that punitive damages serve the same two purposes as criminal laws, punishment and deterrence, Justice O'Connor engages in her own examination of the history of the eighth amendment. She finds that the amendment applies to civil awards of punitive damages.[37] Her analysis discusses English precedent for invading the province of the jury in order to prevent excessive awards that endanger the liberty of those against whom they are levied.[38] "I should not allow the respect which is traditionally paid to an assessment of damages by a jury to prevent me from seeing that the weapon is used without restraint."[39] Ultimately, Justice O'Connor advocates use of the proportionality framework of *Solem v. Helm*[40] to determine whether a particular award is excessive.[41] *Solem* established that the constitutionality of punishment should be measured against "objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[42] Applied to punitive damages, the *Solem* framework provides at least some guidance in determining the relative fairness of a jury award.[43]

Justice O' Connor's dissent is significant in several respects. Foremost is her recognition of the growing problem of excessive jury awards in punitive damage cases.[44] Second, Justice O'Connor recognizes that such awards are often the result of the unbridled discretion accorded juries in these matters.[45] Finally, the proposal to adapt the *Solem* framework demonstrates the unique interrelationship between the civil and criminal aspects of punitive damages. This represents a critical step toward abandonment of the majority's formalistic approach in favor of a more pragmatic method that avoids the significant social harms of disproportionate awards.[46]

---

36. *Browning-Ferris*, 109 S. Ct. at 2924. (O'Connor, J., dissenting) (citations omitted). The pattern of high punitive damage awards is continuing today. *See, e.g.* Davis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 906 F.2d 1206 (8th Cir. 1990) (upholding a jury award of punitive damages 20 times greater than the amount awarded as compensatory damages).

37. *Browning-Ferris*, 109 S. Ct. at 2924-34. Justice O' Connor's analysis ably demonstrates the insufficiencies of the majority approach, and the need to take into account the impact of excessive awards on modern defendants in order to adequately evaluate the constitutional claims.

38. *Id.* at 2926-30.

39. *Id.* at 2930 (citing Rookes v. Barnard [1964] A.C. 1129, 1227). *Compare* this approach *with* the actual action of the Court, *id.* at 2923 n.26 (expressing reluctance to interfere with the jury because of traditional common law standards).

40. 463 U.S. 277 (1982).

41. *Id.* at 290-92.

42. *Id.* at 292.

43. *Browning-Ferris*, 109 S. Ct. at 2933-34.

44. *Id.* at 2924. (O'Connor, J., dissenting). *See also infra* Part III.D.

45. *Id.* at 2932.

46. *See infra* notes 74-93 and accompanying text.

III. THE LAW OF PUNITIVE DAMAGES: UNDERLYING PRINCIPLES AND IMPACT

A. *History*

As noted above, the practice of awarding punitive damages predates the Magna Carta.[47] Control of these awards was allocated to the jury as early as the thirteenth century.[48] Because the jury had little guidance as to what constituted an appropriate measure of damages, jury awards "ranged from the ridiculously excessive to the grossly inadequate."[49] The basic principle of these awards was to provide the plaintiff with a sum greater than his injury required, to punish the defendant.[50] Throughout American history, controversy over the propriety of punitive damages has raged, with periods of favor and disfavor over the last 225 years.[51] England virtually abolished the practice of awarding punitive damages in civil cases in 1963,[52] leading many American scholars to call for their abolition here as well.[53]

B. *Rationale for Punitive Damage Awards*

Although the purposes advanced for punitive damage awards vary from jurisdiction to jurisdiction and statute to statute, three justifications are common: retribution, compensation, and punishment/deterrence.

The first, retribution, seems incompatible with our modern conception of the judicial system.[54] It is, nonetheless, a long-standing rationale for both punitive damages and the law in general. As Justice Holmes has noted, "[i]f people would gratify the passion of revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution."[55] If these words remain true today, then it is certainly disturbing that the instrument of this retribution, the jury, has so little guidance in exacting its revenge. The specter of unguided retribution makes a compelling argument for greater jury supervision in punitive damage cases.

Three states, Connecticut, Georgia, and Michigan, consider punitive damages to be another element of compensation.[56] The Michigan law is illustrative.

---

47. *See supra* text accompanying notes 23-24.

48. Belli, *Punitive Damages: Their History, Their Use, and Their Worth in Present Day Society*, 49 UMKC L. REV. 1, 3 (1980).

49. *Id.* at 3.

50. K. REDDEN, PUNITIVE DAMAGES § 7.4 (1980).

51. Belli, *supra* note 48, at 4 ("Punitive damages have had a checkered history of favor-disfavor in English jurisprudence, just as they have had in American jurisprudence."). *See also* K. REDDEN, *supra* note 50, at § 7.5(D) (showing cases over 100 years ago criticizing the doctrine), *but see* Belli, *supra* note 48, at 5 ("punitive damages now are permitted almost uniformly").

52. Belli, *supra* note 48, at 4.

53. *See* K. REDDEN, *supra* note 50, at § 7.5(B). *See also* Sales & Coles, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117 (1984).

54. Belli, *supra* note 48, at 5.

55. O.W. HOLMES, THE COMMON LAW 4 (1881).

56. *See generally* 1 J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE ¶¶ 4.02-4.06 (1985) (summarizing the individual approaches of these states). *See also No Punitive Damages in Michigan*, FOR THE DEF., Jan. 1989, at 31.

As the Michigan Supreme Court explains its policy, "the purpose of exemplary damages has not been to punish the defendant but to render the plaintiff whole by compensating for mental injury in a limited class of cases where such mental injury is the result of outrageous conduct."[57] While this approach is unique, and avoids the criminal overtones that exist in the punitive damage award system in the majority of states, it seems intuitively incorrect. If the damages are compensatory, then they should be proven by the plaintiff, and not left to the unfettered discretion of the jury.

The third rationale for punitive damages is the most frequently cited and most logical: to punish the defendant in order to deter him, and others like him, from repeating the offensive conduct.[58] Because of its logical and semantic appeal, this approach was adopted by the Restatement (Second) of Torts: "[p]unitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future."[59] This method allows the courts to enforce social mores, a time-honored function of the judicial system.[60] The difficulty with this rationale, however, is that punishment is generally the domain of criminal law.[61] "Punitive damage awards corrupt the distinction between the civil and criminal law while permitting a lesser burden of proof for imposing the penalties."[62] This argument is one of the cornerstones of constitutional attacks on punitive damages.[63]

C. *Modern Developments*

Punitive damage awards were relatively benign until the late 1960s and the landmark case of *Roginsky v. Richardson-Merell, Inc.*[64] In *Roginsky*, Judge Friendly correctly forecast the current dilemma:

> The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering. If all recovered punitive damages in the amount here awarded these would run into tens of millions, as contrasted with the maximum criminal penalty. . . . We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.[65]

Judge Friendly's words proved prophetic: mass tort claims, coupled with claims for punitive damages, skyrocketed throughout the 1970s.[66] In addition to an increased number of punitive damage awards, the amount of the awards also

---

57. Gilroy v. Conway, 151 Mich. App. 628, 636, 391 N.W.2d 419, 422 (1986).

58. Belli, *supra* note 48, at 6. *See also* K. REDDEN, *supra* note 50, at § 7.5(B)(2) (Supp. 1987); Jeffries & Freeman, *supra* note 20, at 10.

59. RESTATEMENT (SECOND) OF TORTS § 908(1) (1977).

60. *See* J. GHIARDI & J. KIRCHER, *supra* note 56, at ¶ 2.02 (comparing functions of punitive damages to criminal concepts).

61. K. REDDEN, *supra* note 50, at § 7.5 (Supp. 1987).

62 *Id.*

63. Jeffries & Freeman, *supra* note 20, at 10-12.

64. 378 F.2d 832 (2d Cir. 1967).

65. *Id.* at 839.

66. *See* Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 142-45 (1986). *Compare* Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258 (1976) *with*

escalated rapidly.[67] The dramatic growth of punitive damage awards led Professor David Owen, originally a leading advocate of the use of punitive damages as a check on corporate abuses against the general public, to reconsider his position: "the experience of the past several years has raised questions whether the punitive damages doctrine is being abused in products cases, whether some manufacturers are being punished who should not be, and whether penalties, though appropriately assessed, are sometimes unfairly large."[68]

Neither the trend of increasing awards nor the discomfort with that trend in the legal community appears to be easing at all.[69] Furthermore, the courts have handled numerous challenges since the June 1989 *Browning-Ferris* decision without settling the matter.[70] Martin Connor, President of the American Tort Reform Association, succinctly described the mood of the legal community, including state legislators, when he said, "the system is broke and needs fixing."[71]

D. *Social and Economic Impact of Punitive Damages*

The fundamental premise of this Note is that the detrimental impact of excessive punitive damage awards warrants a solution of constitutional proportions. Many persons in the field remain unconvinced, claiming that large punitive awards are the exception and not the rule.[72] Fortunately, this view is beginning to give way to the more realistic view espoused by one corporate general counsel, that "[c]ourts are beginning to understand that there is no free

---

Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1 (1982).

67. Jeffries, *supra* note 66, at 145 n.23. More recent cases have continued that trend. *See, e.g.*, Bankers Life & Cas. Co. v. Crenshaw, 483 So. 2d 254 (Miss. 1985), *aff'd*, 486 U.S. 71 (1988); Lake Placid Holding Co. v. Paparone, 508 So. 2d 372 (Fla. Dist. Ct. App. 1987); Alfa Mut. Ins. Co. v. Northington, 561 So. 2d 1041 (Ala. 1990).

68. Jeffries, *supra* note 66, at 144. *See also supra* note 66 (comparing articles that contain both positions of Professor Owen).

69. *See, e.g.*, Villella v. Waikem Motors, Inc., 45 Ohio St. 3d. 36, 543 N.E.2d 464 (1989); Fed. Deposit Ins. Corp. v. W.R. Grace Co. 691 F. Supp. 87 (N.D. Ill. 1988), *rev'd in part*, 877 F.2d 614 (7th Cir. 1988) (district court ordered remittitur of 75 million dollar punitive damage award; entire punitive damage award overturned on appeal); Eichenseer v. Reserve Life Ins. Co., 881 F.2d 1355 (5th Cir. 1989) (while upholding $500,000 punitive damage award on $10,000 compensatory damage award, court noted "[b]ecause of the harsh consequences which might ensue from such action, courts should not lightly seek to limit the imposition of punitive damages without due thought and consideration). In *Eichenseer*, the court utilized a due process analysis in upholding the award but declined to rule on the actual constitutionality of such awards. 881 F.2d at 1365-68. *See also* Geller & Levy, *supra* note 6, at 90.

70. *See, e.g.*, Simpson v. Pittsburgh Corning Corp., 901 F.2d 277 (2d Cir. 1990); Johnson v. Celotex Corp., 899 F.2d 1281 (2d Cir. 1990); Juzmin v. Amtorg Trading Corp., 705 F. Supp. 1053 (D.N.J. 1989), *vacated*, 718 F. Supp. 1233 (D.N.J. 1989), *rev'd on other grounds*, 900 F.2d 686 (3d Cir. 1990); Eichenseer v. Reserve Life Ins. Co., 881 F.2d. 1355 (5th Cir. 1989); Western Fireproofing Co. v. W.R. Grace, No. 88-2396, slip op. (8th Cir. July 31, 1989), *vacated*, 896 F.2d 286 (8th Cir. 1990); Robertson Oil Co. v. Phillips Petroleum Co., 871 F.2d 1368 (8th Cir. 1989). *But see* Pacific Mut. Life Ins. Co. v. Haslip, 553 So. 2d 537 (Ala. 1989), *cert. granted*, 110 S. Ct. 1780 (1990).

71. *Punitives in Peril*, A.B.A. J., Oct. 1989, at 46.

72. *Id.* This appears to be a minority view. *See* Jeffries, *supra* note 66, at 143, nn.14-15.

lunch—that punitives have an impact on society, on innovation and on what products are marketed."[73]

The specter of large punitive damage awards hangs over every corporate decision in America today.[74] As large verdicts are affirmed,[75] more suits allege punitive damages in the hope of obtaining a larger award or a larger settlement.[76] Discovery in a suit demanding punitive damages can become more expansive than in mere compensatory tort actions, increasing the costs of litigation.[77] These costs create a more difficult choice for defendants who must "choose between the Scylla of economically devastating discovery costs that can transform a favorable verdict into a pyrrhic economic victory and the Charybdis of outrageous and unwarranted monetary settlements."[78]

The immediate impact of this situation is the soaring cost or absolute unavailability of insurance for companies in "high-risk" industries.[79] These "high-risk" fields include the food, automotive, aviation, pharmaceutical, and media industries.[80] The burden is especially difficult on smaller companies which, unable to locate affordable insurance, must choose between abandoning new products or risk bankruptcy by the decision of a civil jury.[81]

In the end, of course, it is the consumer who must bear this cost. "Economically, the long term effect of these trends may be concentration of manufacturing and professional services; most likely resulting in less competition and higher prices."[82] The situation in professional services, especially physicians, is equally disturbing.

> Obstetricians appear to be particularly affected by malpractice suits and rising insurance premiums. According to a survey by the American College of Obstetricians and Gynecologists, record numbers of obstetricians are abandoning the practice. Experts say this trend, together with increasing insurance premiums, means higher fees and fewer options for one's choice of a physician. Not only are more obstetricians aban-

---

73. Gross, *Punitive Damages in the Products Liability Setting*, in PREPARATION AND TRIAL OF A TOXIC TORT CASE (PLA) 511, 514 (1988) ("The threat of overpunishment and possible bankruptcy to a corporate defendant involved in a mass tort situation is perhaps the most litigated and controversial issue in the punitive damages/products liability area today"); Geller & Levy, *supra* note 6, at 90; Jeffries, *supra* note 66, at 143 nn.14-15.

74. Bell, *Reverse Synergisms: Unprecedented Results From Traditional Legal Means*, 23 HOUS. L. REV. 849, 852 (1986). *See also* Sales & Coles, *supra* note 53, at 1154-57; Gross, *supra* note 73, at 514.

75. Sales & Coles, *supra* note 53, at 1156.

76. *Id.*

77. *Id.* at 1157. This is true because the plaintiff must now not only investigate the actual causation of the injury, but also the malice aspect, as well as detailed financial information to attempt to determine a suitable dollar amount for punitive damages.

78. *Id.* Scylla and Charybdis were twin dangers to seamen in Greek mythology.

79. Comment, *Punitive Damages: The Burden of Proof Required by Procedural Due Process*, 22 U.S.F. L. REV. 99, 109-11 (1988).

80. *Id.* at 104. The cases in these areas are among the most prominent in the field, both to legal scholars and lay observers. *See generally* Ford Motor Co. v. Durrill, 714 S.W.2d 329 (Tex. Ct. App. 1986), *vacated*, 754 S.W.2d 646 (Tex. 1988) (automotive); *In re* Paris Air Crash of March 3, 1974, 427 F. Supp. 701 (C.D. Cal. 1977), *rev'd*, 622 F.2d 1315 (9th Cir. 1980) (aviation); Roginsky v. Richardson-Merell, Inc., 378 F.2d 832 (2d Cir. 1967) (pharmaceutical).

81. Comment, *supra* note 79, at 104. *See also Business Struggling To Adapt As Insurance Crisis Spreads*, Wall St. J., Jan. 21, 1986, at 33, col. 1.

82. Comment, *supra* note 79, at 111.

> doning the field, but more doctors in general are shunning private practice or leaving practice altogether. [83]

Neither are lawyers immune from this threat, as evidenced by their soaring malpractice premiums.[84] Architects, accountants, and corporate officers—indeed any person who makes professional judgments—face a similar crisis.[85]

The social impact of excessive punitive damage awards extends beyond the higher costs and limited choices available to consumers. Vast amounts of social resources are also wasted.[86] This is a society which is "claim-oriented, litigious . . . [and] will become more so."[87] Allowing awards that lack a principled basis only makes suits with excessive punitive damage claims more attractive.[88] This contributes to the burden on our already overtaxed system, and may actually serve to undermine the legitimate purposes and benefits of punitive damages.[89]

Still another problem for business lies in the uncertainty of a punitive damage award. Without a standard fixing the award of punitive damages, unlike criminal fines or compensatory damages, defendants against such claims have no way of knowing what their potential punishment will be.[90] This uncertainty makes it extremely difficult for business to assess the merits of a given enterprise, particularly in the area of new product development.[91] Some consumer activists argue that this is beneficial, preventing manufacturers from factoring in the cost of socially undesirable behavior.[92] Nevertheless, certainty in business planning is an accepted goal of the law, as evidenced by the adoption of the Uniform Commercial Code.[93] Furthermore, given that the detrimental costs of punitive damage awards are ultimately passed along to consumers, it is debatable whether the uncertainty created by uncontrolled punitive damage awards actually furthers its purported policy goals.

The bottom line is that something needs to be done to curtail the growth of punitive damage awards and their deleterious economic and social costs. Although the Supreme Court has consistently avoided the issue,[94] the constitution-

---

83. *Id.* at 107 (footnotes omitted). *See also MDs Won't Deliver*, A.B.A. J., July 1986, at 20 (35% of the 2600 physicians responding to a survey indicated they were giving up their OB/GYN practice due to the difficulty in obtaining insurance).

84. Comment, *supra* note 79, at 106-07. *See also* Lynch, *The Insurance Panic for Lawyers*, A.B.A. J., July 1986, at 42.

85. Comment, *supra* note 79, at 107-08. *See also Costly Crash I*, 6 BUS. L. REV. 106 (1985).

86. Bell, *supra* note 74, at 853.

87. *Id.* at 855.

88. *See supra* notes 74-76.

89. Bell, *supra* note 74, at 853. *See also* Sales & Coles, *supra* note 53, at 1158 n.183 (quoting editorial of *The Houston Post*: "It seems no one these days is willing to take responsibility for his own actions. It's always someone else's fault. However, it doesn't take too much imagination to figure out why GM was sued instead of the driver: GM is richer.").

90. Comment, *supra* note 79, at 114.

91. *See generally* Comment, *supra* note 79; Sales & Coles, *supra* note 53.

92. *Punitives in Peril*, *supra* note 71.

93. Llewellyn, *Why a Commercial Code*, 22 TENN. L. REV. 779, 780-83 (1953).

94. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986); Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71 (1988); Browning-Ferris Indus. v. Kelco Disposal, Inc., 109 S. Ct. 2909 (1989). *But see* Pacific Mut. Life Ins. Co. v. Haslip, 553 So. 2d 537 (Ala. 1989), *cert. granted*, 110 S. Ct. 1780 (1990).

ality of these awards has been considered fairly settled.[95] Nevertheless, the important policy implications discussed above demand that the Court examine how excessive punitive damage awards affect the due process issue. Juries are essentially allowed *carte blanche* with this extremely potent weapon. Because punitive damage awards are so clearly within the province of the jury, courts are reluctant to set aside jury awards as excessive. This practice raises serious questions of due process.[96]

The problem is, however, that the Court does not appear receptive to the due process argument. Again last term, the Court denied certiorari to three cases posing this issue.[97] As was the case in *Browning-Ferris*, due process claims are often not properly preserved.[98] Where a due process claim has been preserved, an argument presented in the analytical framework established by the Court in earlier due process cases is likely to demonstrate that the award of disproportionately high punitive damages has serious constitutional infirmities. Part IV outlines an approach based on the vagueness doctrine.

IV. A DUE PROCESS CHALLENGE BASED ON THE VAGUENESS DOCTRINE

The first step in formulating a due process challenge is to determine that the fourteenth amendment applies to punitive damage awards. To make such a finding, it becomes absolutely critical to characterize punitive damages by their true nature, that is, that punitive damages are a form of *punishment*.[99]

As discussed earlier, such awards cannot truly be considered compensatory;[100] rather, they serve the purposes of retribution and deterrence.[101] The Supreme Court has made it quite clear that "[r]etribution and deterrence are not legitimate nonpunitive governmental objectives."[102] This finding by the Court has the effect of making punitive damages a quasi-criminal concept, and warrants the accordance of constitutional protections against unconstrained punishment by the state to those facing punitive damage awards in a civil proceeding.[103]

Constitutional protections arise when punitive damages are viewed as a criminal concept.[104] This formulation should not be considered overreaching, because due process is an abstract concept not limited to any rigid compartmentalization.[105] In essence, this approach locates the appropriate state action

---

95. Wheeler, *The Constitutional Case for Reforming Punitive Damage Procedures*, 69 VA. L. REV. 269 (1983); *see also* Jeffries, *supra* note 66, at 140.

96. Jeffries & Freeman, *supra* note 20, at 10. *See also Browning-Ferris*, 109 S. Ct. at 2933-34.

97. *See supra* note 70 and accompanying text. *But see* Pacific Mut. Life Ins. Co. v. Haslip, 553 So. 2d 537 (Ala. 1989), *cert. granted*, 110 S. Ct. 1780 (1990).

98. Jeffries & Freeman, *supra* note 20, at 19.

99. J. GHIARDI & J. KIRCHER, *supra* note 56, at ¶¶ 2.02, 4.13-4.16; Jeffries & Freeman, *supra* note 20, at 10.

100. *See supra* text accompanying notes 54-55.

101. Jeffries & Freeman, *supra* note 20, at 10.

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

103. Jeffries & Freeman, *supra* note 20, at 10.

104. Wheeler, *supra* note 95, at 286; Jeffries & Freeman, *supra* note 20, at 10.

105. Comment, *supra* note 79, at 121. *See also* Jeffries & Freeman, *supra* note 20, at 16.

necessary for constitutional analysis.[106] Furthermore, valuable private interests, such as the property at risk of loss to a punitive damages award, are clearly at stake.[107] These factors combine to warrant the protection from unrestrained governmental action afforded by the due process clause.

Having justified due process protections, the next step is to apply the Court's due process test. As established in *Mathews v. Eldridge*,[108] this test, also known as the "fundamental fairness" test, has three elements which the Court will balance to determine if due process is satisfied: (1) the private interests at stake; (2) the risk of erroneous deprivation under the current procedures and the probable reduction of error with new procedures; and, (3) the government's interest in minimizing the procedures.[109] An analysis of these elements reveals that the current state of punitive damage awards, with their vague standards, boundless jury discretion, and limited appellate review contains serious constitutional problems.

The first question under a *Mathews v. Eldridge* analysis is whether any private interests are at stake. Clearly, significant property interests are involved in a multi-million dollar lawsuit. Many businesses are forced to dissolve or seek sanctuary in the bankruptcy court after a large jury award has been returned against them.[110] In fact, it also can be argued that this restraint on action, as well as the restraint on new product development in fear of large awards, infringes on a protectible liberty interest as well.[111] Additionally, the damage to a defendant's reputation, which can be caused by the mere allegation of improprieties that might result in a quasi-criminal sanction of punitive damages, including decreased sales, potential loss of credit, and a stigma of improper behavior long after the conclusion of a lawsuit, constitutes a protected liberty interest.[112] This brief listing, by no means exhaustive, demonstrates clearly that many private interests are at stake in a punitive damages case, and that these interests run deeper than the mere depletion of corporate cash reservoirs.[113]

The second prong of the "fundamental fairness" test is the risk of error under the current procedures. It is in this area that the vagueness of jury instructions poses the most substantial problem with punitive damage awards. Currently, juries are instructed to award punitive damages when a certain level

---

106. For a general discussion of the concept of state action, see J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 421-50 (3d ed. 1986).

107. Comment, *supra* note 79, at 124-34.

108. 424 U.S. 319 (1976).

109. *Id.* at 335. *See also* Comment, *supra* note 79, at 121.

110. The difficulties encountered by A.H. Robins Co. (Dalkon Shield), Johns-Manville (asbestos) and Texaco have been well documented. Comment, *supra* note 79, at 109 n.51 and the sources cited therein.

111. *Id.* at 127-31. As the author points out, the specter and stigma of large punitive damage awards can cause difficulties in obtaining credit, maintaining goodwill, or cultivating sales. The subsequent cash difficulties can prevent a company from being able to take action, and freedom of action is something which is protected by this type of analysis. *Id.*

112. *See, e.g., In re* Paris Air Crash, 622 F.2d 1315, 1322 (9th Cir. 1980), *cert. denied*, 449 U.S. 976 (1980) (describing punitive damages as an expression of "social condemnation"). In fact, this may be the most important interest to be protected, for enforcing the stigma of criminal punishment without due process of law strikes at the very heart of these protections. *See* Comment, *supra* note 79, at 124-27.

113. *See* Comment, *supra* note 79, at 127. Not to be forgotten in this analysis are the high social costs of such large punitive damage awards. *See supra* notes 72-98 and accompanying text.

of malice is found in a civil case.[114] Unfortunately, the courts have been unable to define with any precision what that level is.[115] This vagueness and uncertainty has a number of unfortunate and severe consequences:

> First, the vague definition means that the jury has only the vaguest idea of the standards it is being asked to apply. The inexact terminology inevitably produces inconsistency and inequality. It also leads to punitive sanctions being imposed upon individuals for [reasons] that are clearly improper, such as popularity of the plaintiff or defendant, the sympathy for one party or the other, or any of the commonly known prejudices. It is difficult enough to eliminate such factors from the adjudicatory process in cases in which punishment is not an issue. To permit a jury to impose punishment upon an individual without giving that jury concrete or comprehensible guidelines upon which to base its judgment simply invites abuse. [116]

Furthermore, these errors are compounded by the deference accorded to jury findings. This means that many jury awards, even though they were calculated without any reasonable guidelines, are not overturned on appeal.[117]

This lack of supervision leaves the entire system vulnerable to bias. Without any other standards to consult, jury members will quite naturally turn to their own beliefs and prejudices.[118] Juries most often will award higher damages against wealthy corporate defendants, who are perceived as "stuffed-shirts" and persons who exploit workers and consumers for their own profit.[119] If evidence of the defendant's wealth is introduced, the jury is more likely to award higher punitive damages against this "deep-pocket."[120] This sort of cultural or class bias, often referred to as the "Robin Hood" syndrome, is inherently unfair, yet the current vague standards do little to assist in its elimination.[121] Class bias can also run the other way. As the Court noted in *Santosky v. Kramer*, juries may fail to award sufficient damages in cases for recovery based on permanent neglect because the defendant is poor, uneducated, and non-white.[122] In either situation, however, such bias is contrary to our traditional notions of fairness in the court system.

The question that naturally follows from this analysis, and is required by the "fundamental fairness" test, is whether or not more detailed procedures would decrease the risk of error. It seems clear that more definitive standards would, in fact, alleviate most of the problems enumerated above. By providing the jury with more precise instructions, the court would assist the jury in dis-

---

114. Leitner, *Punitive Damages: A Constitutional Assessment*, 38 FED'N INS. & CORP. COUNS. Q. 119, 128 (1988). *See, e.g.*, Illinois Pattern Jury Instructions-Civil (IPI) 35.01 (1990) ("willful and wanton conduct"); California BAJI 14.71 (West 7th ed. 1986 & Supp. 1990) (allowing award of punitive damages for oppression, fraud, or actual malice).

115. *See, e.g.*, Villella v. Waikem Motors Inc., 45 Ohio St. 3d 36, 43 (1989) (Brown, J., concurring); Leitner, *supra* note 114, at 128.

116. Leitner, *supra* note 114, at 128-29.

117. Sales & Coles, *supra* note 53, at 1156-57 n.181 (listing several cases in which extremely large punitive damage awards have been upheld on appeal).

118. Jeffries & Freeman, *supra* note 20, at 15.

119. Comment, *supra* note 79, at 142-44. *See also*, Eichenseer v. Reserve Life Ins. Co., 894 F.2d 1414, 1418-22 (5th Cir. 1990) (Jones, J., dissenting).

120. Jeffries & Freeman, *supra* note 20, at 15.

121. Comment, *supra* note 79, at 143.

122. 455 U.S. 745, 763 (1982) (permanent neglect proceeding). *See* Comment, *supra* note 79, at 140-44.

charging its duties more objectively.[123] Jury decisions will thereby be less susceptible to bias than before.[124] These standards will also provide for more involvement by the trial courts, who will have a better measure of whether or not the jury decision is subject to passion or prejudice.[125] The same is true of appellate courts, which would have more criteria with which to monitor and control jury awards.[126] Additionally, detailed instructions will signal the jury members that they must use caution and not act indiscriminately in exercising the power of the jury.[127] Most important, increased scrutiny of jury awards, instead of deference to excessive awards, will certainly reduce the uncertainty in punitive damage cases.

Finally, the analysis must turn to the third prong of the "fundamental fairness" test: the governmental interests at stake in maintaining the status quo. It is critical to recall that the underlying purpose of punitive damages is to punish and deter undesirable behavior.[128] It is therefore argued that this quasi-criminal posture requires the types of protection afforded by criminal procedure. Following that logic, if the government's interest is punishment, then to argue that it should be allowed to punish without restraint is contrary to the basic principles of the Constitution. Furthermore, vague standards for assessing punitive damage awards actually defeat the governmental objective of deterring similar conduct in the future.[129] "An effective deterrent is based upon a clear and unequivocal threat. A threat has no impact or value as a deterrent unless the persons against whom it is directed understand it."[130] Since juries are given no standards, it is clear that potential defendants cannot know what conduct is considered sufficient to warrant severe punishment. Therefore, more suits follow, and the cycle of growth discussed earlier[131] continues to feed upon itself. Clearly, the government lacks a compelling interest in maintaining the status quo.

It also has been argued that punitive damage awards protect consumer interests, by preventing corporations from marketing dangerous goods, and the government therefore has a duty to protect this defensive tool.[132] This theory, however, collapses under the weight of the consumer cost discussed earlier.[133] "[T]he innocent consumer must pay higher prices for products and high risk products, although they may be beneficial products, such as contraceptives and pharmaceuticals, which may have to be withdrawn from the market."[134] Thus, it becomes clear that in order to protect consumers' interests properly, the gov-

123. *Id.* at 150-51. *Compare* Villella v. Waikem Motors Inc., 45 Ohio St. 3d 36, 43 (1989) (Brown, J., concurring) (recommending usage of more definite jury instructions proposed by the American College of Trial Lawyers) *with* K. REDDEN, *supra* note 50, at appendix A (collecting various state model jury instructions that feature the vagueness criticized in this Note).

124. Comment, *supra* note 79, at 150-51. *See also* Wheeler, *supra* note 95, at 296-98.

125. Comment, *supra* note 79, at 150-51. *See infra* notes 138-42 and accompanying text.

126. Jeffries & Freeman, *supra* note 20, at 15.

127. *Id.*, at 298. *See infra* notes 137-41 and accompanying text.

128. *See supra* note 99. *See also* Wheeler, *supra* note 95, at 333-38.

129. Leitner, *supra* note 114, at 128.

130. *Id.*

131. *See supra* notes 75-77 and accompanying text.

132. Comment, *supra* note 79, at 155.

133. *See supra* notes 79-85 and accompanying text.

134. Comment, *supra* note 79, at 155-56. *See supra* notes 79-82 and accompanying text.

ernment must insure that punitive damages are awarded judiciously and without error.[135] Accordingly, the government has no interest in maintaining the status quo under the guise of protecting consumers.

With the completion of the *Mathews v. Eldridge* "fundamental fairness" test, it is clear that due process requires increased protections for defendants in the punitive damages area. Nonetheless, the question remains as to what precisely should be done. The possibilities range from abolition of punitives altogether to holding bifurcated trials where punitive damages are decided separately.[136]

This Note proposes two potential solutions. The first is to provide more precise jury instructions. This approach will eliminate some of the arbitrary nature of punitive damage awards. It also will constrain some of the unbridled discretion that has disturbed both courts and commentators. The concurring opinion of Justice Brown of the Ohio Supreme Court in the recent case of *Villella v. Waikem Motors*[137] is illustrative of this approach. Justice Brown recommends the adoption of the proposed model instruction of the American College of Trial Lawyers.[138] These instructions adopt a "clear and convincing" standard of evidence in determining the reasonableness of a punitive award.[139] The model further proposes relevant criteria to guide the jury in its deliberations.[140] Most importantly, the instruction admonishes the jury that " '[t]he purpose of punitive damages is to punish and deter, not to vanquish or annihilate the defendant.' "[141] This statement alerts the jury to the ramifications of its ultimate decision and stresses the need for it to take great care in utilizing the weapon of punitive damages. Although not entirely corrective, this process would be a strong initial step towards controlling punitive damage awards.

---

135. *Id.* at 157.

136. *See* Jeffries & Freeman, *supra* note 20, at 11-16; Wheeler, *supra* note 95, at 294-303. Bifurcated trials have been used with increasing frequency. *See* 1 KNAPP, COMMERCIAL DAMAGES ¶ 8.16; J. GHIARDI & J. KIRCHER, *supra* note 56, at ch. 12; Jenkins v. Raymark Indus., 782 F.2d 468 (5th Cir. 1986).

137. 45 Ohio St. 3d 36, 43 (1989) (Brown, J., concurring).

138. *Id.* The American College of Trial Lawyers has taken a strong stance against punitive damages. *See* AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT OF THE TASK FORCE ON LITIGATION ISSUES 27-36 (1986) (finding the costs of punitive damages to outweigh the benefits and calling for severe limitations and controls on jury awards); AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT ON PUNITIVE DAMAGES OF THE COMMITTEE ON SPECIAL PROBLEMS IN THE ADMINISTRATION OF JUSTICE (1989) [hereinafter REPORT ON PUNITIVE DAMAGES].

139. *Villella*, 45 Ohio St. 3d at 43. The "clear and convincing" evidence standard is in operation in a number of jurisdictions today. In fact, it was used in *Browning-Ferris*, ably demonstrating that this step alone is insufficient to solve the problem. Other controls are also needed to achieve the consistency and fairness which the proponents desire and the due process clause requires.

140. *Villella*, 45 Ohio St. 3d at 43. The criteria provided in these instructions are:

> (1) the nature of the defendant's conduct; (2) the impact of defendant's conduct on the plaintiff; (3) the relationship between the plaintiff and defendant; (4) the likelihood that the defendant would repeat the conduct if a punitive award is not made; (5) the defendant's financial condition; and (6) any other circumstances shown by the evidence, including any circumstances of mitigation, that bear on the question of the size of any punitive award.

Id. (quoting REPORT ON PUNITIVE DAMAGES, *supra* note 138).

141. *Id.* (quoting REPORT ON PUNITIVE DAMAGES, *supra* note 138). This is in concert with the basic precepts of the doctrine at common law. *See supra* notes 24-25 and accompanying text.

A second possibility is the establishment of legislative limits on punitive damage awards.[142] While this may seem to be an invasion of the province of the jury, it is quite similar to the federal antitrust practice of trebling actual damages.[143] That approach provides a substantial penalty for undesirable behavior, while still allowing for a high degree of certainty in the sum to be exacted as a penalty. If the basis of punitive damage awards is, in fact, punishment, then it is essential that potential violators be given fair warning as to the consequences of their actions. Furthermore, as a matter of public policy, such legislative action will help prevent some of the harmful economic and social impact described earlier.[144]

V. CONCLUSION

While it is always unwise to attempt to predict action that the Supreme Court will take, it is this Author's opinion that the Court will be receptive to a due process argument regarding excessive punitive damage awards. First, four members of the Court expressly left this question open in *Browning-Ferris*.[145] Justice O'Connor, in fact, previously acknowledged the apparent due process infirmities in this area in *Bankers Life & Casualty Co. v. Crenshaw*,[146] in which she stated, "[a]s the Mississippi Supreme Court said, 'the determination of the amount of punitive damages is a matter committed solely to the authority and discretion of the jury.' . . . This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process."[147]

Additionally, there is a growing recognition throughout the nation that the current status of punitive damages is unacceptable. As one scholar has summarized the situation, "[t]he unfortunate truth is that the evil of repetitive and unconstrained punitive damages cannot be forestalled on such an ad hoc basis. . . . A realistic solution to this problem must be national in scope and therefore federal in origin."[148] This Author believes that the Court will be prepared to answer this challenge when a proper case is presented.

Furthermore, it is also this Author's opinion that the due process argument is compelling, especially in light of the important policy considerations discussed

---

142. Wheeler, *supra* note 95, at 298-300. The drafting of such legislative limits has proven to be extremely difficult, as the tort reform packages of thirteen states have been found unconstituitional. *Judge Rules on Tort Reform*, A.B.A. J., July 1990, at 31. The most recent example occurred in Georgia, where U.S. District Judge J. Robert Elliott ruled that the state's limits, passed in 1987, were vague and indefinite, and thus violated both the equal protection and due process clauses. *See* McBride v. General Motors Corp., 737 F. Supp. 1563 (M.D. Ga. 1990).

143. 15 U.S.C. § 15 (1987). *See supra* note 11.

144. *See supra* notes 72-93 and accompanying text.

145. Browning-Ferris Indus. v. Kelco Disposal, Inc., 109 S. Ct. 2909 (1989). This alignment was altered before the *Haslip* case was argued in October. Justice Brennan, who retired on July 20, 1990, was the author of the concurring opinion in *Browning-Ferris* that expressly left open the due process question for further consideration. Justice Souter was not seated in time to hear oral argument in the case. *See* 59 U.S.L.W. 3307 (Oct. 23, 1990).

146. 486 U.S. 71 (1988).

147. *Id.* at 88 (O'Connor, J., concurring).

148. Jeffries, *supra* note 66, at 147.

in Part III of this Note. The current method of awarding punitive damages is destined to be altered.

Steven H. Sneiderman