

Two Cheers For Punitive Damages

Punitive damages are awarded to a plaintiff in a civil suit when the defendant's injurious behavior was not merely illegal but also morally offensive—when a tort was intentional, for example, or the defendant was negligent to the point of recklessness. The aim of such awards is explicitly to punish the defendant over and above compensating the plaintiff's present and future losses from the injury.

Many critics suspect that juries use punitive damages simply in order to pick deep corporate pockets, giving an undeserved windfall to plaintiffs. Such critics believe that this encourages unscrupulous plaintiffs' lawyers to bring weak or frivolous cases that don't belong in court; the result is a litigation explosion, increased insurance premiums, and a brake on innovative new technologies for fear that they will spawn expensive lawsuits. For this reason, many tort reformers propose capping or even eliminating punitive damages.

The evidence does not substantiate the charges, however. State courts—where 98 percent of litigation occurs—report that tort filings have grown only slightly faster than population over the last decade, and the most extensive study of punitive damages finds that they are awarded in a mere 1.5 percent of personal injury cases.

Critics also believe, however, that high punitive damages are unprincipled and indeed unconstitutional. "Let the punishment fit the crime" expresses the principle of proportionality, and punitive damages are often grossly disproportionate to compensatory damages. It is this criticism, based on philosophical principle, that concerns me here.

Last term the U.S. Supreme Court heard a case entitled *Browning-Ferris Industries (BFI) v. Kelco*. Kelco was an independent garbage hauler in Burlington, Vermont, which set itself up in competition with the only other garbage hauler in town, a subsidiary of BFI (a large Houston-based corporation). Kelco—owned by a man named John Kelley—soon attracted more than half the market, and BFI responded badly. A BFI executive ordered the local franchise to put Kelley out of business, using the expression "Squish him like a bug." BFI slashed its prices and soon won back a sizable portion of the market. Kelco sued for predatory pricing, and the jury awarded \$51,000 in compensatory damages. However, presumably impressed by "Squish him like a bug," it proceeded to impose \$6 million in punitive damages on BFI.

BFI appealed, claiming that punitive damages so far in excess of the compensatory damages amounted to

"excessive fines" prohibited by the Eighth Amendment along with "cruel and unusual punishment." The Supreme Court ruled seven to two in favor of Kelco, but based the decision on grounds having nothing to do with proportionality. The issue of proportionality is thus almost certain to arise again. I agree with tort reformers that unlimited punitive damages violate the principle of proportionality; but I also want to argue that there is nothing at all disproportionate about punitive damages that are orders of magnitude bigger than the injuries actually suffered by the plaintiff.

Norm Projection and Deterrence

First, let us consider the staple justifications of punishment: deterrence, retribution, incapacitation, rehabilitation. The latter two—incapacitation and rehabilitation—are unlikely to be at issue in punitive damage cases. Typically we think of rehabilitation as a process of retraining, education, therapy, or whatever, that occurs during a term in prison, and it's hard to imagine a corporate entity being "rehabilitated" by paying money. Similarly, incapacitation usually means prison, and arises in punitive damages cases only in the rare case when a jury decides to put the defendant out of business. Thus, discussion of punitive damages should focus on deterrence and retributivist theories.

Not only these two, however, for punishment may prevent offenses in other ways besides deterrence. Deterrence suggests that people will disobey the law unless they fear punishment. But this is a gross caricature of our political psychology. Many of us will willingly comply with law once we know that it is seriously intended; and sociologists point out that an important aim of punishment is to highlight in a public way the serious intent behind legal norms.

Having said this, let's look at the complaint about punitive damages raised by BFI. It claims that \$6 million is disproportionate because it so far exceeds the \$51,000 compensatory damages. BFI thinks that punitive damages should be scaled to compensatory damages, which measure the bad consequences of the tort to its victim. BFI's proposed scaling principle thus amounts to the idea of scaling punishment to the bad consequences of an offense. But, as we shall see, this idea makes no sense on any of the three remaining rationales for punishment—norm-projection, deterrence, and retribution.

On the norm-projection rationale the purpose of punishment is to emphasize that the law against predatory pricing is a serious one. And I believe that

this can be done *only* if the punitive damages are grossly disproportionate to compensatory damages. Kelco lost \$51,000 worth of business to BFI because of its predatory pricing. If the punitive damages were roughly commensurable with compensatory damages—say, \$150,000—BFI might well be tempted to treat this as a mere cost of doing business and to play what is called the “enforcement lottery”: continue its predatory practices hoping that it will be successfully sued only one time out of four, so that it will still turn a profit.

That is, with lenient punitive damages companies will be more likely to treat the law not as a norm demanding compliance but merely as a kind of tax on predatory pricing. The difference is fundamental. A serious norm prohibiting conduct is *categorical*: it says “Don’t do X!” By contrast, a tax on conduct is *disjunctive*: it says “Either don’t do X or else pay,” thereby presenting the norm in merely optional form. My contention here is that only by imposing punitive damages of a different order from compensatory damages can a jury convey the message that a norm is categorical, that it demands compliance and not cost-benefit analysis. The point is to make the numbers on the balance sheet so ridiculous that the offender stops looking at the balance sheet.

Similarly, to fully deter would-be offenders from engaging in morally outrageous behavior, the price tag must be high enough to make playing the enforcement lottery an unattractive proposition. We have seen that this requires punitive damages that far outweigh the gains from committing the tort weighted by the likelihood of being sued successfully: the lower the chance of being caught, the higher the punitive damages. In the BFI case, BFI’s gains roughly equaled Kelco’s losses—the compensatory damages. Since

predatory pricing schemes are not easy to detect, deterrence requires setting BFI’s punitive damages well in excess of its gains, and thus well in excess of compensatory damages.

Retribution

The heart of my analysis lies in retributivist theories of punishment, and the basic point is simply stated. A retributivist scales punishment to the heinousness of the offense, and that is not measured by the magnitude of harm. A moment’s negligence behind the wheel, of the sort that each of us has been guilty of many times, may result in horrible consequences, while cold-bloodedly throwing a child out of a skyscraper window may result in very little harm because the child’s suspenders miraculously catch on a flag-pole.

The hard question is what scaling principles make retributivist sense, and to answer this, we must know what makes retributivism plausible. In *Forgiveness and Mercy* Jean Hampton explains that culpably harming another person or being culpably negligent expresses a false view of the wrongdoer’s value relative to that of the victim. Implicitly it says that the victim is a low person, the sort of person one can do this kind of thing to. Or it says that the wrongdoer is an especially valuable and high kind of person, the sort of person who is entitled to take liberties with the well-being of others. Or it says both.

It is crucial to Hampton’s analysis of retributivism that the wrongdoer has implicitly asserted a kind of undeserved mastery and superiority over the victim: in different words, the wrongdoer has expressed a falsehood about the world of value. The purpose of punishment is to reassert the truth about the relative value of wrongdoer and victim by inflicting a publicly visible defeat on the wrongdoer. And the magnitude

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“We, the jury, find the defendant guilty and ask that we no longer be considered his peers.”

of punishment must reflect the magnitude and, if possible, the nature of the asserted inequality between wrongdoer and victim. A more heinous act expresses more contempt for the victim's value relative to the wrongdoer's, and so a more decisive defeat must be visited on the wrongdoer to reassert our public judgment of the victim's worth. If the punishment is too lenient, the society as a whole implicitly ratifies the view that the victim is the sort of person it's all right to do these things to. (Hampton offers a telling example: if sentences for forcible rape are low, the legal system is expressing a contemptuous view of the value of women relative to men.)

This still does not tell us how a retributivist will scale punitive damages. And of course there can be no formula for punitive damages, since heinousness cannot be assigned a straightforward dollar-value. But once we begin to focus on the requirement that the punishment express, as transparently as possible, the true

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scale of values in the moral world, we have a rough-and-ready yardstick for assessing punitive damages (and, in many cases, for capping them). Let me illustrate what I mean with an example.

In 1981 a California jury heard a case involving Grimshaw, a boy who had been hideously burned in an explosion of his Ford Pinto. The plaintiff presented evidence that Ford had known of the Pinto's defective gas tank, but had decided against recalling it after a cost-benefit analysis showed that the company could save \$125 million by leaving the unaltered cars on the road. The jury awarded the boy \$125 million in punitive damages, later reduced by the judge to \$6.6 million. The case has been cited by critics of the tort system as a classic example of a jury run amok; but I believe that the jury's award was a perfect case of "letting the punishment fit the tort."

On a deterrence rationale the jury's decision makes obvious sense: Ford's reliance on cost-benefit analysis indicates that it could be deterred only if it lost money through its decision, and the jury's punitive damages were calculated precisely to annihilate Ford's profit. But on a retributivist view it also makes sense to take the outcome of Ford's cost-benefit analysis as a measure of wrongdoing. Ford had displayed contempt for Grimshaw's value, but more importantly it had displayed a certain *kind* of contempt for Grimshaw's value. In Kant's famous words, it treated Grimshaw as pos-

sessing merely a price, not a dignity. For this reason, inflicting a monetary defeat on Ford was an especially expressive form of punishment. Moreover, Ford had affixed its customers' prices through the technique of cost-benefit analysis. For this reason, the jury chose to inflict a monetary defeat on Ford that incorporated within it a reference to Ford's own cost-benefit analysis—a defeat that Ford could not help but understand because the jury held up the cost-benefit analysis as a kind of mirror in which we would all recognize the moral truth of the situation.

Obviously, the medium of monetary damages has limited expressive power, and in many instances of high punitive damages we will be unable to infer anything from the amount beyond the message that the jury thought the tortfeasor had been a real schmuck. Nevertheless, high punitive damages are often adequate expressions of the tortfeasor's wrongdoing. Punitive damages arise most often in the context of economically motivated wrongdoing: corner-cutting in manufacturing or recalling products, as in *Grimshaw*, or ruthless business practices, as in *Kelco*. High punitive damages hit *homo economicus* where it hurts: an eye for an eye a tooth for a tooth, and a bottom line for a bottom line.

The Practical Reason for Punitive Damages

This brings me to one of the most important points about punitive damages. It is of the nature of the beast that punitive damages are sought only against white collars, because only white collars have deep pockets. I want to contend that punitive damages are the only practical method of exercising social control on white collars, because criminal penalties are no substitute. For even if egregious and morally shocking torts were criminalized, the cases would never be prosecuted, because it's very hard to determine that an accident was brought about by egregious and morally shocking torts. Consider the Pinto cases once again. The only objective event is a car crash and subsequent burning. The repeated pattern of such crashes indicating defective design emerges only when we do a statistical analysis of all the evidence from many different states and jurisdictions, and then go into the company to discover culpable negligence. No federal agency has or could have the resources to carry out such massive investigations across the entire range of accidents and the entire range of products. Nor would we want such an omniscient federal agency.

The punitive damages system remedies this problem in the most obvious way: it provides injured parties and their lawyers with financial incentives to do the investigation themselves. Typically, a tort lawyer works on a 30- to 40-percent contingency fee and invests thousands of dollars of her firm's resources in investigation, hoping to recoup the investment by winning big-ticket punitive damages cases. She is a bounty-hunter. She may not be a "nice person," for bounty-hunters are mainly out for the buck. This is the grain of truth in critics' suspicions about personal injury lawyers. But in a world of scarce public resources for law enforce-

ment, the private bounty-hunter does an important and worthwhile job. Viewed in this light, the punitive damages system exists not to provide plaintiffs with windfalls, but to induce the bounty-hunter to do her job. And this provides an important practical argument against slashing punitive damages: if we cut back on the bounty-hunter's reward too much by limiting punitive damages or contingency fees, we will lose out on needed law enforcement.

For as we have seen, government is incapable of controlling white-collar wrongdoing, though it may work to control the villainous poor. That leaves the punitive

damages system, which—warts and all—stands out as our best hope for protection from the villainous rich.

—David Luban

This article was condensed and adapted from "Let the Punishment Fit the Tort," a talk given at the Institute's Workshop on Philosophy and Public Policy, held at the Catholic University of America on June 21-23, 1989. Sources used in writing this article are: *Kelco v. BFI*, 845 F. 2d 404 (2nd Cir. 1988); Jean Hampton, "The Retributive Idea," in Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press, 1988); Marc Galanter, "Punishment Civil Style," (unpublished); and *Grimshaw v. Ford*, 119 Cal. App. 3d 757 (1981).

Who Is the Patient?

New genetic discoveries and technologies in medicine have raised a host of profound ethical questions. One of the most prominent concerns our understanding of the traditional obligations of the physician, in particular, his obligation regarding confidentiality. As we learn more and more about the genetic basis of many diseases, questions such as "To whom does the physician owe a duty of confidentiality?" are becoming increasingly difficult to answer. Part of this difficulty can be traced to a transformation in our understanding of who is the patient, and a corresponding change in our understanding of the physician-patient relationship.

Let me illustrate this transformation with an example, based on a true case recently told to me. A young boy has been diagnosed as having hemophilia A. Since this is an x-linked, recessive disease, there is good reason to believe that the boy inherited the defective gene from his mother who in turn inherited it from her mother. (Because it is a recessive disease, these women are under no risk of contracting any symptoms or suffering the disease themselves even though they carry the harmful gene.) The physician learns that the boy's mother has two sisters. Given the available information, each of these sisters has a 50-percent probability of also being a carrier of the harmful gene. The physician wishes to inform these sisters of their condition, since it might affect their reproductive plans, but the boy's mother, who has had a terrible falling out with her sisters, forbids it. Bent on withholding information as a way of getting revenge on her sisters, she insists that the boy's right to confidentiality be respected.

Admittedly, articulating the ethical question raised by this sort of case as "Who is the patient?" is not the usual approach. A more common one would be to frame the ethical question in terms of the scope and

limits of the physician's duty of confidentiality to the patient. Thus, if the medical condition may (or must) be disclosed to others, this is because the duty of confidentiality here is outweighed by other obligations. By presenting the issue instead in terms of who the patient is, I am trying to underscore a shift in how such cases should and will be seen. If the physician must disclose the information to others, this does not reflect a duty or consideration that competes with the integrity of the physician-patient relationship. Rather, it grows out of that very relationship. Disclosures in these cases are not "news leaks." If and when they are justified, they arise from the physician's loyalties and obligations as a physician to the patient. The physician's disclosure, if it is to have this kind of justification, must be to his patient. The crucial question, however, is who is the patient.

We can get a better understanding of how this question will become increasingly significant by analyzing the hemophilia example. Let me begin by examining three different models of health care that might be invoked to frame the ethical dilemma raised.

The Private Health Model

The most familiar model is what we could call the *private health model*. Its clearest applications are to cases of physical injury or non-communicable diseases. In such cases, the question "Who is the patient?" has an obvious answer: the patient is the particular individual suffering the disease or accident. According to this model, the physician's mission is to care for his patient and treat the medical condition. This mission, however, is constrained by a respect for the autonomy of the patient. This respect is generally taken to mean that the physician must have the patient's informed consent before performing any major medical intervention. Fur-