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Punitive Damages in Products Liability Actions: A Comparative Critique of the Puerto Rican and Californian Traditions

I. INTRODUCTION

On New Years Eve 1986, a fire is deliberately set in a first-floor ballroom of the San Juan Dupont Plaza Hotel in San Juan, Puerto Rico. The ballroom is consumed with flames. The fire moves rapidly through the hotel's lobby and casino. The conflagration kills ninety-seven people and injures one hundred and forty.¹ It is the deadliest fire in the United States since the 1980 MGM-Grand Hotel blaze in Las Vegas, Nevada.²

While the fire at the hotel still smolders, plaintiffs' attorneys descend upon San Juan. Some seek to protect the interests of legitimately-obtained clients. Others openly solicit business.³ Like their colleagues after the Union Carbide disaster in Bhopal, India, these attorneys seek to profit from death and human misery.⁴ However, they will return to the mainland less satisfied than on other excursions.

The Dupont Plaza litigation will require at least two separate trials.⁵ The first, which centers on ownership of the hotel and its liability to those injured or killed, ends in a \$150 million settlement.⁶ The second trial, which is currently pending in Federal District Court for the District of Puerto Rico, centers on the liability of certain manufacturers whose products allegedly contributed to the injuries and deaths.⁷

1. Carbonara, *Taming a Mass Torts Monster*, AM. LAW., Sept. 1989, at 108.

2. *Id.* (the MGM-Grand Hotel fire claimed 84 lives).

3. *Id.* at 110.

4. For detailed descriptions of the ethically-questionable conduct of attorneys in the San Juan Dupont Plaza Hotel fire, as well as other mass disaster cases, see *id.* at 110-11; Jenkins, *Courting Disaster*, GENTLEMAN'S Q., Feb. 1989, at 215.

5. Federal Judge Raymond Acosta originally divided the case into seven different trials. Carbonara, *supra* note 1, at 108. After the settlement of the first trial on hotel ownership, and the consolidation of product and supplier actions into one trial, three other trials were scheduled to be heard in the matter before Judge Acosta. *Id.* at 113.

6. See *id.* at 112.

7. *Id.*

In this second trial, the plaintiffs make out a claim for punitive damages: "Defendant's conduct under the circumstances was malicious and amounted to gross negligence, wanton, willful and reckless misconduct, and gross disregard for the plaintiffs' safety, thereby rendering defendant liable to the plaintiffs for punitive damages under applicable choice of law principles in addition to compensatory damages."⁸

Defendant manufacturers then file a motion for directed verdict, seeking to disallow the plaintiffs' demand for punitive damages.⁹ On August 3, 1990, Judge Raymond Acosta determines that under applicable choice of law principles, Puerto Rican law will govern the punitive damages issue.¹⁰ Since Puerto Rican law does not allow for punitive damages,¹¹ the obscenely large damage awards normally associated with a disaster on the scale of the Dupont Plaza Hotel fire will be severely limited. As a result, the plaintiffs' attorneys in this products liability action will earn a smaller contingency fee than they anticipated.

Puerto Rico's refusal to allow punitive damages is the beginning point of this Comment's analysis. The island of Puerto Rico is a civil law jurisdiction that also adheres to a well-developed common law tradition. Elements of both judicial traditions co-exist in the territory's well-developed body of case law. For example, Puerto Rican products liability law closely mirrors that of California, a tort law trend-setter.¹² However, Puerto Rico does not follow California's lead on the availability of punitive damages in products liability actions.

This point, while seemingly small in the larger scope of judicial action in Puerto Rico, highlights a significant difference in judicial attitudes and philosophies between the two jurisdictions. Further, the rationales that underlie Puerto Rican and Californian policy shed light on the theoretical propriety of punitive damages.

This Comment will highlight these differences, attempt to

8. Plaintiffs' Second Amended Complaint at para. LLLLL.9, *In re San Juan Dupont Plaza Hotel Fire Litigation*, 745 F. Supp. 79 (D.P.R. 1990) (MDL No. 721).

9. *In re San Juan Dupont Plaza Hotel Fire Litigation*, 745 F. Supp. 79, 80 (D.P.R. 1990).

10. *Id.* at 87.

11. Puerto Rico, Louisiana, and Nebraska prohibit punitive damages entirely. Indiana allows punitive damages, but only if the defendant's conduct is not also punishable as a crime. See Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1, 4 n.9 (1985).

12. See *infra* text accompanying notes 66-99.

achieve an understanding of both sides of the issue, and will conclude that the increasing trend of manufacturer liability for punitive damages is arguably a judicial anomaly with severe economic and social repercussions.

II. PUNITIVE DAMAGES IN PRODUCTS LIABILITY ACTIONS IN PUERTO RICO

Puerto Rico's unique relationship with the United States significantly affects the commonwealth's legal system. A short history of this relationship and its legal effects will provide background on Puerto Rico's judicial system. Such an historical perspective will facilitate the task of explaining how the island arrived at its seemingly anomalous positions on products liability and punitive damages.

A. History of Puerto Rico's Judicial System

Although the history of Puerto Rico, and the Spanish occupation of that island, spans centuries,¹³ only a small portion of that history fits within the scope of this Comment. Spain "discovered"¹⁴ Puerto Rico in 1493 and claimed it in the name of civilization.¹⁵ During the next 400 years, Puerto Rico remained a politically-neglected Spanish colony. The island's principal value to the crown consisted of its strategic position along the trade routes in the Caribbean archipelago.¹⁶ Cultural bonds, however, developed during this period, including the assimilation of a common language and the introduction of European legal institutions, which the sovereign extended to its colonies.¹⁷

United States involvement with Puerto Rico began on July 25, 1898, when American expeditionary forces landed on the island during the Spanish-American war.¹⁸ On August 12, 1898, a peace protocol suspended hostilities between the United States and Spain.¹⁹ The two nations signed the Treaty of Paris on December 10, 1898, for-

13. For a detailed background of the colonial and pre-colonial history of the island, see generally Cain & Moya, *The Legal System of Puerto Rico, U.S.A.*, in 1 MODERN LEGAL SYSTEMS CYCLOPEDIA, ch. 4, § 1.3(A)-(E), at 1.80.8-12 (K. Redden ed. 1988).

14. Taino Indians lived on the island prior to the Spaniards' arrival. *Id.* § 1.3(A), at 1.80.8.

15. *Id.* § 1.3(B), at 1.80.9; Ramos, *Interaction of Civil Law and Anglo-American Law in the Legal Method in Puerto Rico* (pts. 1 & 2), 23 TUL. L. REV. 1, 4, 345 (1948).

16. See Cain & Moya, *supra* note 13, § 1.3(D), at 1.80.10.

17. Ramos, *supra* note 15, at 4-5.

18. *Id.* at 3.

19. 30 Stat. 1742 (1898).

mally ending the conflict.²⁰ Article II of the treaty provided that, "Spain cedes to the United States the island of Porto Rico"²¹

The United States exercised legal authority in Puerto Rico before the countries actually signed the Treaty of Paris. On October 18, 1898, the United States established a provisional military government on the island.²² Major General John R. Brooke, the Commanding Officer of the Department of Porto Rico,²³ issued his General Order Number 1.²⁴ This order contained provisions similar to the instructions that President William McKinley previously sent to his secretary of war regarding the conduct to be observed during the military occupation of Cuba.²⁵ The contents of this order set the tone for United States policy toward the Puerto Rican legal system: harmoni-

20. Treaty of Paris, Dec. 10, 1898, United States-Spain, 30 Stat. 1754, T.I.A.S. No. 343. The agreement is also known as the Treaty of Peace. See Ramos, *supra* note 15, at 4.

21. Treaty of Paris, *supra* note 20.

22. Ramos, *supra* note 15, at 3. For the next eighteen months, the United States military controlled Puerto Rico. *Id.* at 6. During this time, the military government issued 375 General Orders which were serially numbered from 1 to 39 in 1898, from 1 to 232 in 1899 and from 1 to 104 in 1900. It also issued at least 268 other orders under the name of Circulars, which were serially numbered 1 to 93 in 1898 and from 1 to 175 in 1900. The military government also issued more than 100 unnumbered orders entitled Judicial Orders or Orders. *Id.* at 7. See SECRETARY OF WAR, LAWS, ORDINANCES, DECREES, AND MILITARY ORDERS HAVING THE FORCE OF LAW, EFFECTIVE IN PORTO RICO, MAY 1, 1900, H.R. Doc. No. 1484, 60th Cong., 2d Sess. 2173-79 (1909) [hereinafter LAWS AND ORDINANCES] for an incomplete compilation of those orders issued during military rule.

23. Puerto Rico was then known by its anglicized translation, "Porto Rico." The island's name was not formally changed until 1932. Cain & Moya, *supra* note 13, § 1.3(E), at 1.80.11.

24. General Order No. 1 reads, in pertinent part, as follows:

The provincial and municipal laws, in so far as they affect the settlement of private rights of persons and property and provide for the punishment of crime, will be enforced unless they are incompatible with the changed conditions of Porto Rico, in which event they may be suspended by the department commander. They will be administered substantially as they were before the cession to the United States.

LAWS AND ORDINANCES, *supra* note 22, at 2179.

25. President McKinley's instructions to his secretary of war included the following:

Though the powers of the military occupant are absolute and supreme . . . the municipal laws of the conquered territory, such as affect private rights of person and property and provide for the punishment of crime, are considered as continuing in force, so far as they are compatible with the new order of things until they are suspended or superseded by the occupying belligerent and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals, substantially as they were before the occupation. This enlightened practice is, so far as possible, to be adhered to on the present occasion.

LAWS AND ORDINANCES, *supra* note 22, at 2177. These instructions became General Order No. 101, of July 18, 1898, issued by the United States War Department, published, and applied in Puerto Rico when General Nelson A. Miles landed on the island. *Id.* at 2174.

Before occupying Puerto Rico, the United States Army occupied Cuba, which was also a former Spanish colony. WORLD MARK ENCYCLOPEDIA OF THE NATIONS, Cuba §§ 8-12 (6th ed. 1984).

zation of the island's existing judicial system with those notions of justice governing the mainland.

From the beginning of the United States' occupation of the island, each of the five basic laws that generally existed in some form in all civil law countries were present in Puerto Rico.²⁶ These laws were: (1) The Spanish Civil Code of 1888;²⁷ (2) The Spanish Code of Commerce of 1885;²⁸ (3) The Spanish Penal Code of 1870;²⁹ (4) The Spanish Law of Civil Procedure of 1855;³⁰ and (5) The Spanish Law of Criminal Procedure of 1872.³¹ The judicial system administering these laws consisted of a supreme court and courts of first resort, including criminal courts, civil courts, and municipal courts.³² The sys-

26. Ramos, *supra* note 15, at 5.

27. P.R. LAWS ANN. tit. 31, § 1 note on history (1967); *see also* Torres v. Rubianes, 20 P.R.R. 316 (1914). The Spanish Civil Code was extended to Puerto Rico by Royal Decree of July 31, 1889, and took effect on January 1, 1890. P.R. LAWS ANN. tit. 31, § 1 note on history (1967).

28. LAWS AND ORDINANCES, *supra* note 22, at 1173. The Spanish Code of Commerce was extended to Puerto Rico by the Royal Decree of January 28, 1886. *Id.*

29. *Id.* at 625. The Spanish Penal Code was revised in 1876 and extended to Puerto Rico by the Royal Decree of May 23, 1879. *Id.*

30. *Id.* at 242. The Spanish Law of Civil Procedure was substantially amended in 1881 and was extended to Puerto Rico by the Royal Decree of September 25, 1885. *Id.*

31. *Id.* at 759. The Spanish Law of Criminal Procedure was amended in 1879, 1882, and 1888, and was extended to Puerto Rico on October 19, 1888. *Id.*

32. *See* Cain & Moya, *supra* note 13, § 1.8(A), at 1.90.6. At the time of United States occupation in 1898, Puerto Rico's judicial system was organized as follows:

(1) A municipal court in each of the towns and cities of the island, and two in San Juan, which took cognizance of civil actions when the amount in controversy did not exceed 200 pesos and of the offenses defined in Book III of the penal code; that is, of offenses against public order, against the public interests, and infractions of municipal ordinances. The proceedings in these courts were oral.

(2) Eleven courts of first instance and *instrucción* (juzgados de primera instancia té instrucción), with their respective seats in Ponce, Mayaguez, San German, Humacao, Vega-baja, Arecibo, Guayama, Aguadilla, Utuado, and two in the city of San Juan, with one judge each, and with a jurisdiction over all civil actions when the amount in controversy exceeded 200 pesos. The trial was conducted by written depositions. These courts were also empowered to pass upon appeals (recursos de casación) from decisions of the municipal courts. The judges of these courts in their capacity as judges of *instrucción* were also charged with the conduct of initial proceedings in criminal cases and ordering the detention or imprisonment of the presumed offenders.

(3) One territorial court (audiencia), whose jurisdiction extended over the whole island, and included appeals in civil cases from decisions of the courts of first instance.

(4) Three audiencias for criminal cases, one in Ponce, one in Mayaguez, and another in San Juan, made up of judges of the former real audiencia and closely related with it in all that concerned its internal government and organization. These audiencias for criminal cases took cognizance of criminal actions for offenses committed within the island in conformity with the provisions of the law of criminal procedure. The trials were oral and public.

(5) The supreme court in Madrid, to which appeals (recursos de casación) in civil

tem was apparently well-developed and met the needs of the local citizenry.³³ With some exceptions,³⁴ the United States military simply administered the laws and judicial institutions of Puerto Rico in a manner similar to that which existed prior to the occupation.³⁵

Military rule terminated on April 12, 1900 with congressional passage of the Foraker Act—"An Act Temporarily to provide revenues and a civil government for Porto Rico, and for other purposes."³⁶ In addition to legislating the island's self-governance,³⁷ the

cases were taken from decisions of the territorial court or *audiencia*, and in criminal cases from decisions of the criminal courts in San Juan, Ponce, and Mayaguez.

To complete this statement it must be added that it was obligatory to use stamped paper for all judicial documents, the price of which varied according to the amount in controversy, ranging from 10 to 50 centavos per sheet.

When, in 1898, the change of sovereignty took place the judicial system was left incomplete at its highest point. The island being separated from Spain, the insular system was deprived of the court of cassation to pass upon appeals (*recursos de casación*) from judgements of the territorial court or *audiencia territorial*, and from decisions of the criminal courts or *audiencias de lo criminal*.

REPORT OF THE COMMISSION TO REVISE AND COMPILE THE LAWS OF PORTO RICO, H.R. DOC. NO. 52, 57th Cong., 1st Sess., vol. 1, 102-04 (1901) [hereinafter COMMISSION REPORT].

33. Requesting the establishment of a civilian government during a message to Congress on December 5, 1889, President McKinley stated that "[t]he system of civil jurisprudence now adopted by the people of this island is described by competent lawyers who are familiar with it, as thoroughly modern and scientific, so far as it relates to matters of internal business, trade, production, and social and private right in general." Ramos, *supra* note 15, at 11.

34. See generally *id.* at 9-10 (discussing some of the more noteworthy interferences by the United States military in the judicial affairs of the island).

35. In his report to the Secretary of War on November 22, 1901, Brigadier General George W. Davis indicated the following:

It was known that the military government was but a temporary one, and that within a short time—a few years, or perhaps a few months—Congress would probably legislate for the island and make laws determining the civil rights and political status of the inhabitants. The tendency of the military government under such circumstances was naturally to abstain from interference with the courts, the laws, and native institutions.

Ramos, *supra* note 15, at 8-9.

36. Organic (Foraker) Act of 1900, ch. 191, 31 Stat. 77 (1901). The Act was more commonly known as the Foraker Act, following the name of its author, Senator Joseph Benson Foraker, from Ohio. Ramos, *supra* note 15, at 8-9.

37. Among other provisions, the Foraker Act created a civilian government to replace the military rule in place during the previous eighteen months. Organic (Foraker) Act of 1900, ch. 191, § 40, 31 Stat. 77, 86. With regard to the judiciary, the Act provided: "[t]hat the judicial power shall be vested in the courts and tribunals of Porto Rico as already established and now in operation . . .", *id.* § 33, 31 Stat. at 84; that "[t]he jurisdiction of said courts and the form of procedure in them, and the various officials and attachés thereof, respectively, shall be the same . . .", *id.*; and that "Porto Rico shall constitute a [federal] judicial district to be called 'the district of Porto Rico.'" *Id.* § 34, 31 Stat. at 84.

The Act further provided:

That writs of error and appeals from the final decisions of the supreme court of Porto Rico and the district court of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same

Foraker Act initially directed the development of the island's legal system toward harmonization with the United States' legal system.³⁸ It required in part:

That a commission, to consist of three members, at least one of whom shall be a native citizen of Porto Rico, shall be appointed . . . to compile and revise the laws of Porto Rico . . . and to . . . make a simple, harmonious, and economical government, establish justice and secure its prompt and efficient administration³⁹

Due to time constraints,⁴⁰ the commission did not begin work until September of 1900.⁴¹ Despite the constraints and resistance from the local populace,⁴² the commission worked in good faith to improve conditions in Puerto Rico.⁴³ This "good faith effort to improve conditions," however, eventually gave rise to the major criti-

regulations and in the same cases as from the supreme courts of the Territories of the United States"

Id. § 35, 31 Stat. at 85.

With regard to statutory governance, the Act provided "[t]hat the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this Act shall take effect" *Id.* § 8, 31 Stat. at 79.

38. See *supra* notes 25-27 and accompanying text.

39. Organic (Foraker) Act of 1900, ch. 191, § 40, 31 Stat. 77, 86.

40. The Foraker Act did not take effect until May 1, 1900. *Id.* § 41, 31 Stat. at 86. The final member of the three-person commission was not sworn in until July 3 of that year. Ramos, *supra* note 15, at 15.

Thus, the commission had only nine months to familiarize itself with both the civil and common laws as they related to Puerto Rico, to study the prevailing situation on the island, to decide on the changes to be recommended, and to make its report to Congress. *Id.*

According to Manuel Rodriguez Ramos, former dean of the University of Puerto Rico College of Law, "[i]f we were . . . to use two words to describe the situations and the circumstances which surrounded the work of the Commission, we would write: haste and confusion." *Id.* at 16.

41. Ramos, *supra* note 15, at 14.

42. Animosity from Puerto Rican citizens against the efforts of mainlanders seeking to reform their familiar judicial system was perhaps a more acute difficulty than the time constraints. An excerpt from a report by Military Governor Davis highlights this resentment:

While few, if any, of the more enlightened natives, and none of the Spanish commercial class, are inclined to openly comment unfavorably upon the Congressional requirement that their laws be codified and changed by a foreign commission, yet almost all, in their hearts, resent the suggestion that they themselves, unaided by Americans, are not perfectly competent to revise and adapt their own codes if the new conditions require it. They know that they now have an insular assembly to which Congress has delegated the power to legislate. "What need for a code commission?"

ANNUAL REPORTS OF THE WAR DEPARTMENT FOR THE FISCAL YEAR ENDED JUNE 30, 1900: REPORT OF THE MILITARY GOVERNOR OF PORTO RICO ON CIVIL AFFAIRS, H.R. DOC. NO. 2, 56th Cong., 2d Sess., pt. 13, at 62 (1902).

43. Ramos, *supra* note 15, at 17.

cism of the commission's work—that it went too far in reforming a legal system that appeared healthy and in no need of revision.⁴⁴

In its report to Congress,⁴⁵ the commission recommended a number of changes in Puerto Rico's existing laws and legal institutions.⁴⁶ The commission further recommended that the local territorial government implement the revision.⁴⁷ Accordingly, in early 1902, Congress referred the commission's report to the Insular Assembly⁴⁸ for proper action.⁴⁹ With the commission's report before it,⁵⁰ the Insular Assembly began its revision.⁵¹

However, revision was not an easy task. The attitudes of a number of influential mainlanders, both in the government and legal

44. According to Juan Hernandez Lopez, the Puerto Rican member of the commission, [s]uch were the principles and the judgment upon which the revision of the Civil Code was based, and the sins [of the revision] can be found in that on many occasions it leaned to the side of reform, not from a conviction that the existing institutions were not good, but out of a desire materially to evidence our strong belief in the principles of solidarity regarding anything which might seem just or rational.

Id. at 15.

But in the commission's own words, it was "strongly attached to the historical school of jurisprudence" COMMISSION REPORT, *supra* note 32, at 144. According to this view, "law is not a product of reason, its primary source is customary law and it can only be found in history." Ramos, *supra* note 15, at 35. With regard to the revision of codes, this created an intellectual obstacle. In the civil law tradition, a code represented a fresh start in the law, while to scholars of the historical school, codes merely restated existing law. *Id.*

45. The report was completed on April 12, 1901, during a congressional recess. The Commissioner submitted the report to Attorney General P.C. Knox, who later presented it to Congress when it reconvened on December 3, 1901. COMMISSION REPORT, *supra* note 32, at 1 (letter from P.C. Knox, Attorney General, to the Speaker of the House of Representatives).

46. See Ramos, *supra* note 15, at 17. The commission also recommended changes in the Foraker Act, one of which would have granted United States citizenship to Puerto Ricans. United States citizenship was eventually granted to Puerto Ricans in 1917. See Organic (Jones) Act of 1917, ch. 145, § 5, 39 Stat. 951, 953 (1917).

47. Ramos, *supra* note 15, at 17.

With the exception of the revision of the organic act (the Foraker Act), all the subjects intrusted [sic] to the commission are within the competency of the local legislative assembly, and unless Congress is prepared to enact a complete code of laws for the island, the revision of the legal system will have to be carried out by the insular assembly.

COMMISSION REPORT, *supra* note 32, at 28.

48. The legislative branch of the local Puerto Rican government. Ramos, *supra* note 15, at 12.

49. *Id.* at 19.

50. In 1901, the local legislature had also created, by its own statute, a similar commission, and was likewise considering its recommendations. *Id.* Two members of the former commission, Leo Stanton Rowe and Hernandez Lopez, were also members of the new commission. The third member of the original commission, Joseph Daly, of New York, was replaced by J.M. Keedy, also of New York. *Id.*

51. *Id.*

community, presented a major obstacle to the Insular Assembly.⁵² Generally, mainlanders sought to impose their own agendas on revision.⁵³ Some mainlanders desired to import the legal institutions of their own states, while others were hostile to any legal system unlike that of the United States.⁵⁴

In pursuit of revision, the Insular Assembly had essentially three options: to preserve the island's existing legal system and codes; to abandon the civil law system and adopt a common law approach; or to follow the code commission's recommendation of bringing the existing civil law system into harmony with the mainland's common law system without any sudden changes.⁵⁵

The Insular Assembly eventually adopted the code commission's approach.⁵⁶ Puerto Rican lawmakers thereafter began a process of cutting and pasting laws imported from the mainland onto the existing legal system.⁵⁷ The civil code remained virtually unchanged.⁵⁸ To the extent the code of commerce did not conflict with United States laws that were extended to Puerto Rico, the Insular Assembly left it in force.⁵⁹ In 1902, the Insular Assembly adopted a new penal code, borrowed from the state of Montana.⁶⁰ California lent its code

52. *Id.* at 17-22.

53. As commissioner Rowe relates:

To the mass of Americans resident in the island—and this is particularly true of the lawyers—the entire system of law and government, of domestic and public institutions, was bad simply because it was different from our own. . . . The lawyer from Massachusetts wanted the Massachusetts system, the lawyer from South Carolina the South Carolina system, and so on. . . . The only way to make Americans of the Porto Ricans, it was argued, was to give them, without delay, the system of law of one of our states. "This is the way we do it in the States" was regarded as an argument sufficient to bring conviction to the mind of every native.

L.S. ROWE, THE UNITED STATES AND PORTO RICO 14 (1904).

54. *Id.*

55. Ramos, *supra* note 15, at 19-20.

56. *Id.* at 20.

57. *See id.* at 20-21.

58. *Id.* at 20. The code followed the traditional distribution of subjects into categories of persons, things, and actions as they appeared in the Justinian Institute of Roman law. This scheme was developed in the Spanish Civil Code's use of four books: (1) persons; (2) property, ownership, and its modifications; (3) different ways of acquiring ownership; and (4) obligations and contracts. *Id.*

Initially, many changes were made in the text of the code in an attempt to incorporate provisions of Louisiana's civil code. *Id.* The specific provisions imported from Louisiana were taken from a code which pre-dated that of the Spanish code in place at the time of occupation. Thus, most of the changes conflicted with traditional laws and mores on the island, and were later abandoned. *Id.*

59. *Id.* at 21.

60. *Id.*

of criminal procedure and its political (government) code, which the Insular Assembly also adopted in 1902.⁶¹ The Insular Assembly adopted the code of civil procedure of Idaho and the law of private corporations of New Jersey in 1904 and 1911, respectively.⁶²

It is unclear whether these adoptions reflected the mainlanders' belief that what worked at home was best, or whether they reflected attempts to import familiar law from their own home states. Of greater significance is the fact that Puerto Rico began its history of United States governance by creating a legal system where elements of both the common and civil law traditions existed in an uneasy, often problematic juxtaposition.

B. Cutting and Pasting in Practice: Strict Products Liability and Punitive Damages

The practice of doctrinal cutting and pasting, adopted by the Insular Assembly in the early twentieth century, was not limited to codified law.⁶³ In response to changing commercial, societal, and industrial conditions, common law courts on the mainland developed new substantive law doctrines.⁶⁴ Despite the limited discretion afforded judges in traditional civil law jurisdictions,⁶⁵ Puerto Rican courts continued the process of cutting and pasting by importing judicial doctrines which logically conformed to the civil law tradition, and rejecting those which did not. The adoption of strict products liability and the rejection of punitive damages reflect this practice of importation and rejection.

1. Importing Strict Products Liability

Puerto Rico has codified all obligations to others arising from fault or negligence in Chapter 393 of the Civil Code, which provides

61. *Id.*

62. *Id.*

63. In civil law jurisdictions, prior judicial decisions do not carry nearly the same weight as they do under the common law. *Id.* at 345-46; see *infra* text accompanying notes 71-73, 234-41. However, the acts imported from the mainland by the Insular Assembly, if not complete by themselves, "were subject to the Anglo-American stare decisis of interpretation, a technique in conflict with the civil law method." *Id.* at 22.

This created difficult questions regarding the weight to be given subsequent judicial decisions from the jurisdiction which was the source of the act. See generally *id.* at 352-59.

64. See generally W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 139-40, 650-58 (4th ed. 1971) (covering respectively the development of modern negligence doctrine and the move from warranty to strict liability in products actions).

65. See *infra* text accompanying notes 239-41.

in pertinent part: "A person who by an act or omission causes damage to another through fault or negligence shall be obliged to repair the damage so done."⁶⁶

The applicability of this statute to cases involving injuries to consumers from defective products is problematic in two ways. First, Puerto Rico's goal in imposing an extra-contractual obligation for negligence is to compensate a victim for injuries sustained as a result of the lack of foresight or prudence of the wrongdoer.⁶⁷ Under this view, compensation for injuries is unavailable unless the consumer can prove that the manufacturer did not exercise due diligence in the manufacture of its product.⁶⁸ The doctrine of strict liability, or liability without fault, is not a basis for redress, since it is incompatible with a statutory scheme based upon fault.⁶⁹

Second, the text of the statute allows little leeway for an interpretation creating strict liability, and an unduly liberal construction would run counter to Puerto Rico's civil law tradition.⁷⁰ In civil law jurisdictions, the texts of written codes constitute the primary source of the law.⁷¹ Unlike the common law, the decisions of civil law judges merely put a secondary gloss on the codes.⁷² Thus, civil law jurists generally give great deference to both the text of codified statutes and legislative intent.⁷³

The first Puerto Rican courts to address the problem of con-

66. P.R. LAWS ANN. tit. 31, § 5141 (1968). This section is derived from the 1902 Civil Code of Puerto Rico, section 1803, which, in turn, was derived from article 1902 of the Spanish Civil Code, originally extended to Puerto Rico in 1889. *Id.* (note on derivation); P.R. LAWS ANN. tit. 31, § 1 note on history (1967); see *supra* text accompanying notes 27, 58.

67. *Graham v. Banco Territorial y Agrícola*, 5 P.R.R. 163 (1904). "[A] person who, by an act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage done . . ." *Id.* at 170.

68. W. PROSSER, *supra* note 64, at 642-44.

69. *Id.* at 492-96.

70. See generally Ramos, *supra* note 15, at 25-37.

71. *Id.* at 345.

72. *Id.* at 346.

73. See *id.* at 346-47. Given its anomalous status as a civil law jurisdiction in the common law United States, Puerto Rico is somewhat unique. According to Dean Rodríguez Ramos, "[f]or the Supreme Court of Puerto Rico the written law is . . . a primary source of law. Nearly always, the court has resorted in the first instance to written law, in search of a solution for the problems brought before it." *Id.* at 365.

However, a diluted version of *stare decisis*, not found in most other civil law jurisdictions, exists in Puerto Rico as well. See *id.* at 355, 361-64. Judicial decisions are taken into account "only as instructive for a sound understanding and just application of the statutes." Sperl, *Case Law and the European Codified Law*, 19 ILL. L. REV. 505, 519 (1925).

The Supreme Court of Puerto Rico does not consider itself bound by its own prior decisions in a manner comparable to mainland tribunals. Rather, prior decisions only have a per-

sumer injury from manufactured goods were confronted with a statute that provided little analytical opportunity for adopting a theory of strict liability or products liability based on fault. However, products liability in Puerto Rico developed in much the same way as it did on the mainland.⁷⁴

In *Castro v. Payco, Inc.*,⁷⁵ the Puerto Rico Supreme Court addressed the issue of products liability. In that case, the plaintiff purchased tainted ice cream directly from an employee of the manufacturer.⁷⁶ The court, in awarding compensatory damages to the plaintiff, adopted a form of the implied warranty analysis which prevailed on the mainland.⁷⁷ Unlike the mainland doctrine, which was almost completely based on an extension of contract principles, the court greatly supplemented its reasoning with negligence per se principles.⁷⁸

The Puerto Rican court did not, however, totally divorce the warranty doctrine from its contractual underpinnings. In *Castro*, the

suasive effect on the court. Ramos, *supra* note 15, at 366. The high court's decisions, on the other hand, strictly bind the insular district and municipal courts. *Id.*

Interestingly, the court considers itself bound by constructions of the Spanish Civil Code rendered by the Supreme Court of Spain prior to October 18, 1898. *Olivieri v. Biaggi*, 17 P.R.R. 676 (1911); see also *Marchan v. Eguen*, 44 P.R.R. 396 (1933) (holding that when the legislature adopted the Civil Code of Spain, it accepted the construction placed upon it by the Spanish courts). Decisions rendered after that date are merely persuasive to the extent the Puerto Rican high court agrees with the force of their reasoning. *Olivieri*, 17 P.R.R. at 676. Thus, the court will frequently look to its own prior decisions and to those of the Spanish Supreme Court in solving novel legal problems not addressed by statute.

The court may also refer to eminent Spanish commentators for the "proper" interpretation of those portions of the Civil Code of Puerto Rico literally copied from the Spanish Code. *Bonillerse v. Gonzalez*, 17 P.R.R. 1084 (1911).

74. W. PROSSER, *supra* note 64, at 641-56.

75. 75 P.R.R. 59 (1953).

76. *Id.* at 61.

77. See W. PROSSER, *supra* note 64, at 650-56 for a discussion of the doctrine of implied warranty.

78. *Castro*, 75 P.R.R. at 68. The court utilized the Puerto Rico Food, Drug and Cosmetic Act, P.R. LAWS ANN. tit. 24, §§ 711-32 (1979). The court noted:

Consequently, when the manufacturer of an article used for food offers it for sale for human consumption, the presumption is that he has complied with the Act, that he has placed on the market an unadulterated article and that he warrants that it is fit for its intended use.

The majority of states in which this question has arisen, adhere to the rule of implied warranty, that is, that the person who serves or sells food for human consumption impliedly warrants that the product is wholesome and fit for human consumption. . . . This doctrine is applicable in Puerto Rico according to the provisions of Act No. 72 of 1940 mentioned above.

Castro, 75 P.R.R. at 68 (citation omitted).

plaintiff purchased the ice cream directly from the manufacturer.⁷⁹ Thus, privity of contract—a concept which later created problems on the mainland⁸⁰—was established in *Castro*. However, the court also laid the foundation for difficulties in applying the doctrine to a consumer who purchased a defective product, but was separated from the manufacturer by the chain of distribution.⁸¹

In *Mendoza v. Cerveceria Corona, Inc.*,⁸² the court considered a case that did not involve privity of contract. The plaintiff, after purchasing a quantity of beer from a local warehouse and consuming a bottle, became severely ill and was eventually hospitalized.⁸³ In the resulting action against the brewery, the court analyzed the mainland's difficulties with the implied warranty doctrine's early requirement of privity of contract and its eventual adoption of strict liability.⁸⁴ The court then adopted a strict products liability formulation for all manufacturers, which was similar to that set forth by the California Supreme Court in *Greenman v. Yuba Power Products, Inc.*⁸⁵ and the *Restatement (Second) of Torts* section 402A.⁸⁶

The Puerto Rican high court noted that "[t]here is nothing in

79. *Castro*, 75 P.R.R. at 61.

80. See *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

81. In *Coca-Cola Bottling Co. of Puerto Rico v. Negron Torres*, 255 F.2d 149, 152 (1st Cir. 1958), the First Circuit interpreted *Castro* as establishing liability without requiring privity of any sort.

[W]e feel justified in believing that the . . . Supreme Court of Puerto Rico . . . [would] hold when the occasion arises that as to the wholesomeness of food the implied warranty of fitness for human consumption is not grounded so much upon contract as upon the strong public policy, as clearly expressed in the local pure food and drug act, to preserve human health and even life itself.

Id.

82. 97 P.R.R. 487 (1969).

83. *Id.* at 487-88.

84. *Id.* at 489-95.

85. 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963).

86. See *Mendoza*, 97 P.R.R. at 499-500. *Restatement (Second) of Torts*, section 402A provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

§ 1902 of the Spanish Civil Code . . . to prevent [the adoption of strict liability]."⁸⁷ Rather, the court pointed out, the Spanish Supreme Court was itself moving in the direction of objective or strict liability.⁸⁸ The court found further support for its move toward strict liability in *Greenman*: "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."⁸⁹ Noting that the adoption of strict liability did not force manufacturers to be insurers of every injury caused by their products,⁹⁰ the court held that "the strict liability rule being the most reasonable and being consistent with the social needs of Puerto Rico and there being no provision in our code of laws militating against its adoption in our juridical sphere, it is proper that we adopt it in this jurisdiction."⁹¹

The Puerto Rico Supreme Court's importation of California strict products liability doctrine continued in *Montero Saldaña v. American Motors Corp.*,⁹² a case in which the court adopted the California definition of "defect" as set forth in *Cronin v. J.B.E. Olson Corp.*⁹³ In *Saldaña*, the plaintiff suffered injuries when his vehicle's

87. *Mendoza*, 97 P.R.R. at 496.

88. *Id.* The court quoted from a 1963 Spanish Supreme Court case to support its reasoning:

[a]lthough our legislation has not expressly admitted the objective liability system, with respect to damages sustained by a third person, it is evident that both the doctrine and the jurisprudence in an increasing evolution are to acknowledge liability on the ground of the mere creation of perils for the community, even disregarding the fault of the one liable

Id. at 496-97 (quoting Judgment of Oct. 30, 1963, Supreme Court of Spain, 32 Aranzadi, Repertorio de Jurisprudencia 4231).

89. *Mendoza*, 97 P.R.R. at 499 (quoting *Greenman v. Yuba Power Products Inc.*, 59 Cal. 2d 57, 63, 27 Cal. Rptr. 697, 377 P.2d 897 (1963)).

90. *Mendoza*, 97 P.R.R. at 499.

91. *Id.* at 500.

92. 107 D.P.R. 452 (1978).

93. *Id.* at 462 (quoting *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 104 Cal. Rptr. 433, 501 P.2d 1153 (1972)). In *Cronin*, the defendant corporation in a products liability action challenged a jury instruction which did not require the plaintiff to show that the defect found in the product was "unreasonably dangerous," as set forth in *Restatement (Second) of Torts* section 402A. *Cronin*, 8 Cal. 3d at 127-29, 104 Cal. Rptr. at 437-38, 501 P.2d at 1157-58. For the text of section 402A, see *supra* note 86. The California Supreme Court, however, relying on *Greenman*, concluded that requiring a plaintiff to prove not only that a product contained a defect, but also that the defect made the product unreasonably dangerous to the consumer, "would place a considerably greater burden upon him than that articulated in *Greenman*." *Id.* at 134-35, 104 Cal. Rptr. at 443, 501 P.2d at 1163.

The *Cronin* court also eliminated any distinction between defects resulting from an error in manufacturing and defects resulting from poor design:

brakes failed.⁹⁴ Defendant American Motors asserted that it did not own the factory which manufactured the vehicle. It further asserted that the trial court had not interpreted the holding in *Mendoza* in light of the *Restatement (Second) of Torts*.⁹⁵

The Puerto Rico Supreme Court, however, held that the "defect which afflicts a product does not have to be one which is 'unreasonably dangerous to the consumer or purchaser' as expressed in Sec. 402A (1965) of the Restatement of Torts."⁹⁶ For support, the court relied on *Mendoza* dicta quoting an article by California Chief Justice Traynor⁹⁷ and the California Supreme Court's decision in *Cronin*.⁹⁸

As to the distinction between defects arising during production and those arising during design, the court again followed *Cronin*, noting that

[i]t is pertinent to make clear that the defect which gives rise to the application of the doctrine of strict liability includes that defect in manufacture as well as in design. "A defect may emerge from the mind of the designer as well as from the hand of the workman."⁹⁹

Thus, as shown in the area of strict products liability, the Puerto Rico Supreme Court has essentially continued the process of importing mainland law begun by the Insular Assembly at the turn of the century. Its willingness to adopt the law of the mainland has not, however, extended to the entire breadth of tort law. As this Com-

We can see no difficulty in applying the *Greenman* formulation to the full range of products liability situations, including those involving "design defects." A defect may emerge from the mind of the designer as well as from the hand of the workman Although it is easier to see the "defect" in a single, imperfectly fashioned product than in an entire line badly conceived, a distinction between manufacture and design defects is not tenable.

Id. at 134, 104 Cal. Rptr. at 442-43, 501 P.2d at 1162-63.

94. *Montero Saldaña*, 107 D.P.R. at 455.

95. *Id.*

96. *Id.* at 461 (translation by author).

97. *Mendoza v. Cervceria Corona, Inc.*, 97 P.R.R. 487, 499 & n.7 (1969)(citing Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965)). In his article, Chief Justice Traynor suggested the following definition of "defect": "A defective product may be defined as one that fails to match the average quality of like products, and the manufacturer is then liable for injuries resulting from deviations from the norm." Traynor, *supra* at 367.

98. *Montero Saldaña*, 107 D.P.R. at 461-62 (citing *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 134, 104 Cal. Rptr. 433, 443-44, 501 P.2d 1153, 1162-63 (1972)); see *supra* text accompanying note 93.

99. *Montero Saldaña*, 107 D.P.R. at 462 (quoting *Cronin*, 8 Cal. 3d at 134, 104 Cal. Rptr. at 443-44, 501 P.2d at 1162-63) (those portions of *Montero Saldaña* not quoting *Cronin* translated by author).

ment will point out, the court has declined to adopt at least one common law doctrine in its courtrooms.

2. Rejecting Punitive Damages

Although the doctrine of punitive liability in civil actions has ancient roots,¹⁰⁰ the common law doctrine originates from a 1763 English case, *Huckle v. Money*.¹⁰¹ By the turn of the twentieth century, nearly every state in the union had accepted punitive civil liability.¹⁰²

Puerto Rico's judiciary, however, has not opted to import this doctrine. Rather, by adhering to the letter of the Puerto Rico Civil Code, the island's courts limit damages to those necessary to compensate the victim.¹⁰³ Damages designed principally to punish or deter conduct do not fit into this compensatory scheme and are therefore not available.¹⁰⁴

As previously indicated,¹⁰⁵ Title 31, section 5141 of Puerto Rican law¹⁰⁶ is the source for all actions brought in Puerto Rico for injuries resulting from the negligent or wrongful act of another.¹⁰⁷ The section uses broad language in specifying the available damages: "A person who by an act or omission causes damage to another through

100. For an in-depth historical background of punitive damages both internationally and in the United States, see Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1262-64 & n.17 (1976).

101. 95 Eng. Rep. 768 (K.B. 1763). In *Huckle*, the plaintiff sued the King's officers for assault, trespass, and false imprisonment for actions under an illegal warrant. While the plaintiff was detained only six hours, and suffered slight physical damage, "exemplary damages" were legitimately awarded because the illegal warrant was a "most daring public attack made upon the liberty of the subject." *Id.* at 769.

102. Owen, *supra* note 100, at 1264 n.23. By 1935, all but four states (Louisiana, Massachusetts, Nebraska, and Washington) had adopted some form of punitive damages. *Id.*

103. See *Computec Systems Corp. v. General Automation, Inc.*, 599 F. Supp. 819, 827 (D.P.R. 1984) (stating that "[u]nless the damage claimed is proven to have in fact existed and to have been related to the injurious act, no compensation can be awarded . . ."); see also *Jimenez Nieves v. United States*, 618 F. Supp. 66, 69 (D.P.R. 1985) (stating that "the law of torts in Puerto Rico has revolved around the central theme of compensation to the victim for the damages he or she has suffered").

104. *Cooperativa de Seguros Multiples de Puerto Rico v. San Juan*, 289 F. Supp. 858, 859 (D.P.R. 1968) (stating that "damages to be awarded under the law of Puerto Rico should be of a compensatory nature, to make the plaintiff whole for the damages and injuries suffered by him, and not in the manner of a punishment").

105. See *supra* text accompanying note 66.

106. Prior to the codification in its current form, the text of Title 31, section 5141 was found in section 1802 of the Civil Code of Puerto Rico. See *supra* note 66 and accompanying text. In cases predating the current codification, the supreme court refers to the section as it was identified in the prior codification (§ 1802). To avoid confusion, this Comment has substituted, where possible, the section's location in the current codification.

107. *Rivera v. Rossi*, 64 P.R.R. 683, 689 (1945).

fault or negligence shall be obliged to repair the damage so done.”¹⁰⁸ The scheme of the section, however, is clearly compensatory in nature. The Puerto Rican courts have expansively interpreted the section as encompassing a broad range of injuries.¹⁰⁹

One of the principal Puerto Rican cases concerning the damages available under Title 31, section 5141 is *Rivera v. Rossi*.¹¹⁰ In *Rivera*, an action brought for a wrongful attachment of the plaintiff's automobile,¹¹¹ the Puerto Rico Supreme Court expanded the availability of damages for mental suffering while simultaneously stressing the compensatory nature of the code section.

The court began by noting that it is inferred from the language of Title 31, section 5141, and “is so held by the decisions and the text writers, that in order to be compensable the damage must be the natural consequence of the fault or negligence of the person from whom recovery is sought”¹¹² In most prior Puerto Rican cases, awards for mental suffering were limited to cases in which physical injury was also present.¹¹³

The *Rivera* court questioned the necessity and logic of this requirement, asking, “is not a humiliation . . . more important than many physical injuries for which compensation is usually and unhesitatingly awarded?”¹¹⁴ Although the Spanish Supreme Court had

108. P.R. LAWS ANN. tit. 31, § 5141 (1968) (reprinted in full at *supra* text accompanying note 66).

109. See *Ganapolsky v. Park Gardens Dev. Corp.*, 439 F.2d 844, 846 n.* (1st Cir. 1971).

110. 64 P.R.R. 683 (1945).

111. *Id.* at 684-85.

112. *Id.* at 689. Referring to the circumstances in which damages may be awarded under the section, the court provided the following quote from a commentator on the Spanish Civil Code:

As to the determination of the damage, the latter must be genuine and must not flow from the fulfillment of the obligations, or from acts or omissions of the injured person himself, and as to the proof of the fault or negligence, mere indications or inadmissible presumptions are not sufficient to prove said fault or negligence; they should be proved in such a manner as to leave no room to doubt their very existence and their connection with the injury caused, for in order that fault or negligence may become a source of obligation there must exist between them and the injury caused the relation of cause and effect.

Id. at 690 (quoting Manresa, 12 COMMENTARIOS AL CÓDIGO CIVIL ESPAÑOL 545 (4th ed. 1931)).

113. See *id.* at 687-89. The court also noted the common law majority view at that time, which required accompanying physical damages for the recovery of mental suffering. *Id.* at 690. According to the court, the underlying theory is that a “physical impact” helps to guarantee that alleged mental suffering is genuine, thereby minimizing fraudulent claims. *Id.*; see generally W. PROSSER, *supra* note 64, at 213-16 (common law adoption and eventual rejection of physical impact rule).

114. *Rivera*, 64 P.R.R. at 689.

not previously addressed the issue beyond awarding compensation for damages to honor and family emotions,¹¹⁵ the court noted that Title 31, section 5141 makes no distinction between damages to feelings and physical damages with respect to compensation.¹¹⁶ Therefore, the court saw "no reason whatsoever to restrict compensation for damages to the feelings, to those cases where the honor and family emotions are involved and to deny them in cases . . . where . . . it is evident that a person of normal susceptibility must necessarily have suffered mental anguish"¹¹⁷

While expanding the availability of damages for mental suffering,¹¹⁸ the *Rivera* court expressly indicated that its broad interpretation of Title 31, section 5141 did not expand the recovery of damages beyond those necessary to compensate the injured plaintiff: "The award of damages . . . is not a penalty imposed on the person who has to pay them, but a compensation to the one who has sustained the damages and, therefore, it is incumbent on the latter to prove the existence of said damages in order to obtain the compensation."¹¹⁹

This declaration of the compensatory basis for tort damages in Puerto Rico is the foundation for the general unavailability of punitive damages in the commonwealth's subsequent case law.¹²⁰ According to one commentator on the island's jurisprudence:

Puerto Rican case law has not yet admitted the theory of punitive damages adopted by Anglo-American Law. According to that law, one may take into account not only the result produced by the tort, the material and moral suffering of the victim, but also the cause, that is, the conduct of the agent, in cases where such conduct constitutes, besides a violation of a right, an outrage or an insult. It seems that in Anglo-American Law, in which moral damages are not admitted, such a theory is justified; that justification does not exist in Puerto Rican Law.¹²¹

115. *Id.* at 696-97.

116. *Id.* at 689.

117. *Id.* at 697.

118. *Compagnie Nationale Air France v. Castano*, 358 F.2d 203, 208 (1st Cir. 1966); P.R. LAWS ANN. tit. 31 § 5141 annot. 340 (1968).

119. *Rivera*, 64 P.R.R. at 686.

120. See *Ganapolsky v. Park Gardens Dev. Corp.*, 439 F.2d 844, 846 n.* (1st Cir. 1971); *Pereira v. Int'l Basic Energy Corp.*, 95 P.R.R. 28, 54 (1967) (stating "in Puerto Rico the award of punitive damages has not been authorized by law, and therefore, to award them is improper"); *Toro v. Porto Rican & Am. Ins. Co.*, 87 P.R.R. 625, 626 (1963).

121. VELÁZQUEZ, *LAS OBLIGACIONES SEGÚN EL DERECHO PUERTORRIQUEÑO* 120 (1964), quoted in *Cooperativa de Seguros Múltiples de Puerto Rico v. San Juan*, 289 F. Supp. 858, 860 (D.P.R. 1968).

This general refusal to award punitive damages has also resulted in excessive jury awards. In *Carrasquillo v. Lippitt & Simonpietri, Inc.*,¹²² the plaintiff, after being injured in an automobile accident, was fraudulently induced into settling his claim for a small amount and signing a form releasing the defendants from any future liability.¹²³ The trial court subsequently rendered a \$10,000 judgment against the defendants for their deceitful and fraudulent conduct.¹²⁴

On appeal, the defendants challenged the excessiveness of the judgment as punitive in nature.¹²⁵ The Puerto Rico Supreme Court agreed. In particular, the court pointed to the fact that the plaintiff had not offered any proof at trial of the damages that resulted from the alleged fraud.¹²⁶ The court therefore held that "the estimate of said damages at \$10,000 [was] so excessive that it should be considered of a punitive character,"¹²⁷ which is not recognized in Puerto Rico.

With such steadfast adherence to the compensatory nature of the Puerto Rico Civil Code, the island's courts have refused to adopt one of the more noteworthy aspects of the California tort system. This rejection of punitive damages occurred despite the apparent willingness of the Puerto Rican courts to adopt California's system of strict products liability. After discussing the development of punitive liability in California, this Comment will consider some of the possible reasons for, and ultimately the wisdom behind, Puerto Rico's rejection of the doctrine.

III. PUNITIVE DAMAGES IN CALIFORNIA PRODUCTS LIABILITY ACTIONS

California courts have been in the forefront of the development of the common law of torts in the United States with respect to the duties citizens owe one another,¹²⁸ the causes of action generally available to plaintiffs,¹²⁹ and the potential damages available to pre-

122. 98 P.R.R. 646 (1970).

123. *Id.* at 647-48.

124. *Id.* at 649.

125. *See id.* at 649.

126. *Id.* at 657.

127. *Carrasquillo*, 98 P.R.R. at 657.

128. *See generally* Rowland v. Christian, 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968) (repudiating common law classifications between landowners and the duties they owe to others); Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334 (1976) (psychotherapist's affirmative duty to warn third party endangered by patient).

129. *See generally* Dillon v. Legg, 68 Cal. 2d 728, 69 Cal. Rptr. 72, 44 P.2d 912 (1968)

vailing parties.¹³⁰ Consistent with California's trend toward plaintiff-oriented tort law is the availability of punitive damages in products liability actions. Before discussing the applicability of punitive damages in the products liability context, it is helpful to understand how the doctrine of punitive damages developed in the state and how the courts apply it to tort actions in general.

A. *Punitive Damages in California*

The California legislature and courts have made punitive damages available for nearly as long as the state has existed.¹³¹ As explained below, the interaction between the punitive damage statutes and judicial interpretation has guided the development of the various requirements necessary for a jury to award exemplary damages.

1. Statutory Authority and Legislative History

The recovery of punitive damages in civil actions in California derives from section 3294 of the Civil Code.¹³² As originally worded, this section required the plaintiff to prove that the defendant acted

(establishing broad rule of liability for negligent infliction of emotional distress); *Greenman v. Yuba Power Products*, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963) (establishing strict liability for manufacturers of goods).

130. See generally *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 (1978) (adopting doctrine of comparative partial indemnity).

131. The section of the Civil Code providing for exemplary damages was enacted in 1872. CAL. CIV. CODE § 3294 (West 1970). California was admitted to the union in 1850. CALIFORNIA JOURNAL, ALMANAC OF CALIFORNIA GOVERNMENT AND POLITICS 1983-84 (4th ed. 1983).

132. Section 3294 provides:

(a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer has advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defend-

with oppression, fraud, or malice, actual or presumed, in order for a jury to award punitive damages.¹³³ As amended in 1905,¹³⁴ this section allowed the recovery of punitive damages, when "the defendant [had] been guilty of oppression, fraud, or malice, express or implied"¹³⁵

The most significant difference between the code section as originally enacted and as it existed for some seventy-five years after the 1905 amendment was the two words qualifying the term "malice." Although there appears to be little semantic difference between the terms "actual and presumed" and "express or implied," the issue of what constituted the necessary element of malice, and how malice could be proved, made up the substantial portion of California case law on punitive damages.

In 1980, the state legislature discarded the distinction by deleting the words "express and implied," and redefined malice as "conduct which is intended by the defendant to cause injury to the plaintiff or conduct which is carried on by the defendant with a conscious disregard of the rights or safety of others."¹³⁶ These changes represented an effort to limit what the legislature, government entities, and many business interests considered an uncontrolled deluge of punitive damage awards.¹³⁷ Apparently, little of the expected relief materialized, and these same special interest groups turned again to Sacramento in 1987. These groups and the plaintiff's bar, represented by the California Trial Lawyers Association, struck an old-fashioned back-room political deal. The latter promised a greater measure of relief for business interests in return for a promise not to pursue serious tort reform until 1992.¹³⁸

Among other tort reform measures, the Brown-Lockyer Civil Liability Reform Act of 1987¹³⁹ affected punitive damages by requiring plaintiffs to prove oppression, fraud, or malice by "clear and convinc-

ant of thereby depriving a person of property or legal rights or otherwise causing injury.

CAL. CIV. CODE § 3294 (West Supp. 1991).

133. 2 CIV. CODE OF CAL. § 3294 (C. Haymond & J. Burch, Cal. Code Comm'rs) (1st ed. 1872).

134. 1905 Cal. Stat. 621.

135. CAL. CIV. CODE § 3294 (West 1970).

136. 1980 Cal. Stat. 4217-18.

137. See Brady, *Welcome News From California: Lessening the Conflict Between Insurer and Insured*, 29 FOR THE DEFENSE, Dec. 1987, at 13.

138. *Id.*

139. 1987 Cal. Stat. 1, ch. 1498.

ing evidence."¹⁴⁰ The Act redefined oppression as "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights,"¹⁴¹ and malice as "conduct . . . intended by the defendant to cause injury to the plaintiff or despicable conduct . . . carried on . . . with a willful and conscious disregard of the rights or safety of others."¹⁴²

The legislature effected these statutory modifications in an effort to limit the expansion of punitive damage awards.¹⁴³ This represents the current statutory framework for the doctrine of punitive damages in California. More relevant to this Comment, however, are the actions taken by the California courts in the intervening years (1905-1980) which resulted in these dramatic statutory responses.

2. Judicial Changes in the Doctrine

Judicial recognition of punitive damages in California actually predated the adoption of Civil Code section 3294. In *Wilson v. Middleton*,¹⁴⁴ the California Supreme Court allowed punitive damages in an action for malicious assault.¹⁴⁵ This decision immediately followed the United States Supreme Court's decision in *Day v. Woodworth*¹⁴⁶ in which the Court held that the challenges to the propriety of the doctrine would "not admit of argument."¹⁴⁷

The enactment of Civil Code section 3294, therefore, merely ratified judicial acceptance of the doctrine both inside and outside of the state.¹⁴⁸ With the adoption of section 3294, however, California courts had statutory guidance for awarding punitive damages. Yet,

140. *Id.* § 5. Until this modification, malice, oppression, or fraud sufficient to justify an award could be proven by a preponderance of the evidence. Brady, *supra* note 137, at 16.

141. 1987 Cal. Stat. 1, ch. 1498, sec. 5.

142. *Id.*

143. Brady, *supra* note 137, at 16-17.

144. 2 Cal. 54 (1852). Other cases decided prior to 1872 allowing punitive damages include *Mendelsohn v. Anaheim Lighter Co.*, 40 Cal. 657 (1871); *Nightingale v. Scannell*, 18 Cal. 315 (1861); and *Dorsey v. Manlove*, 14 Cal. 553, 556 (1860).

Where the trespass is committed from wanton or malicious motives, or a reckless disregard of the rights of others, or under circumstances of great hardship or oppression, the rule of compensation is not adhered to . . . In these cases the jury are [sic] not confined to the loss or injury sustained, but may go further and award punitive or exemplary damages, as a punishment for the act, or as a warning to others.

Id.

145. *Wilson*, 2 Cal. at 56.

146. 54 U.S. (13 How.) 363 (1851).

147. *Id.* at 371.

148. See Note, *Punitive Damages in California under the Malice Standard: Defining Conscious Disregard*, 57 S. CAL. L. REV. 1065 (1984).

the courts still had to develop standards for the rather ambiguous and underdefined statutory prerequisites of malice.

In *Davis v. Hearst*,¹⁴⁹ the California Supreme Court set forth the first widely-accepted definitions of malice under section 3294. In a libel action against William Randolph Hearst and one of his newspapers, a Pasadena School Board member sought compensatory and punitive damages for a series of newspaper articles on local government.¹⁵⁰ Faced with the two types of malice involved in libel actions—that malice required to prove libel itself and that which must be shown to recover punitive damages—the court laid down a workable distinction between constructive and actual malice.¹⁵¹

To recover compensatory damages under *Davis*, a plaintiff must only prove constructive malice or malice presumed by law from a defendant's defamatory and unprivileged communication.¹⁵² However, in order to recover punitive damages, a plaintiff must prove malice in fact, or an actual, subjective malicious intent on the part of the defendant.

It should be apparent that the malice, and the only malice, contemplated by section 3294 is malice in fact . . . [I]t is only upon some showing regarded by the law as adequate to establish the presence of malice in fact, that is the motive and willingness to vex, harass, annoy, or injure, that punitive damages have ever been awarded.¹⁵³

The *Davis* definition of malice remains one of the bases for the recovery of punitive damages in California.¹⁵⁴ This would present few problems if recovery was limited to actions for libel and other intentional torts, where *animus malus*, if not necessary, is relatively easy to prove. However, section 3294, even as amended in 1987, does not restrict the recovery of punitive damages to such cases.¹⁵⁵ Despite this fact, a number of California courts for some time both expressly and impliedly adhered to the *animus malus* or evil motive standard set down in *Davis*.¹⁵⁶

149. 160 Cal. 143 (1911).

150. *Id.* at 149-54. The newspaper implicated was the Los Angeles Examiner. *Id.* at 149.

151. *Id.* at 156-58.

152. *Wilson v. Fitch*, 41 Cal. 363 (1871).

153. *Davis*, 160 Cal. at 162.

154. 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW § 1325, at 793 (9th ed. 1988).

155. See *supra* text accompanying notes 140-42. For the complete current text of section 3294, see *supra* note 132.

156. For a lengthy list of decisions, see *G.D. Searle & Co. v. Superior Court*, 49 Cal. App. 3d 22, 30 n.2, 122 Cal. Rptr. 212, 223 (1975).

The *Davis* rule therefore created an almost insurmountable obstacle in actions based on civil liability which were arguably within the scope of section 3294, but did not rise to the level of intentional tort.¹⁵⁷ The difficulties created by *Davis* in nonintentional tort cases led a number of California courts to develop explications of malice which would extend the punitive damage doctrine without rejecting the venerable *Davis* analysis. One line of cases cast malice in terms of wanton and reckless misconduct,¹⁵⁸ while other cases employed the term recklessness in conjunction with other disparaging terms, such as wantonness, willfulness, intent, and conscious disregard of danger.¹⁵⁹ Still other cases utilized reckless misconduct and reckless disregard as terms with an independent capacity to sustain punitive damage awards.¹⁶⁰ According to one court, the later cases in this group merely "assume, without analysis, that reckless disregard of the consequences completely satisfies the statutory concept of malice."¹⁶¹

In the mid-1970s, these judicial variations on the meaning of malice ended with two decisions. In *Silberg v. California Life Ins. Co.*,¹⁶² an insurance bad faith case, the California Supreme Court held that "[i]n order to justify an award of exemplary damages, the defendant must be guilty of oppression, fraud or malice. (Civ. Code § 3294.) He must act with the intent to vex, injure or annoy, or with a conscious disregard of the plaintiff's rights."¹⁶³

This "conscious disregard" approach was adapted to the prod-

157. For example, in a typical products liability action, the plaintiff rarely can prove that a manufacturer actually harbored a subjective intent to injure, vex, harass, or annoy, a specific consumer or even the consuming public as a whole.

158. See *Donnelly v. Southern Pacific Co.*, 18 Cal. 2d 863, 869-70, 118 P.2d 465, 468-69 (1941).

159. See *Schroeder v. Auto Driveway Co.*, 11 Cal. 3d 908, 922, 114 Cal. Rptr. 622, 631, 523 P.2d 662, 671 (1974); *Ebaugh v. Rabkin*, 22 Cal. App. 3d 891, 895-96, 99 Cal. Rptr. 706, 709 (1972); *Black v. Shearson, Hammill & Co.*, 266 Cal. App. 2d 362, 369, 72 Cal. Rptr. 157, 162 (1968); *Toole v. Richardson-Merrell Inc.*, 251 Cal. App. 2d 689, 713, 60 Cal. Rptr. 398, 415 (1967); *Cohen v. Groman Mortuary, Inc.*, 231 Cal. App. 2d 1, 9, 41 Cal. Rptr. 481, 486 (1964); *Roth v. Shell Oil Co.*, 185 Cal. App. 2d 676, 682, 8 Cal. Rptr. 514, 517 (1960); *Gombos v. Ashe*, 158 Cal. App. 2d 517, 526-30, 322 P.2d 933 (1958); see generally *Franson, Exemplary Damages in Vehicle Accident Cases*, 50 CAL. ST. B.J. 93 (1975).

160. See *Templeton Feed & Grain v. Ralston Purina Co.*, 69 Cal. 2d 461, 471, 72 Cal. Rptr. 344, 350, 446 P.2d 152, 158 (1968); *Dorsey v. Manlove*, 14 Cal. 553, 556 (1860); *Sturges v. Charles L. Harney, Inc.*, 165 Cal. App. 2d 306, 322, 331 P.2d 1072, 1081 (1958); *McDonnell v. American Trust Co.*, 130 Cal. App. 2d 296, 299, 279 P.2d 138, 140-41 (1955).

161. *Searle*, 49 Cal. App. at 31, 122 Cal. Rptr. at 224.

162. 11 Cal. 3d 452, 113 Cal. Rptr. 711, 521 P.2d 1103 (1974).

163. *Id.* at 462, 113 Cal. Rptr. at 718, 521 P.2d at 1110.

ucts liability context in *G.D. Searle & Co. v. Superior Court*.¹⁶⁴ In *Searle*, the plaintiff sued Searle, a drug manufacturer, alleging injury from the use of an oral contraceptive. The plaintiff sought both general and punitive damages.¹⁶⁵ Searle filed a demurrer attacking, among other things, the sufficiency of the plaintiff's punitive damages claim.¹⁶⁶ After a detailed analysis of relevant precedent, the court concluded that the shifts in the definition of malice reflected "judicial restlessness with the *Davis v. Hearst* formula."¹⁶⁷ In particular, the court noted that "[v]erbalisms coined in a libel action may seem unsuitable for a products liability suit involving claims of commercial callousness"¹⁶⁸

Determining that "suits of the present variety call for a restatement of the traditional concept,"¹⁶⁹ the *Searle* court put forth its own suggestion. In reliance on the California Supreme Court's language in *Silberg*, the court reasoned that "[i]n a personal injury action the notion of conscious disregard of the *safety* of others logically may be substituted for that of disregard of the *rights* of others."¹⁷⁰ The court then suggested "*conscious disregard of safety* as an appropriate description of the *animus malus* which may justify an exemplary damage award when nondeliberate injury is alleged."¹⁷¹

The "conscious disregard of safety" standard has been followed in virtually every nonintentional injury case in which punitive damages have been awarded under the malice standard.¹⁷² As indicated above, this standard was incorporated in the definition of malice in the 1980 amendments to section 3294.¹⁷³ With the new 1987 amendments to section 3294, and the requirement of "despicable" conduct,¹⁷⁴ however, it remains to be seen how the courts will maneuver within these tighter guidelines. With this legal background on the

164. 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (1975).

165. *Id.* at 25, 122 Cal. Rptr. at 220.

166. *Id.*

167. *Id.* at 32, 122 Cal. Rptr. at 224.

168. *Id.*, 122 Cal. Rptr. at 224-25.

169. *Searle*, 49 Cal. App. 3d at 32, 122 Cal. Rptr. at 225.

170. *Id.*

171. *Id.*

172. Note, *supra* note 148, at 1075. In *Taylor v. Superior Court*, 24 Cal. 3d 890, 157 Cal. Rptr. 693, 598 P.2d 854 (1979), the California Supreme Court sanctioned the "conscious disregard" standard. The court concurred with the *Searle* observation that "a conscious disregard of the safety of others may constitute malice within the meaning of section 3294 of the Civil Code." *Id.* at 895, 157 Cal. Rptr. at 696, 598 P.2d at 856.

173. See *supra* note 136 and accompanying text.

174. See *supra* notes 140-42 and accompanying text.

development of the doctrine of punitive damages in California now complete, this Comment will examine its specific application in the products liability context.

B. Punitive Damages in Products Liability Actions

The prevalence of punitive damage awards in California and the rest of the nation gives few courts or commentators pause to question their availability in actions based on fraud or deceit, at least when the plaintiff satisfies the jurisdiction's pleading requirements.¹⁷⁵ However, with respect to implied warranty and strict liability actions, many have raised vociferous complaints about the logical, economic, and equitable propriety of this type of damages.¹⁷⁶

1. The Case Against Punitive Damages: *Roginsky v. Richardson-Merrell, Inc.*

Early decisions in this country reflected judicial discomfort with applying the traditional punitive damages doctrine to actions based on strict liability, where the question of fault is irrelevant. As a result, most of the early cases resulted in favorable decisions for manufacturers challenging the availability of punitive damages in products liability actions.

Representative of this trend was *Roginsky v. Richardson-Merrell, Inc.*,¹⁷⁷ a New York case in which the plaintiff sued the manufacturer of a prescription drug which was designed to lower blood cholesterol, but which caused users throughout the country to develop cataracts. The case provides a cogent, in-depth analysis of the inherent problems in reconciling the strict liability and punitive damages doctrines.

In *Roginsky*, the jury awarded the plaintiff \$100,000 in punitive damages.¹⁷⁸ On appeal, the Second Circuit found the evidence insufficient to sustain the award and overturned it.¹⁷⁹ In dicta, Judge Friendly, writing for the majority, criticized the general advisability of punitive damages in products liability actions and raised three important points.

First, if multiple plaintiffs, each affected by the same defect in a widely-marketed product, recovered punitive damages in the amount

175. Owen, *supra* note 100, at 1268.

176. See *id.* at 1268-77.

177. 378 F.2d 832 (2d Cir.), *reh'g denied*, 378 F.2d 832, 851 (1967).

178. *Id.* at 834.

179. *Id.* at 835.

awarded to Mr. Roginsky, total liability "would run into tens of millions [of dollars], as contrasted with the maximum criminal penalty of . . . 'not more than \$10,000 . . .', 21 U.S.C. § 333(b), for each violation of the Food, Drug and Cosmetic Act with intent to defraud or mislead."¹⁸⁰ Thus, a manufacturer's aggregate punitive liability could well exceed the maximum allowable criminal penalty, even to the point of bankrupting an otherwise honest and socially beneficial manufacturer.¹⁸¹

This possibility additionally raises concerns about the denial of the manufacturer's right to due process,¹⁸² as the rules of civil procedure are generally less stringent than constitutionally-mandated criminal safeguards.¹⁸³ Further, even if punitive damages are limited to first-time plaintiffs, a practical and equitable issue arises as to who should draw the line separating first-comers, and when and where the line should be drawn.¹⁸⁴

Second, the majority opinion raises the fear that manufacturers could escape the punitive effects of exemplary damages by obtaining products liability insurance.¹⁸⁵ While Judge Friendly ignores the potential unconscionability of indemnity for intentional conduct, he cites the detrimental effect such insurance would have on insurance rates for the public as a whole.¹⁸⁶

Finally, the opinion points out that the financial burden of a punitive award would not actually be borne by the offending actors. Rather, the court notes that "a sufficiently egregious error as to one product can end the business life of a concern . . . with many innocent stockholders suffering extinction of their investments for a single management sin."¹⁸⁷

180. *Id.* at 839.

181. *Id.* at 841.

182. *Roginsky*, 378 F.2d at 839-40.

183. For example, in civil cases the standard of proof is generally a preponderance of the evidence, while in criminal trials in the United States, the Constitution has been interpreted to require the much heavier burden of proving guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970).

184. See *Roginsky*, 378 F.2d at 839-40. The court noted that most juries and a number of judges would have some difficulty in understanding why plaintiffs in equally meritorious cases throughout the country should get fewer or no punitive damages, simply because other plaintiffs fortuitously arrived first and stripped the cupboard bare. *Id.*

185. *Id.* at 841.

186. *Id.*

187. *Id.*

2. The Judicial Response in California: *Toole v. Richardson-Merrell, Inc.*

Toole v. Richardson-Merrell, Inc.,¹⁸⁸ a case decided almost three months after *Roginsky*, involved the same defective drug, the same defendant, an almost identically-situated plaintiff, and virtually the same set of facts. However, the California Court of Appeal largely ignored, if not implicitly repudiated, the concerns raised by the Second Circuit. The *Toole* court disagreed with the *Roginsky* court's holding as to the sufficiency of evidence for an award of punitive damages, noting that it saw in its "record ample evidence of conduct on the part of appellant from which the jury could infer intentional, wilful and reckless conduct on appellant's part, done in disregard of possible injury to persons such as respondent."¹⁸⁹

Setting aside evidentiary issues, these two decisions represent a deep difference of opinion on the general advisability of punitive damages in products liability actions. The Second Circuit in *Roginsky* believed that a number of public policy concerns warranted caution in awarding punitive damages.¹⁹⁰ The court of appeal in *Toole*, however, demonstrated no such caution. It apparently failed to consider important concerns regarding who eventually must bear the burden of these damages and what effect insuring against them might have on consumers at large.¹⁹¹

In its petition for rehearing, Richardson-Merrell argued again that punitive damages are unconstitutional given the lack of a standard to measure the punishment and the lack of a limit on the amount to be awarded.¹⁹² The court of appeal found no merit whatsoever in this contention.¹⁹³ Thus, the court implicitly repudiated all three of Judge Friendly's arguments in *Roginsky*.¹⁹⁴

188. 251 Cal. App. 2d 689, 60 Cal. Rptr. 398, *reh'g denied*, 251 Cal. App. 2d 718 (1967).

189. *Id.* at 715 n.3, 60 Cal. Rptr. at 416.

190. *See supra* text accompanying notes 180-87.

191. The court explicitly rejected Richardson-Merrell's constitutional challenge to the awarding of punitive damages and thereby implicitly rejected the Second Circuit's similar argument in *Roginsky*. *See Toole*, 251 Cal. App. 2d at 716-17, 60 Cal. Rptr. at 417-18. As to the insurability against punitive damages, California courts have subsequently held such insurance contracts void as against public policy. *Ford Motor Co. v. Home Ins. Co.*, 116 Cal. App. 3d 374, 172 Cal. Rptr. 59 (1981).

192. *Id.* at 719, 60 Cal. Rptr. at 419.

193. *Id.*

194. As to the arguments regarding innocent shareholders and the availability of insurance, if there is no merit in the contention as to what effect huge punitive damage awards might have, it follows there is no need to worry about who eventually pays these awards. As to

In its decision, the *Toole* court further stated that "a plaintiff's right to exemplary or punitive damages, when the defendant's conduct justifies the award, is generally accepted, and may exist even in the absence of statute. Some authorities have said that the right to such damages is as old as the right to trial by jury."¹⁹⁵

The court's language implies that punitive damages serve a retributitional function and are thereby a right of litigants who successfully prove that they have been sufficiently wronged. The court does not give consideration to the effect of punitive damages on future business conduct or the public at large.

A less radical interpretation might be that given the enormous cost of prosecuting products liability actions, the successful litigant should reap the reward for his or her initiative. This interpretation, however, is unfounded, since the court does not limit its comment to products liability actions. Therefore the court's comments could be applied to any more-easily-prosecuted action in which punitive damages are sought.

With either interpretation, the *Toole* court certainly broke new ground in awarding punitive damages.¹⁹⁶ Building on the court's comment that the right to punitive damages may exist even in the absence of statute, other California courts have clearly adopted their own views as to the availability of punitive damages in products liability actions.¹⁹⁷

3. Post-*Toole* Reprise in California

The general availability of punitive damages in California products liability actions was elaborately explained and solidified in *Grimshaw v. Ford Motor Co.*,¹⁹⁸ the infamous "Pinto" litigation.

In *Grimshaw*, the plaintiffs sued the Ford Motor Company for injuries sustained when the Ford Pinto in which they had been traveling exploded after a rear-end collision.¹⁹⁹ According to facts elicited at trial, Ford management was aware that the Pinto could not survive

the constitutional challenge itself, the court's view of Judge Friendly's contention is self-explanatory. See *id.*; see also *supra* text accompanying notes 180-87.

195. *Toole*, 251 Cal. App. 2d at 719, 60 Cal. Rptr. at 419 (emphasis added).

196. Since the California Supreme Court refused to review *Toole*, *Roginsky* has little, if any, persuasive authority.

197. See, e.g., *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 358 (1981); *G.D. Searle & Co.*, 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (1975).

198. 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981).

199. *Id.* at 771, 174 Cal. Rptr. at 358.

a twenty mile per hour rear-end collision without significant fuel spillage.²⁰⁰ Ford, however, decided to produce the subcompact without implementing recommended changes in the vehicle's design.²⁰¹ These recommendations originated from Ford's own engineers and would have achieved fuel system integrity at relatively little cost.²⁰²

Following a six-month jury trial, plaintiff Grimshaw, the only occupant who survived the explosion, was awarded \$2.5 million in compensatory damages and \$125 million in punitive damages.²⁰³ On appeal, Ford contended that punitive damages were statutorily impermissible in a design defect case and that there was no evidentiary support for a finding of malice or corporate responsibility for malice.²⁰⁴

In particular, Ford asserted that the "malice" required by Civil Code section 3294 necessitated evidence of *animus malus*—an intention to injure the person harmed.²⁰⁵ This essentially restated the *Davis* definition of malice,²⁰⁶ which Ford contended was "conceptually incompatible with an unintentional tort such as the manufacture and marketing of a defectively designed product."²⁰⁷

The court of appeal rejoined that Ford's contention ran counter to the state's case law on the definition of malice.²⁰⁸ The court pointed out that malice not only includes a malicious intention to injure the specific person harmed, but also "conduct evincing 'a conscious disregard of the probability that the actor's conduct will result in injury to others.'"²⁰⁹

The court continued:

The interpretation of the word "malice" . . . to encompass conduct evincing callous and conscious disregard of public safety by those who manufacture and market mass produced articles is

200. *Id.* at 775-77, 174 Cal. Rptr. 360-62.

201. *Id.* at 776, 174 Cal. Rptr. at 361.

202. *Id.* at 775-76, 174 Cal. Rptr. at 360-61.

203. *Grimshaw*, 119 Cal. App. 3d at 771, 174 Cal. Rptr. at 358. On Ford's motion for a new trial, Grimshaw was required to remit all but \$3.5 million of the punitive damages as a condition of denial of the motion. *Id.* at 772, 174 Cal. Rptr. at 358. Plaintiff Gray, who was the driver of the vehicle, suffered fatal burns as a result of the accident. Her estate was awarded \$559,680 in compensatory damages in a consolidated wrongful death action. *Id.* at 771-72 & n.1, 174 Cal. Rptr. at 358.

204. *Id.* at 807, 174 Cal. Rptr. at 380.

205. *Id.* at 808, 174 Cal. Rptr. at 381.

206. *See supra* text accompanying note 153.

207. *Grimshaw*, 119 Cal. App. 3d at 808, 174 Cal. Rptr. at 381.

208. *See supra* text accompanying notes 162-73.

209. *Grimshaw*, 119 Cal. App. 3d at 808, 174 Cal. Rptr. at 381 (quoting *Dawes v. Superior Court*, 111 Cal. App. 3d 82, 88, 168 Cal. Rptr. 319, 322 (1980)).

consonant with and furthers the objectives of punitive damages[. . . punishment and deterrence of like conduct by the wrongdoer and others. . . . In the traditional noncommercial intentional tort, compensatory damages alone may serve as an effective deterrent against future wrongful conduct but in commerce-related torts, the manufacturer may find it more profitable to treat compensatory damages as part of the cost of doing business rather than to remedy the defect. . . . Deterrence of such "objectionable corporate policies" serves one of the principal purposes of Civil Code section 3294. . . . Punitive damages thus remain as the most effective remedy for consumer protection against defectively designed mass produced articles.²¹⁰

The court treated with equal contempt Ford's contention that the evidence at trial was insufficient to support a finding of malice or corporate responsibility for such malice.²¹¹ According to the court, Ford knew, through the results of its own crash tests, that its customers risked serious injury or death in a twenty to thirty mile per hour collision.²¹² Further, "[t]here was evidence that Ford could have corrected the hazardous design defects at minimal cost. . . ."²¹³ Ford, however, "decided to defer correction of the shortcomings by engaging in a cost-benefit analysis balancing human lives and limbs against corporate profits."²¹⁴ In the court's view, "Ford's institutional mentality was shown to be one of callous indifference to public safety[.]"²¹⁵ and therefore, "[t]here was substantial evidence that Ford's conduct constituted 'conscious disregard' of the probability of injury to members of the consuming public."²¹⁶

Ford's claim that the evidence was insufficient to support a finding of corporate ratification of the malicious misconduct was equally without merit.²¹⁷ The court first recited California law on the punitive liability of corporations for employee actions.²¹⁸ It then held that the malicious conduct at issue was either perpetrated by managerial employees of Ford acting within the scope of their authority, or rati-

210. *Id.* at 810, 174 Cal. Rptr. at 382-83 (citations omitted).

211. *Id.* at 813, 174 Cal. Rptr. at 384.

212. *Id.*

213. *Id.*

214. *Grimshaw*, 119 Cal. App. 3d at 813, 174 Cal. Rptr. at 384.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* California follows the Restatement rule that punitive damages can be awarded against a principal because of an agent's action if, but only if,

fied or approved by Ford or its managerial agents.²¹⁹

In particular, the court noted that Ford management was aware of the results of the crash tests prior to the decision to go forward with production.²²⁰ Testimony indicated that these results were forwarded up the chain of command to the committee that made the final decision.²²¹ The court summed up the testimony by noting that

[w]hile much of the evidence was necessarily circumstantial, there was substantial evidence from which the jury could reasonably find that Ford's management decided to proceed with the production of the Pinto with knowledge of test results revealing design defects which rendered the fuel tank extremely vulnerable on rear impact at low speeds and endangered the safety and lives of the occupants. Such conduct constitutes corporate malice.²²²

In terms of basic fairness, the California court of appeal's decision in *Grimshaw* appears correct, given Ford's callous manufacturing decisions. Indeed, the facts of the case possibly make the strongest argument for awarding punitive damages in products liability actions. Hopefully, however, the decisions of Ford at issue in *Grimshaw* represent an anomaly in the larger scheme of business affecting the state's residents. A question arises, therefore, whether *Grimshaw* should apply equally to cases in which the manufacturer's intent is ambiguous or does not rise to a *Grimshaw* level of callousness. At some point,

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- (a) the principal authorized the doing and the manner of the act, or
 - (b) the agent was unfit and the principal was reckless in employing him, or
 - (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
 - (d) the principal or a managerial agent of the principal ratified or approved the act.

RESTATEMENT (SECOND) OF TORTS § 909 (Tent. Draft No. 19, 1973); see also *Hart v. National Mortgage & Land Co.*, 189 Cal. App. 3d 1420, 1432, 235 Cal. Rptr. 68, 76 (1987); *Pusateri v. E. F. Hutton & Co.*, 180 Cal. App. 3d 247, 250, 225 Cal. Rptr. 526, 527 (1986); *Greenfield v. Spectrum Investment Corp.*, 174 Cal. App. 3d 111, 118, 219 Cal. Rptr. 805, 809 (1985); *Grieves v. Superior Court*, 157 Cal. App. 3d 159, 167, 203 Cal. Rptr. 556, 561 (1984); *Chodos v. Ins. Co. of North Am.*, 126 Cal. App. 3d 86, 102, 178 Cal. Rptr. 831, 840 (1981); *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal. 3d 809, 822-32, 157 Cal. Rptr. 482, 489, 598 P.2d 452, 458-59 (1979); *Merlo v. Standard Life & Acc. Ins. Co.*, 59 Cal. App. 3d 5, 18, 130 Cal. Rptr. 416, 424-25 (1976); *Hale v. Farmers Ins. Exch.*, 42 Cal. App. 3d 681, 691-92, 117 Cal. Rptr. 146, 153-54 (1974), *rev'd on other grounds*, 24 Cal. 3d 809, 822 n.5 (1979). For statutory requirements for the awarding of punitive damages against a corporate employer, see CAL. CIV. CODE § 3294(b) (West Supp. 1990) (reprinted in full *supra* note 132).

219. *Grimshaw*, 119 Cal. App. 3d at 813, 174 Cal. Rptr. at 384.

220. *Id.* at 814, 174 Cal. Rptr. at 385.

221. *Id.*

222. *Id.*

cost-benefit analysis can justifiably determine appropriate standards for a product while still rendering it affordable to the consumer.

If Ford's behavior in *Grimshaw* and Richardson-Merrel's behavior in *Toole* are anomalies, should the courts derive a rule which will expand punitive liability to innocent or commercially and socially-reasonable manufacturing decisions? The California judiciary has done just that. As a result, a manufacturer could face punitive liability solely for placing its product on the market, regardless of its intent in developing or marketing the product.

The sections that follow compare the logic behind codification and liability in both Puerto Rico and California, and recommend a solution to minimize the criminal type of behavior evident in *Grimshaw*, and dismantle what has become strict punitive liability for manufacturers in California.

IV. DISCUSSION: DISTINCTIONS AND PROBLEMS

As previously indicated,²²³ Puerto Rico and California have reached opposite conclusions on the availability of punitive damages in products liability actions. In large measure, this results from the jurisdictions' divergent views on civil liability.

Puerto Rico adheres to the compensatory nature of civil liability and has prohibited the advent of punitive liability on the island.²²⁴ On the other hand, California's legislature and courts have allowed juries to consider not only the victim's injuries, but also the wrongdoer's actions, in assessing liability.²²⁵

What differences in the structure of the two legal systems account for these contrasting views on the nature of liability? What problems have arisen in the products liability context in California as a result of its view? These are the questions that the following two sections address.

A. Codification

In outlining and implementing their views on civil liability, Puerto Rico and California have utilized similar procedures. Their admittedly divergent views on liability are based on their respective Civil Codes.²²⁶ Judicial bodies in both jurisdictions have interpreted the

223. See *supra* text accompanying notes 103-27, 188-222.

224. See *supra* text accompanying notes 103-27.

225. See *supra* text accompanying notes 131-74.

226. For Puerto Rico, see P.R. LAWS ANN. tit. 31, § 5141 (1968) (reprinted in pertinent

sections to give them their respective meanings.²²⁷ Here, however, the similarities end. What these civil codes represent, how they are structured, and how they are interpreted in some measure accounts for their differing views on civil liability.

Virtually all modern jurisdictions which adhere to the civil law tradition base their judicial institutions on codified law.²²⁸ The perception "that civil law systems are codified statutory systems, whereas the common law is uncoded and is . . . large[ly] judicial" is often used to describe the differences between the civil and common law traditions.²²⁹ But this is both an oversimplification and a misstatement. In fact, California, which is not a civil law jurisdiction, has more codes than any civil law nation,²³⁰ and until recently some civil law countries remained uncoded.²³¹

Ultimately, it is what the codifications²³² represent, and how they are structured, that account for some of the real differences between the civil and common law traditions, including their dissimilar views on punitive damages.

1. The Theory Behind Codification

a. *Puerto Rico*

In civil law jurisdictions like Puerto Rico, codification is not merely a political endorsement of previous law.²³³ Rather, codification entails the "logical and methodical ordering of rules of law which are the product of reason, and not a gift from history, in one body . . . known as a code."²³⁴ Historically, codification has often resulted from various utopian efforts to unify and simplify the law, in such a

part *supra* text accompanying note 66). For California, see CAL. CIV. CODE § 3294 (West Supp. 1990) (reprinted in full *supra* note 132).

227. See *supra* text accompanying notes 103-127, 144-74.

228. J.H. MERRYMAN, *THE CIVIL LAW TRADITION—AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 26 (2d ed. 1985).

229. See *id.*

230. *Id.* California has twenty-eight separate codes. CAL. CIV. CODE vol. 6 (§§ 1-653), at IX (1982).

231. J.H. MERRYMAN, *supra* note 228, at 26. For example, Hungarian civil law was codified after World War II, when Hungary became a socialist state. Greece also enacted its first civil code after World War II. South Africa, whose judicial institutions are based on Roman-Dutch law, remains uncoded. *Id.*

232. "Codification" refers to the preparation of a written work which is intended to authoritatively set out the basic principles and rules of a broad field of law. A. WATSON, *THE MAKING OF THE CIVIL LAW* 100 (1981).

233. Ramos, *supra* note 15, at 30.

234. *Id.*

way as to bring order and predictability to the legal system.²³⁵

Codifications are more than mere compilations of statutes. They provide comprehensive expressions of national ideology.²³⁶ First, they can signify the complete repudiation of prior law and the accompanying adoption of new law.²³⁷ In this sense, any principles of pre-existing law that are incorporated into new codes derive their validity from this "rebirth," and not from any prior existence or value.²³⁸

Second, codifications embody the concept of political separation of powers, where the judge is "bound to 'find' the law implicit in the statutes, never to invent a law theretofore non-existent."²³⁹ From this perspective, judicial decisions are merely "an echo of the statutory will; not declarations of the judge's own legal will."²⁴⁰ They are "[i]n short an application, not a creation, of law."²⁴¹

Finally, codification represents an effort to simplify the law, make it accessible to average citizens, and allow them to determine their legal rights and obligations without the aid of attorneys,²⁴² courts, or volumes of caselaw.²⁴³ One commentator provides an excellent statement of this populist ideology:

[W]ritten codes are not accessible to jurists alone, nor even primarily intended for them, but for *everybody*; on the other hand, a library of case reports, text-books, commentaries, or encyclopedias is *for lawyers only*. . . . Law is no esoteric science that must be discovered through learned work from thousands of precedents,

235. Spain codified in an attempt to effect legal unity in the aftermath of the Moorish invasion and the nation's subsequent feudalization after reconquest. See Ramos, *supra* note 15, at 26-30. Codification in France occurred after the revolution, in an effort to create, out of a judicial system governed by a diverse and regional aristocracy, a centralized state with a unified legal system. See J.H. MERRYMAN, *supra* note 228, at 15, 27; F.H. LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW 54 (1955). German codification, on the other hand, accorded less weight to pure reason. After careful historical study, the Germans endeavored to codify essential principles of their legal system. J.H. MERRYMAN, *supra* note 228, at 31; F.H. LAWSON, *supra*, at 53.

236. J.H. MERRYMAN, *supra* note 228, at 26-27.

237. See F.H. LAWSON, *supra* note 235, at 49.

238. See J.H. MERRYMAN, *supra* note 228, at 27.

239. Sperl, *supra* note 73, at 516; see J.H. MERRYMAN, *supra* note 228, at 29.

240. "Fear of a 'gouvernement des juges' hovered over French post-revolutionary reforms and colored the codification process." J.H. MERRYMAN, *supra* note 228, at 28-29.

241. Sperl, *supra* note 73, at 516.

242. In France, one of the objectives of the revolution, and the resulting codification "was to make lawyers unnecessary." J.H. MERRYMAN, *supra* note 228, at 28.

243. *Id.* at 28. "[T]he French Civil Code of 1804 was envisioned as a kind of popular book that could be put on the shelf next to the family Bible. It would be a handbook for the citizen, clearly organized and stated in straightforward language" *Id.* See Sperl, *supra* note 73, at 522.

from judicial decisions in litigated cases—from cases which after all are not quite like the one now to be decided, and which perhaps come down from times in which there prevailed arrangements of life, and therefore a legal order, that contradict those of today. What judicial or case-law *cannot* be, that codified law *is*: a people's law, no jurists' law of a learned class, but an intellectual possession of all citizens, as befits our democratic age.²⁴⁴

b. California

This civil law theory and its underlying ideologies do not, in practice, exist in common law jurisdictions, such as California, which have adopted semblances of codification.²⁴⁵ Where such codes exist, they do not purport to abolish all prior law in the field.²⁴⁶ They also do not compel judges to decide cases within the code's confines and do not make any pretense of completeness.²⁴⁷

An English legal philosopher, Jeremy Bentham, is credited with introducing the word "codification" into the English language.²⁴⁸ Bentham considered a code as complete and self-sufficing, capable of development, supplementation, or modification only by legislative enactment.²⁴⁹ He concisely expressed the essence of codification, as it is understood in the civil law tradition.²⁵⁰

In the United States, interest in codification sprouted early in the nineteenth century, with an 1837 report by a commission to codify the common law of Massachusetts.²⁵¹ About ten years later, similar interest was voiced in New York.²⁵² During codification discussions in New York, a New York attorney, David Dudley Field, vigorously advocated codification and was rewarded with a place on the state's newly enacted commission to codify the law.²⁵³

Over a span of eighteen years,²⁵⁴ Field drafted five codes: Polit-

244. Sperl, *supra* note 73, at 522.

245. J.H. MERRYMAN, *supra* note 228, at 32.

246. *Id.*

247. *Id.*

248. C. ILBERT, LEGISLATIVE METHODS AND FORMS 122 (1901).

249. *Id.* at 123.

250. See Ramos, *supra* note 15, at 31.

251. See Batiza, *Sources of the Field Civil Code: The Civil Law Influences on a Common Law Code*, 60 TUL. L. REV. 799 (1986).

252. *Id.* at 800; see generally Pound, *David Dudley Field: An Appraisal*, in DAVID DUDLEY FIELD: CENTENARY ESSAYS 3, 8-9 (1949).

253. Pound, *supra* note 252, at 9.

254. Field worked on the codes from 1847-1865 while also engaged in an active legal practice. Batiza, *supra* note 251, at 800.

ical, Civil Procedure, Penal, Criminal Procedure, and Civil.²⁵⁵ Field endeavored to reduce "to a positive code . . . those general principles of the common law, and . . . the expansions, exceptions, qualification and minor deductions, which have already, by judicial decisions or otherwise, been engrafted on them, and are now capable of a distinct enumeration."²⁵⁶ Thus, instead of the fresh adoption of law represented by codification throughout most of the civil law tradition,²⁵⁷ Field attempted to systematically gather the historical roots of the common law in one comprehensive set of codes.²⁵⁸

Field's work eventually had a greater impact in California than it did in his home state.²⁵⁹ When the California legislature ratified the state constitution in 1849, California's legal system, and its social fabric in general, were rather disorganized.²⁶⁰ At the time, California courts administered law handed down from the United States Supreme Court and from the former Spanish and Mexican authorities.²⁶¹

Despite initial urgings to adopt some or all of Louisiana's civil law,²⁶² in 1850 the legislature adopted the common law of England, as modified in the United States, as the law of California.²⁶³ Within ten years, however, confusion again reigned. In his message to the legisla-

255. *Id.*

256. Field, *Codification*, 20 AM. L. REV. 1 (1886).

257. Ramos, *supra* note 15, at 35.

258. In large measure, Field's codification technique directly influenced the Historical School of Jurisprudence, whose views were then popular among United States legal scholars. See *id.* at 35; R. POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 110 (1938).

259. While Field's Code of Civil Procedure was adopted in New York, his draft Civil Code was finally rejected in 1887. See Harrison, *The First Half-Century of the California Civil Code*, 10 CALIF. L. REV. 185, 187 (1922); Parma, *The History of the Adoption of the Codes of California*, 22 L. LIBR. J. 8, 18 (1929).

260. Parma, *supra* note 259, at 9.

261. Nathaniel Bennet, one of the justices of the state supreme court in 1850, stated that the court had to search for

authorities in an unfamiliar language, and an unfamiliar system of Jurisprudence, of ascertaining the law, as laid down in the codes of Spain; in the royal and vice-royal ordinances and decrees; in the laws of the imperial congress of Mexico; in the acts of the republican congress; in presidential regulations; in decrees of dictators, and acts of proconsular governors.

Id. (uncited quotation).

262. In his message to the first legislature, Governor Burnett urged California to adopt the Civil Code and Code of Practice of Louisiana, while allowing the common law to control matters of crimes, evidence, and commercial law. *Id.* at 11.

263. 1850 Cal. Stat. 95. The enactment provided: "The Common Law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or the laws of the State of California, shall be the rule of decisions in all the Courts of this State." *Id.*

ture in 1863, Governor Leland Stanford urged codification of the state's laws, claiming

[a]ll who have occasion to examine into the statutes of California cannot but be deeply impressed with the state of wild confusion into which they have fallen. Such is their condition that no person, not versed in law, can with any certainty of correctness, turn to the page of our statute book to ascertain what the law is. . . . The Bar and Bench find it alike difficult to extract order out of this wild scene of statutory confusion and chaos.

. . . .

The necessity of a thorough codification of our laws has been apparent to the legal profession, and has been frequently urged upon the attention of the legislature.²⁶⁴

In 1868, the legislature created a commission "to [p]rovide for the revision and compilation of the laws of the state of California and the publication thereof."²⁶⁵ When this commission did not complete its work by its July 1869 deadline, the legislature created a new commission, with a new deadline of November 1, 1871.²⁶⁶

By 1871, the commission had completed three of the four codes it would eventually produce.²⁶⁷ The completed Penal Code and Code of Civil Procedure essentially embodied provisions of law that were already in force in California.²⁶⁸ The Civil Code was drawn from Field's draft Civil Code, with minor changes to adapt it to prior California legislation.²⁶⁹

The enactment of the new Civil Code created unique problems for the California courts. In essence, while the courts had some experience with statutes in general, they had never confronted a body of statutes purporting to codify the common law of private rights.²⁷⁰ Conceivably, they could have treated the code as courts in a civil law jurisdiction would. Such an approach would have meant considering the code as the sole source of all rules of law, deciding every case by reference to the express provisions of the code, or when encountering a case with no provision on point, deducing a rule from other provi-

264. Parma, *supra* note 259, at 13 (uncited quotation).

265. 1868 Cal. Stat. ch. 365.

266. 1870 Cal. Stat. ch. 516.

267. Parma, *supra* note 259, at 15.

268. *Id.*

269. *Id.*; Harrison, *supra* note 259, at 187.

270. Harrison, *supra* note 259, at 188.

sions or legislative intent.²⁷¹ Instead, an influential California legal scholar, Carter P. Pomeroy, suggested a different approach.²⁷² To Pomeroy, the new Civil Code "[did] not embody the whole law concerning private and civil relations, rights, and duties; [but was] incomplete, imperfect, and partial."²⁷³ It did not attempt to state the mass of special rules which constituted the body of California law prior to codification, but dealt with each subject by providing general and abstract definitions. These were occasionally followed by special rules plainly intended to settle differences of opinion or conflicts of authority.²⁷⁴

As to the authority of the new Civil Code when it conflicted with pre-existing common law rules, Pomeroy proposed that

[e]xcept in the comparatively few instances where the language is so clear and unequivocal as to leave no doubt of an intention to depart from, alter, or abrogate the common law rule concerning the subject-matter, the courts should avowedly adopt and follow without deviation the uniform principles of interpreting all the definitions, statements of doctrines, and rules contained in the code in complete conformity with the common-law definitions, doctrines, and rules, and as to all the subordinate effects resulting from such interpretation.²⁷⁵

Thus, to Pomeroy, the Civil Code was "not designed to make any general alterations in the established doctrines and rules of the common law."²⁷⁶ Rather, the Civil Code was "merely a supplement to the common-law system, altering its rules only to the extent that the intent to do so clearly appeared."²⁷⁷

The California courts agreed. In *Siminoff v. Goodman & Co. Bank*,²⁷⁸ the plaintiff sued the defendant bank for failing to honor the plaintiff's check.²⁷⁹ As to the measure of damages, the bank contended that Civil Code Section 3302 controlled.²⁸⁰ Section 3302 covered all breaches of obligations to pay money, and limited recovery to

271. This approach was an option for the California courts. See *id.*

272. See *id.* at 189.

273. Pomeroy, *The True Method of Interpreting the Civil Code*, 4 W. COAST RPTR. 109, 114 (1884).

274. *Id.* at 113-14.

275. *Id.* at 109-10.

276. *Id.*

277. Harrison, *supra* note 259, at 189.

278. 18 Cal. App. 5, 121 P. 939 (1912).

279. *Id.* at 7-8, 121 P. at 940.

280. *Id.* at 9, 121 P. at 941.

the terms of the obligation, plus interest.²⁸¹ Plaintiff, on the other hand, asserted he was entitled to a common-law tort remedy, available before the enactment of the civil code.²⁸²

The court of appeal, after stating its approval of Pomeroy's analysis,²⁸³ found for the plaintiff.²⁸⁴ It held that

[b]efore we should feel authorized to hold that the rule laid down in section 3302 was intended to furnish the only measure of damage in such a case as we have here, it should be made to appear clearly from the terms of the statute that such was its intention, which we do not think does so appear.²⁸⁵

Thus, according to one commentator, "[t]he Codes have become glorified statutes merely; the only advantage derived from codification was the institution of a systematized, accessible conceptualism in the place of a vague, confused body of case-law."²⁸⁶ Another commentator states that decisions of the California courts are usually not based on the spirit of the Civil Code, or on any deduction from the presumed legislative intent.²⁸⁷ Rather, he says the courts seem to live by the judicial maxim that "[s]tatutes in derogation of the common law are strictly construed."²⁸⁸

Compared to the civil law conceptualizations, California's common law codification is, at best, a very distant relative. California's codes were designed to compile existing case law.²⁸⁹ One cannot consider them to exemplify the "creation" of new law, the theory which drove codification in most of Europe.²⁹⁰ Moreover, unless expressly prohibited by statute, judges continue to create rules and doctrines, which violate the civil law notion of separation of powers. Finally, while the codes are significantly less voluminous than case records, the cases themselves still contain the majority of law, negating any

281. Civil Code section 3302, at the time, provided, in pertinent part: "The detriment caused by the breach of an obligation to pay money only, is deemed to be the amount due by the terms of the obligation, with interest thereon." CAL. CIV. CODE § 3302 (1872).

282. *Siminoff*, 18 Cal. App. at 9-10, 121 P. at 941.

283. *Id.* at 11, 121 P. at 941.

284. *Id.* at 19, 121 P. at 945.

285. *Id.* at 14-15, 121 P. at 943; see also *Rosenberg v. Frank*, 58 Cal. 387, 404 (1881) (construing the rules prescribed by the Civil Code for the interpretation of wills to be in accord with those previously laid down by the court).

286. Morrow, *Louisiana Blueprint: Civilian Codification and Legal Method for State and Nation*, 17 TUL. L. REV. 351, 403 (1943).

287. Harrison, *supra* note 259, at 197.

288. J.H. MERRYMAN, *supra* note 228, at 32.

289. See Harrison, *supra* note 259, at 188-89.

290. See *id.* at 197.

hope of achieving the populist goal of simplification.²⁹¹

California's common law approach to codification has profound implications for punitive liability in products liability actions. Consider again *Grimshaw v. Ford Motor Co.*²⁹² In *Grimshaw*, Ford argued against the adoption of punitive liability in products liability actions, stressing that the definition of "malice" intended by the original drafters of Civil Code section 3294²⁹³ was "the intent to harm a particular person or persons" ²⁹⁴

The court responded that the legislature did not intend to prevent judicial development of common law substantive doctrines in enacting the Civil Code.²⁹⁵ Rather, the court noted,

the code itself provides that insofar as its provisions are substantially the same as the common law, they should be construed as continuations thereof and not as new enactments, and thus the code has been imbued "with admirable flexibility from the standpoint of adaption to changing circumstances and conditions." In light of the common law heritage of the principle embodied in Civil Code section 3294, it must be construed as a "continuation" of the common law and liberally applied "with a view to effect its objects and to promote justice." . . . [T]he applicable rules of construction "permit if not require that section (3294) be interpreted so as to give dynamic expression to the fundamental precepts which it summarizes."²⁹⁶

In the court's view, punishment and deterrence of "objectionable corporate policies" such as those perpetrated by Ford serves the basic common law principles of punitive damages: "punishment and deterrence of like conduct by the wrongdoer and others."²⁹⁷ In effect, the court merely restated Professor Pomeroy's assertion of the way judges were to interpret the Civil Code after its adoption. The court engrafts new meaning upon "malice." The term no longer denotes action characterized by wrongful intent. Rather, the court has "dynamically" and "flexibly" defined it as conduct which the common law might have sought to punish and deter, even if the conduct in question did not exist at the time.

291. See *id.*

292. 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981).

293. For a discussion of what constitutes "malice," see *supra* text accompanying notes 149-74; see also *supra* note 132 (Civil Code § 3294 reprinted in full).

294. *Grimshaw*, 119 Cal. App. 3d at 809, 174 Cal. Rptr. at 382.

295. See *id.*

296. *Id.* at 809-10, 174 Cal. Rptr. at 382 (citations omitted).

297. *Id.* at 810, 174 Cal. Rptr. at 382.

Disparaging the court's reasoning fails to illuminate the deficiencies of interpreting section 3294 in light of the common-law purposes of punitive damages which existed prior to codification. A commentator remarks that punitive damages "can claim the virtue of allowing punishment decisions to be rendered on a case-by-case basis, zeroing in on conduct that has not yet been addressed by the legislature."²⁹⁸

The difficulty with this reasoning lies in the avowed purposes served by the common-law doctrine of punitive damages: punishment and deterrence of like conduct.²⁹⁹ In particular, by departing from even a semblance of statutory interpretation as practiced in civil law jurisdictions like Puerto Rico,³⁰⁰ and pursuing these two objectives by simultaneously expanding and obscuring the standard by which punitive damages are awarded, the court creates analytical and theoretical inconsistencies with the doctrine's application.³⁰¹

i. Inherent Inconsistencies With the Theory Behind Punitive Liability in California

(a) *Ambiguous Pre-code Basis for the Current Standard*

By employing Pomeroy's common-law view toward codification³⁰² in its interpretation of section 3294, the court encounters a fundamental glitch in its analysis—the fungibility of pre-code common-law precedents. In particular, punishment and deterrence may not have been, as asserted by the *Grimshaw* court,³⁰³ the primary rationales behind the pre-code availability of punitive damages in California.

298. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133, 145-46 (1982).

299. *Grimshaw*, 119 Cal. App. 3d at 810, 174 Cal. Rptr. at 382; *Ford Motor Co. v. Home Ins. Co.*, 116 Cal. App. 3d 374, 380, 172 Cal. Rptr. 59, 63 (1981); *Rosener v. Sears, Roebuck & Co.*, 110 Cal. App. 3d 740, 750, 168 Cal. Rptr. 237, 243 (1980).

300. See *supra* text accompanying notes 239-41.

301. While this Comment focuses on structural and theoretical problems behind the California courts' punitive damage doctrine, practical problems inure as well. In particular, the question is raised whether the meaningless standard for liability renders the courts' goals of punishment and deterrence more elusive? See generally Schwartz, *supra* note 298 (theoretical problems with deterrence justification).

Since a thorough discussion of these practical consequences is outside the scope of this Comment, and increasingly lends itself to a mathematical analysis which this author neither desires, nor is qualified to attempt, the reader should consider looking elsewhere. As a good start, see Kuklin, *Punishment: The Civil Perspective of Punitive Damages*, 37 CLEV. ST. L. REV. 1 (1989).

302. See *supra* text accompanying notes 270-88.

303. *Grimshaw*, 119 Cal. App. 3d at 809-10, 174 Cal. Rptr. at 382.

As indicated above,³⁰⁴ California in 1850 adopted the common law of England, as received and modified in the United States, as the law of California.³⁰⁵ With regard to punitive damages, pre-1872 cases and annotations to early versions of the code accordingly looked to other jurisdictions for persuasive authority.³⁰⁶

The exact justification for the doctrine of punitive damages in England, however, remains a subject of discussion.³⁰⁷ While punishment and deterrence represent one possible theory of the origin of punitive liability,³⁰⁸ another rationale put forward is that the doctrine gave courts the ability, in cases of aggravated conduct, to compensate injuries which were not otherwise recognized at common law.³⁰⁹ The justification for the doctrine in early American jurisprudence reflected disagreement over these two rationales,³¹⁰ with punishment/deterrence eventually predominating in this country by the mid-1800s.³¹¹

A tenable argument can be made, however, that the pre-code rationale in California of "punishment and deterrence" cited by the court of appeal in *Grimshaw*,³¹² was, in reality, a judicial smokescreen to justify the awarding of otherwise unavailable compensatory damages.

A case in point is the California Supreme Court's 1860 opinion in *Dorsey v. Manlove*,³¹³ cited by the *Grimshaw* court in support of an extension of punitive liability beyond torts involving *animus malus*.³¹⁴ In *Dorsey*, the plaintiff was driving cattle from Southern to Northern

304. See *supra* text accompanying note 263.

305. *Id.*

306. See *Mendelsohn v. Anaheim Lighter Co.*, 40 Cal. 657 (1871); *Nightingale v. Scannell*, 18 Cal. 315 (1861); *Dorsey v. Manlove*, 14 Cal. 553 (1860); CAL. CIV. CODE § 3294, Code Commissioners' Annotation (A.L. Bancroft & Co., Sumner Whitney & Co. 1874).

307. See 1 L. SCHLUETER & K. REDDEN, PUNITIVE DAMAGES § 1.3 (2d ed. 1989); 1 J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE § 1.02 (1984); K. REDDEN, PUNITIVE DAMAGES § 2.2(A)(2) (1980); Kuklin, *supra* note 301, at 3-5; Sales & Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1119-22 (1984).

308. See L. SCHLUETER & K. REDDEN, *supra* note 307, § 1.3(E)-(F); K. REDDEN, *supra* note 307, § 2.2(D)-(E); J. GHIARDI & J. KIRCHER, *supra* note 307, § 1.02.

309. In support of this theory, commentators point to the then general unavailability of damages for mental anguish, hurt feelings, wounded dignity, or insult. See L. SCHLUETER & K. REDDEN, *supra* note 307, § 1.3(C)-(D); K. REDDEN, *supra* note 307, § 2.2(B)-(C); J. GHIARDI & J. KIRCHER, *supra* note 307, § 1.02.

310. See L. SCHLUETER & K. REDDEN, *supra* note 307, § 1.4(A).

311. *Id.*

312. 119 Cal. App. 3d at 810, 174 Cal. Rptr. at 382.

313. 14 Cal. 553 (1860).

314. *Grimshaw*, 119 Cal. App. 3d at 809 n.12, 174 Cal. Rptr. at 382.

California.³¹⁵ Near Sacramento, the defendant, as Sheriff and Tax Collector for Sacramento County, detained the plaintiff, and acting under a void or irregular assessment for state and county taxes, seized and then sold three of the plaintiff's horses in satisfaction of the debt.³¹⁶

At trial for the taking and detention of the horses, the trial court allowed the plaintiffs to prove the special value of these particular horses to the venture,³¹⁷ that replacements could not be obtained, and that the venture could not go forward without them for a number of days.³¹⁸ The trial court also allowed the plaintiffs to prove damage to the cattle herd resulting from this delay,³¹⁹ and the wages and expenses of the cattle hands during the period.³²⁰

The California Supreme Court reversed, holding that the admission of this evidence departed from the ordinary rule of compensation and exceeded the plaintiffs' allowable measure of damages: the value of the particular horses plus interest.³²¹ To the court,

compensation, when applied to cases of this character, has a fixed and definite legal signification, and refers solely to the injury done to the property taken, and not to any collateral or consequential damages resulting to the owner, by reason of the trespass. This can be considered only in cases more or less aggravated, where circumstances are shown which justify a departure from the strict rule of compensation.³²²

Therefore, only in cases involving wanton or malicious motives, which were absent in the case at bar, could the jury even consider evidence of consequential damages.³²³

The court goes on to state that in cases involving aggravated conduct, juries were able to range outside the otherwise permissible grounds of strict compensation, and award punitive damages "as a

315. *Dorsey*, 14 Cal. at 554.

316. *Id.* at 554-55.

317. The plaintiffs asserted that they were driving wild, Spanish cattle, a task which required experienced cattle hands on scarce and specially-trained mounts. *Id.* at 554. The plaintiffs claimed that the horses taken were of this type, and that they were difficult to obtain. *Id.*

318. *Id.*

319. In particular, the plaintiffs claimed that the local land could not support the cattle, that a number of head were lost, that others were rendered unmarketable, and that the remaining head lost a great deal of weight. *Id.* at 554.

320. *Dorsey*, 14 Cal. at 554.

321. *Id.* at 555, 558.

322. *Id.* at 555-56,

323. *Id.* at 556.

punishment for the act, or as a warning to others.”³²⁴ The punishment language notwithstanding, the court seemed simply more comfortable in bending the then applicable rules of causation in cases involving more egregious conduct on the part of the defendant.³²⁵

Arguably, the ability of the plaintiff to prove consequential injuries of this nature was due solely to the court’s interest in punishing the defendant’s egregious conduct. However, this argument ignores the fact that if punishment and deterrence were the actual motives, plaintiffs could merely present evidence of the requisite malice, and forego the time and effort involved in proving an attenuated line of causation.³²⁶ Rather, punitive liability, it can be asserted, provided early California courts with the intellectual cover to recognize injuries or redress harms, with which they were otherwise uncomfortable.³²⁷

To be sure, as enacted in 1872, section 3294 appears to codify punishment and deterrence.³²⁸ The court, however, looks beyond the intent behind the statute’s codification, and focuses instead on an am-

324. *Id.*

325. *See Dorsey*, 14 Cal. at 556-57.

326. In fact, plaintiffs, in their short brief accompanying the published opinion, claimed that due to the defendant’s alleged aggravated conduct, they were entitled to “full compensatory damages,” and that the “compensation must be commensurate with the injury.” *Id.* at 553.

327. *See id.* at 558; *see generally* K. REDDEN, *supra* note 307, § 2.2(B)-(C).

328. Section 3294, as originally adopted, provides:

In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant.

CAL. CIV. CODE § 3294 (A.L. Bancroft & Co., Sumner Whitney & Co. 1874).

The last phrase of section 3294 notwithstanding, the intent of the legislature with regard to the justification for punitive liability may be somewhat ambiguous. A tenable argument can be made that not only did early post-codification legislatures intend to limit the types of conduct meriting punitive liability to intentional torts, but that the rationale behind the awarding of exemplary damages was equally compensatory in nature. *See, e.g.,* *Lange v. Schoettler*, 115 Cal. 388, 391-92 (1896) (interpreting an 1874 amendment to the California wrongful death statute to prohibit the award of punitive damages in wrongful death actions). The court stated that the purpose of the amendment was to preclude damages for “any grievance personal to the deceased, or any damage allowed in the interest of the people as punishment.” *Id.*

If punishment of a defendant’s conduct and deterrence of like conduct were the primary purposes of punitive damages at codification, it would make little sense for early California courts to allow their recovery when a plaintiff was only injured, and deny them, when the conduct caused his or her death. This inconsistency did not escape the *Grimshaw* court when considering an appeal from a denial of punitive liability in a consolidated wrongful death action arising out of the accident. *Grimshaw*, 119 Cal. App. 3d at 834, 174 Cal. Rptr. at 398. To the court viewing punitive liability through its punishment/deterrence lens, this inconsistency

ambiguous common-law precedent as the key to its interpretation.³²⁹ To the court, section 3294 must be interpreted to give "dynamic expression" to the underlying common-law precepts which it summarizes: punishment and deterrence.³³⁰ As the preceding discussion indicates, however, the *Grimshaw* court, stands on less than firm ground, when it cites to the *Dorsey* case, for the "common law heritage" of punishment and deterrence embodied in Civil Code section 3294.³³¹ Unfortunately, this is unavoidable. An ambiguous or inconsistent common-law record is the inherent difficulty with Pomeroy's theory of codification.

(b) *Inconsistencies in the Doctrine's Application*

Debates over ambiguous precedents aside, the real difficulty with the court's "dynamic expression" method of interpretation is its creation of a standard for punitive liability which is as uncertain as it is flexible. Despite the court's citation to the "conscious disregard" standard adopted in *Searle*³³² and *Taylor v. Superior Court*,³³³ and subsequently codified by the legislature in 1980,³³⁴ it fails to expressly limit punitive liability to cases which meet this standard.³³⁵ Rather, the court, through "dynamic expression," implies that punitive liability may attach to commercial torts where criminal sanctions do not provide a sufficient protection to the consumer, and private individuals require an added economic incentive to pursue court action.³³⁶ In short, punitive liability should be available whenever a particular judge or jury's notion of justice would be served.³³⁷

In direct contrast to the strict form of statutory interpretation prevalent in civil law jurisdictions like Puerto Rico,³³⁸ this standard creates further inconsistencies in the doctrine's application. To begin

was "difficult to explain," and an "anomaly." *Id.* As long as punishment of culpable conduct is the goal, it makes little difference whether the decedent or his or her heirs brings the action.

However, if compensation was an equally valid justification to early legislators, denying what is essentially an assignment of a cause of action explains the inconsistency.

329. *Grimshaw*, 119 Cal. App. 3d at 809-10, 174 Cal. Rptr. at 382.

330. *Id.* at 810, 174 Cal. Rptr. at 382.

331. *Id.* at 809 n.12, 174 Cal. Rptr. at 382.

332. 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (1975).

333. 24 Cal. 3d 890, 157 Cal. Rptr. 693, 598 P.2d 854 (1979).

334. See *Grimshaw*, 119 Cal. App. 3d at 807-08 n.11, 174 Cal. Rptr. 381; *supra* text accompanying notes 136-37.

335. *Grimshaw*, 119 Cal. App. 3d at 808-10, 174 Cal. Rptr. at 381-82 (1981).

336. See *id.* at 810, 174 Cal. Rptr. at 382.

337. See *id.* at 809-10, 174 Cal. Rptr. at 382.

338. See *supra* text accompanying notes 239-41.

with, the court runs head on into the precedent it cites in support of its "common law heritage" of punishment and deterrence. After reversing the award of consequential damages, the *Dorsey* court admonished its lower courts as follows:

It too frequently happens that the Courts, in their zeal to administer what they deem to be justice, and to compel parties to make complete reparation for injuries resulting from their wrongful acts, involve themselves in difficulties of the most embarrassing character. The rules which have been established to relieve this branch of judicial inquiry from its practical embarrassments, should be adhered to with undeviating firmness.³³⁹

Further, while arguably just dicta,³⁴⁰ the *Grimshaw* court creates a standard which is really no standard at all. This lack of substantive guidelines, particularly in the products context, ensures that the common law's purported goals of punishment and deterrence are not effectively realized. To begin with, if the punishment and deterrence of objectionable corporate policies indeed serves the purposes of punitive damages,³⁴¹ a condition precedent to the realization of these goals is an awareness of the conduct which will subject a manufacturer to liability.³⁴² A flexible standard of liability, however, inherently provides little assurance that despicable conduct will always go punished and innocent conduct will always be absolved.³⁴³

Second, the pursuit of punishment and deterrence requires adherence to the admonition that the punishment fit the particular wrongdoing.³⁴⁴ Jurors in California, however, enjoy an almost unfettered discretion in the amount of punitive damages they may

339. *Dorsey*, 14 Cal. at 558,

340. Assuming arguendo that the court was correct in its focus on pre-codification common law for interpreting section 3294, its resulting punishment and deterrence rationales would clearly support an extension of the applicable standard to a conscious disregard of the safety of others. Further, as the court indicates, there was substantial evidence in the record to support a finding that Ford's conduct met this standard. *Grimshaw*, 119 Cal. App. 3d at 813, 174 Cal. Rptr. at 384.

341. *Id.* at 810, 174 Cal. Rptr. at 382.

342. See Ausness, *supra* note 11, at 40, 82; see also Owen, *Civil Punishment and the Public Good*, 56 S. CAL. L. REV. 103, 114 (1982).

343. See J. GHIARDI & J. KIRCHER, *supra* note 307, § 207; Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 39-40, 52-53 (1982). Of potentially equal concern to society is that the uncertainty of punitive liability will deter manufacturers from engaging in research and development aimed at relieving current societal problems. See *id.* at 46-53; see also *Browning-Ferris v. Kelco Disposal*, 109 S. Ct. 2909, 2924 (1989) (O'Connor, J., concurring in part and dissenting in part).

344. See Schwartz, *supra* note 298, at 141; Ausness, *supra* note 11, at 57.

award.³⁴⁵ An obscure standard of liability exacerbates this lack of control, particularly in the products context, as evidence admissible for the underlying action³⁴⁶ and the almost standardless punitive remedy³⁴⁷ threatens to unduly prejudice the jury.³⁴⁸ Thus, the lack of any meaningful control over juror discretion leads to disparate punishment of otherwise similar conduct and clouds the arguably clear deterrent message communicated to other manufacturers.³⁴⁹

Further, members of the United States Supreme Court, over its

345. See CAL. JURY INSTRUCTIONS (BAJI) No. 14.72.2 (West Supp. 1990) (discretion to be exercised without "passion or prejudice," while considering "reprehensibility" of conduct, "deterrent effect," and "reasonable relation" to the injury). Appellate review and meager procedural protections provide the only check on absolute jury discretion. See *Rosener v. Sears, Roebuck & Co.*, 110 Cal. App. 3d 740, 168 Cal. Rptr. 237 (1980) (\$10 million punitive award accompanying \$158,000 compensatory judgment vacated); see also CAL. CIV. CODE § 3295 (West Supp. 1991) (procedural protections—e.g., bifurcation, admissibility of evidence—but no substantive limits).

However, on appellate review, the same reasoning, which creates the questionable standard for liability to begin with, may resurface to rubber-stamp the jury's verdict. See, e.g., *Grimshaw*, 119 Cal. App. at 820-21, 174 Cal. Rptr. at 389 (citing lack of government protection of consumers for propriety of \$7.7 million punitive award).

346. Under California strict products liability, a product may be proven defective in two ways:

First, a product may be found defective in design if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. Second, a product may alternatively be found defective in design if the plaintiff demonstrates that the product's design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design.

Barker v. Lull Engineering Co., 20 Cal. 3d 413, 432, 143 Cal. Rptr. 225, 237-38, 573 P.2d 443, 455-56 (1978).

In *Grimshaw*, however, the court of appeal, in support of its flexible standard, noted that "in commerce-related torts, the manufacturer may find it more profitable to treat compensatory damages as a part of the cost of doing business rather than to remedy the defect." *Grimshaw*, 119 Cal. App. at 810, 174 Cal. Rptr. at 382. The court went on to condemn Ford for "engaging in a cost-benefit analysis balancing lives and limbs against corporate profits." *Id.* at 813, 174 Cal. Rptr. at 384.

The difficulty implicit in a products liability action where the plaintiff pursues the second *Barker* defect standard, therefore, is that the defendant is required to present, as its defense, the same conduct condemned by the court of appeal in *Grimshaw*. See Schwartz, *supra* note 298, at 150-52.

347. Employing a standard that is as wide as the demands of the "wrongful" conduct in question permits the introduction of otherwise irrelevant evidence. Once a court determines that a particular conduct, if proven, is wrongful, an expert can easily be found to testify that a responsible manufacturer would have conducted more testing or designed the product differently. See, e.g., *West v. Johnson & Johnson Products, Inc.*, 174 Cal. App. 3d 831, 851-52, 220 Cal. Rptr. 437, 447-48 (1985) (failure of tampon manufacturer to conduct research of a previously rare vaginal bacteria labeled an act of "unbelievable irresponsibility").

348. See Owen, *supra* note 100, at 117.

349. See Ellis, *supra* note 343, at 56.

past few terms, have expressed increasing concern over the "skyrocketing" punitive judgments being awarded by state and federal juries.³⁵⁰ This trepidation stems from the lack of any substantive guidance for jurors to determine the amount of punitive awards³⁵¹ and has led the Court to question whether the lack of appropriate standards violates due process under the United States Constitution.³⁵² In April 1990, the Court responded by granting certiorari in *Pacific Mutual Life Ins. Co. v. Haslip*³⁵³ and will decide the question during the October 1990 term.³⁵⁴

(c) *Inherent Inconsistency With the State's Prohibition Against Common Law Crimes*

Although punitive damages do not presently constitute a criminal violation,³⁵⁵ their avowed purposes are similar, if not identical, to those of the criminal law.³⁵⁶ The two sanctions are distinguished solely by the applicable substantive and procedural laws governing the respective actions—civil versus penal.³⁵⁷ Semantic niceties aside,

350. See *Browning-Ferris v. Kelco Disposal*, 109 S. Ct. 2909 (1989) (all nine justices wrote or joined opinions questioning the due process propriety of unfettered juror discretion in awarding excessive punitive damages); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 86-89 (1988) (O'Connor, J., concurring in part and concurring in the judgment).

351. See *Browning-Ferris v. Kelco Disposal*, 109 S. Ct. 2909, 2923 (1989) (Brennan, J., concurring), where Justice Brennan questions the effectiveness of jury instructions, similar to California's (BAJI No. 14.72.2, *supra* note 345) in limiting jury discretion:

Guidance like this is scarcely better than no guidance at all. I do not suggest that the instruction itself was in error The point is, rather, that the instruction reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than the admonishment to do what they think is best. Because "[t]he touch stone of due process is protection of the individual against arbitrary action of government," 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 within a range of penalties as to which responsible officials had deliberated and agreed.

Brown-Ferris, 109 S. Ct. at 2923.

352. *Brown-Ferris*, 109 S. Ct. at 2923. For an illuminating analysis of procedural due process, see Note, *Rafeedie v. Immigration and Naturalization Service: Summary Exclusion and the Procedural Due Process Rights of Permanent Resident Aliens*, 13 LOY. L.A. INT'L & COMP. L.J. 179 (1990) (authored by S. Simerlein).

353. 553 So. 2d 537 (Ala. 1989), *cert. granted*, 110 S. Ct. 1780 (No. 89-1279).

354. See *Crovitz, Justices Can Limit Punitive Damages—and Save Babies*, Wall St. J., Oct. 10, 1990, at A17, col. 1.

355. Schwartz, *supra* note 298, at 145.

356. See W. PROSSER, *supra* note 64, at 9; see also Ford, *The Constitutionality of Punitive Damages*, in DEFENSE RESEARCH INSTITUTE, THE CASE AGAINST PUNITIVE DAMAGES 15, 18 (D. Hirsch & J. Poulos ed. 1969) (comparing policy similarities between punitive liability and criminal liability); W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 11 (1972).

357. See *Grimshaw*, 119 Cal. App. 3d at 811-12, 174 Cal. Rptr. at 383; *Toole v. Richardson-Merrell Inc.*, 251 Cal. App. 2d 689, 716-17, 60 Cal. Rptr. 398, 417-18 (1967).

however, punitive damages often equal or exceed statutory criminal fines for the same conduct.³⁵⁸ Further, punitive liability carries the risk of stigmatization³⁵⁹ and loss of livelihood,³⁶⁰ consequences which can likewise flow from a criminal prosecution.³⁶¹

358. Ford, *supra* note 356, at 18; see Tozer, *Punitive Damages and Products Liability*, 39 INS. COUNS. J., 300, 301 (1972) (citing punitive damage awards running up to \$100,000,000); see also *Grimshaw*, 119 Cal. App. 3d at 810, 174 Cal. Rptr. at 382 (citing failure of the criminal law to protect consumers as justification for extending "malice" as defined in section 3294 to design defects); discussion of *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967) at *supra* text accompanying notes 177-87.

359. At least one opponent of punitive liability concedes that punitive damages do not carry the stigmatization of a criminal sanction. Ford, *supra* note 356. When applied to a single defendant in an intentional tort action, this concession might be warranted. See *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498-99 (1981) (indicating that the United States Supreme Court extends greater tolerance to potentially vague civil statutes, since the consequences of error are less severe); L. SCHLUETER & K. REDDEN, *supra* note 307, § 3.6. However, to the corporate defendant, the stigmatization of punitive liability can equal that of a criminal fine, and in any event, clearly exceeds that of a compensatory award.

Consider, for example, Ford's market position after *Grimshaw*. If the judgment had been limited to compensatory damages, an informed new car buyer would simply avoid purchasing the Pinto—a particular product line of Ford's, proven to have a design defect. While Pinto sales would be expected to drop, confidence in Ford's entire product line should not suffer significantly. The same cannot be said after the actual *Grimshaw* opinion. Armed with the knowledge of Ford's proven conscious disregard for the safety of its consumers, the same buyer will not just question the design of the Pinto, but justifiably, every vehicle manufactured by Ford.

Likewise, a punitive award could deter investment in the enterprise. Simply put, a large punitive award against a concern sends a message of mismanagement to the investment community. See Owen, *supra* note 100, at 1302 n.223; Ausness, *supra* note 11, at 83. To at least one court, this disincentive to invest represents a point in favor of punitive liability, in that the "prospect of ultimate liability for punitive damages may encourage investors to entrust their capital to the most responsible concerns." *Moran v. Johns-Manville Sales Corp.*, 691 F.2d 811, 817 (6th Cir. 1982).

360. The products context creates the potential for loss of livelihood in three ways. First, excessive or multiple punitive awards from a single product can bankrupt even the most financially secure concern, endangering the livelihood of arguably innocent shareholders, employees, suppliers, creditors, and other concerns down the stream of distribution. See Ausness, *supra* note 11, at 58; Owen, *supra* note 100, at 1300; see also the discussion of *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967) at *supra* text accompanying notes 177-87.

Second, both innocent and culpable management employees face termination of employment either through proxy fights or other attempts of shareholders to exert control over the concern. See J. GHIARDI & J. KIRCHER, *supra* note 307, § 6.10; Owen, *supra* note 100, at 1302 n.223; Corboy, *Should Punitive Damages be Abolished?—A Statement for the Negative*, 1965 A.B.A. INS. NEGL. & COMPENSATION PROC. 292, 298.

Finally, the financial health of the concern and its dependents can be damaged through a decrease in market share for the entire product line as a result of stigmatization received from a large punitive award. See *supra* note 359 and accompanying text.

361. See *U.S. v. Lovasco*, 431 U.S. 783, 791 (1976); *Barker v. Wingo*, 407 U.S. 514, 532 n.33 (1971).

In California, the similarities between criminal and punitive liability end at their practical effect. In contrast to the *Grimshaw* court's theories of codification and statutory interpretation, however, criminal liability in California is limited, by code, to a violation of a *written* Penal Code section or other statute.³⁶² There is no common law of crimes in California.³⁶³

Based on the practical effect of punitive liability, the argument could be made that California courts, through their ever-expanding standard of liability, have been administering a common law of crimes in the civil courts in violation of the prohibition.³⁶⁴ That argument must fail, however, since the California Penal Code also preserves all civil remedies, regardless of whether the conduct is also punishable under the Penal Code.³⁶⁵ Nevertheless, the statutory bar against common-law crimes and the caselaw's interpretation of it point to a schizophrenia in California law when compared to the courts' treatment of punitive liability. The stark inconsistencies in doctrine become clear upon comparing the *Grimshaw* court's analysis with that of the California Supreme Court in *Keeler v. Superior Court*.³⁶⁶

As indicated above,³⁶⁷ the *Grimshaw* court bases its extension of the requisite "malice" in section 3294 to the product's context upon what it sees as fundamental common-law precepts summarized in the statute.³⁶⁸ Its arguably strained theory of interpretation, which is simply judicial discretion restated,³⁶⁹ imbues the code with "admirable flexibility from the standpoint of adaption to changing circumstances and conditions."³⁷⁰ This flexibility, in turn, allows a court to punish and deter wrongful conduct which the criminal law has not addressed adequately.³⁷¹ The fact that manufacturers have no fair warning of the conduct which will subject them to punitive liability

362. CAL. PENAL CODE § 6 (West 1988), which provides in pertinent part: "No Act or omission, commenced after twelve o'clock noon of the day on which this Code takes effect as a law, is criminal or punishable, except as prescribed or authorized by this Code"

363. *Keeler v. Superior Court*, 2 Cal. 3d 619, 631-32, 87 Cal. Rptr. 481, 488-89, 470 P.2d 617, 624-25 (1970); *People v. Whipple*, 100 Cal. App. 261, 262 (1929).

364. See Schwartz, *supra* note 298, at 146.

365. CAL. PENAL CODE § 9 (West 1988).

366. 2 Cal. 3d 619, 87 Cal. Rptr. 481, 470 P.2d 617 (1970).

367. See *supra* text accompanying notes 292-97.

368. *Grimshaw*, 119 Cal. App. 3d at 809-10, 174 Cal. Rptr. at 382.

369. See *supra* text accompanying notes 332-37.

370. *Grimshaw*, 119 Cal. App. 3d at 809, 174 Cal. Rptr. at 382.

371. See *id.* at 810, 174 Cal. Rptr. at 382 (the court justifies its extension of punitive liability to the product's context on the failure of governmental regulation and the criminal law to adequately protect consumers).

did not seem to trouble the court. It was sufficient for manufacturers to know that they "might be liable for punitive damages if [they] knowingly exposed others to the hazard."³⁷²

Flexibility and the ability to fill perceived gaps in criminal liability, however, served as the original justification of a common law of crimes.³⁷³ At least as far as criminal liability is concerned, both the California legislature and courts have rejected these justifications.³⁷⁴ In *Keeler*, the state supreme court refused to interpret the term "human being" in the state's murder statute to include in utero fetuses.³⁷⁵ In doing so, the court explicitly rejected judicial exploration of previously unrecognized wrongful conduct as "wholly foreign to the American concept of criminal justice. . . ."³⁷⁶ "The first essential of due process," the court noted, "is fair warning of the act which is made punishable as a crime."³⁷⁷ Without this constitutionally-required "fair warning," a criminal defendant's conduct cannot be punished retroactively.³⁷⁸ Further, the fact that the sciences of obstetrics and pediatrics had progressed since the murder statute's enactment in 1872,³⁷⁹ bringing the life of a fetus within the protected interests of the code (an argument similar to the *Grimshaw* court's extension of "malice"),³⁸⁰ was not persuasive to the court.³⁸¹

The strictness with which the courts construe the two codes, and interpret their specific provisions is likewise inconsistent. In *Grimshaw*, the court based its broad reading of the Civil Code, in part, on an expansive reading of a preliminary provision, section 4,³⁸² which

372. *Id.* at 811, 174 Cal. Rptr. at 383.

373. See W. LAFAVE & A. SCOTT, *supra* note 356, at 58.

374. See *Keeler*, 2 Cal. 3d at 631, 87 Cal. Rptr. at 488, 470 P.2d at 624; CAL. PENAL CODE § 6 (West 1988).

375. *Keeler*, 2 Cal. 3d at 631, 87 Cal. Rptr. at 488, 470 P.2d at 624.

376. *Id.* at 633, 87 Cal. Rptr. at 490, 470 P.2d at 626.

377. *Id.*

378. See *id.*

379. *Id.* at 631, 87 Cal. Rptr. at 488, 470 P.2d at 624. Penal Code section 187, like Civil Code section 3294, was originally adopted in 1872. See historical parenthetical following CAL. PENAL CODE § 187 (West 1988).

380. See Ford's argument that "malice" as originally conceived in 1872 could not have applied to the mass-marketing of products, which was nonexistent at the time, and the court's broad reading of section 3294 in rebuttal. *Grimshaw*, 119 Cal. App. 3d at 809-10, 174 Cal. Rptr. at 382. See also *supra* text accompanying notes 292-97; *supra* text accompanying notes 332-37.

381. See *Keeler*, 2 Cal. 3d at 631, 87 Cal. Rptr. at 488, 470 P.2d at 624.

382. *Grimshaw*, 119 Cal. App. 3d at 809-10, 174 Cal. Rptr. at 382. California Civil Code section 4 provides:

The rule of the common law, that statutes in derogation thereof are to be strictly

provides that the Civil Code's provisions "are to be liberally construed with a view to effect its objects and to promote justice."³⁸³ To the *Grimshaw* court, this applicable rule of construction, among others, "permit[s] if not require[s] that section 3294 be interpreted so as to give dynamic expression to the fundamental precepts which it summarizes."³⁸⁴ Section 3294, therefore, as well as other provisions of the Civil Code, is subject to not only the fair import of its terms, but to any construction, reasonable or unreasonable, which the courts may give it.³⁸⁵

The Penal Code counterpart to Civil Code section 4³⁸⁶ also provides that its code provisions are to be construed "according to the fair import of their terms, with a view to effect its objects and to promote justice."³⁸⁷ The *Keeler* court, however, rejected a similarly broad reading of this language, stating that courts could not go so far as to enlarge a statute, thereby creating an offense "with the aid of inference, implication, and strained interpretation"³⁸⁸ Further, the court noted, "[i]t would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of a kindred character, with those which are enumerated." ³⁸⁹ In contrast to *Grimshaw*, the *Keeler* court, in language more often associated with a civil law jurisdiction,³⁹⁰ simply refused to "rewrite a statute under the guise of construing it."³⁹¹

construed, has no application to this Code. The Code establishes the law of this State respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice.

CAL. CIV. CODE § 4 (West 1982).

383. CAL. CIV. CODE § 4 (West 1982).

384. *Grimshaw*, 119 Cal. App. 3d at 810, 174 Cal. Rptr. at 382.

385. See generally *supra* text accompanying notes 332-37.

386. CAL. PENAL CODE § 4 (West 1988).

387. *Id.* Penal Code section 4 provides: "The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its object and to promote justice." *Id.* Cf. CAL. CIV. CODE § 4 (West 1982) (reprinted, in full, at *supra* text accompanying note 383). Note that the word "liberally" is not contained in Penal Code section 4. Although this may explain some differences in construction of the codes in the abstract, it does not justify an inconsistent construction given the practical effect of punitive liability. See *supra* notes 358-60.

388. *Keeler*, 2 Cal. 3d at 632, 87 Cal. Rptr. at 489, 470 P.2d at 625.

389. *Id.* (quoting *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 96 (1820)).

390. See *supra* text accompanying notes 239-41.

391. *Keeler*, 2 Cal. 3d at 633, 87 Cal. Rptr. at 490, 470 P.2d at 626.

These differences in code construction, in turn, highlight two somewhat conflicting views of the separation of powers and responsibilities in California's state government. In *Grimshaw*, Ford raised the argument that the vague standard for punitive liability constituted an unlawful delegation of legislative power.³⁹² The court responded, however, that the doctrine and application of punitive damages were controlled by common-law principles, and that judicial development of the doctrine therefore constituted a "proper exercise of a power traditionally exercised by the judiciary."³⁹³ Further, the court implied that the need for its judicial action in the products context grew out of a breakdown in traditional separation of powers—a legislative failure to otherwise adequately protect consumers.³⁹⁴

In the penal context, however, "the power to define crimes and fix penalties is vested exclusively in the legislative branch."³⁹⁵ To the *Keeler* court, this prohibition against common-law crimes embodied a fundamental precept of the state's tripartite form of government—that the decision to extend the sanction of state law to wrongful conduct is the province, not of the courts, but of the legislature.³⁹⁶ The supreme court's faith in separation of powers proved justified, at least in the context of feticide, when less than three months after *Keeler*, the legislature amended Penal Code section 187 to extend the sanction for murder to the death of a fetus.³⁹⁷ Any gap in the allowable protection of human life was thereby filled—without judicial legislation.

Given the analagous practical effects, from the defendant's perspective, of both punitive and criminal liability,³⁹⁸ the inconsistent roles played by the civil and criminal courts in defining and deterring wrongful conduct is difficult to explain. Relying on courtroom designations (civil versus criminal) or civil remedy preservation statutes may justify these inconsistencies in cases limited to an injured party's

392. *Grimshaw*, 119 Cal. App. 3d at 811, 174 Cal. Rptr. at 383.

393. *Id.*

394. See *id.* at 810, 174 Cal. Rptr. at 382, where the court states "[g]overnmental safety standards and the criminal law have failed to provide adequate consumer protection against manufacture and distribution of defective products. Punitive damages thus remain as the most effective remedy for consumer protection against defectively designed mass produced articles." *Id.* (citations omitted); see also *supra* text accompanying notes 332-37.

395. *Keeler*, 2 Cal. 3d at 631, 87 Cal. Rptr. at 488, 470 P.2d at 624.

396. See *id.* at 631-33, 87 Cal. Rptr. at 488-90, 470 P.2d at 624-26.

397. *Keeler* was decided June 12, 1970. *Id.* at 619, 87 Cal. Rptr. at 481, 470 P.2d at 617. Assembly Bill 816 was originally amended to reflect the changes to Penal Code section 187 on June 24, 1970. A.B. 816, Reg. Sess., 1970. The bill was approved by the Governor on September 17, 1970. 1970 Cal. Stat. 2440, ch. 1311.

398. See *supra* notes 358-60 and accompanying text.

compensation.³⁹⁹ They constitute meaningless formalisms, however, when attempting to logically reconcile the effects and "substance" of California's punitive damage doctrine with its prohibition against common-law crimes.⁴⁰⁰

These doctrinal inconsistencies between criminal and punitive liability would pose less of a problem, though, if both sanctions were administered in an arguably fair manner. The *Grimshaw* court, however, with a "standard" of liability derived through "dynamic expression," allows a form of *post hoc* punishment which the criminal law refuses to administer to even the most egregious offenders. The ability of defendants to be aware of the liability they face prior to entering a courtroom represents one of the principal rationales behind codification in most civil law jurisdictions,⁴⁰¹ and in California at the time of codification: the ability of lay citizens to be able to understand their rights and obligations.⁴⁰² The common-law courts of California seem to have forgotten or ignored such a common-sense approach.

2. The Structure of Codification

The distinction between criminal and civil liability, however, also raises another difference between codifications in Puerto Rico and California: the actual structure of the codes.

As indicated above, "codification" refers to the preparation of a written work which is intended to authoritatively set out the basic principles and rules of a wide field of the law.⁴⁰³ This implies a formal division between separate areas of the law, with all statutes dealing

399. Indeed, as new injuries arise or become quantifiable, courts should be able to compensate plaintiffs for them. W. PROSSER, *supra* note 64, at 3-4.

400. See *Browning-Ferris v. Kelco Disposal*, 109 S. Ct. 2909, 2932 (1989) (O'Connor, J., concurring in part and dissenting in part). Commenting on the Court's refusal to extend coverage of the eighth amendment's excessive fines clause to punitive damages, Justice O'Connor stated, "[t]he character of a sanction imposed as punishment 'is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution.'" *Id.* (quoting *U.S. v. Chouteau*, 102 U.S. 603, 611 (1881)).

The inconsistencies are even more difficult to reconcile when one considers the avowed purposes of punitive damages—punishment and deterrence. *Grimshaw*, 119 Cal. App. 3d at 810, 174 Cal. Rptr. at 382. However, if the standard of conduct meriting punitive liability constantly shifts through an analysis similar to that in *Grimshaw*, any deterrent effect is lost in either the volumes of caselaw, or the whims of individual judges or juries. See J. GHIRARDI & J. KIRCHER, *supra* note 307, § 2.09; Owen, *supra* note 100, at 1283-84; Schwartz, *supra* note 298, at 145-46; see generally W. LAFAVE & A. SCOTT, *supra* note 356, at 68 (discussion of lack of deterrence from common law crimes).

401. See *supra* text accompanying notes 242-44.

402. See *supra* text accompanying note 264.

403. See *supra* note 232.

with these areas located in their respective volumes.⁴⁰⁴ In form, this structure exists in both California and Puerto Rico. Differences in the nature of civil liability between the two jurisdictions turn on the extent to which the jurisdictions adhere to this structure.

a. Puerto Rico

In general, most modern civil law systems are principally based on the Roman civil law, as compiled and codified under Emperor Justinian, in the sixth century.⁴⁰⁵ This codification encompassed the laws and remedies pertaining to persons, family, inheritance, property, torts, unjust enrichment, and contracts.⁴⁰⁶ Although the rules laid down in this codification have substantially changed since their adoption, their division into the three categories contemplated by Justinian (Persons, Things and Obligations) address substantially the same set of problems and relationships.⁴⁰⁷ Thus, one of the most historic, characteristic aspects of the traditional civil law is the great emphasis placed on formal definitions and distinctions in dividing the law.⁴⁰⁸

With respect to Puerto Rico, and its Spanish civil law heritage, the structural concept of codification may be summarized as follows: "[C]odification should be understood as a collection of all the laws of a country, or, in a more limited sense, of those which refer to a particular branch of the law, under one legal body, the context of which should contain unity of thought and of time."⁴⁰⁹

The formal division of the civil code, as codified by Justinian, reflected the structure of codification within a code. However, similar divisions in structure exist among the five basic codes typically found in a civil law jurisdiction: the civil code, the commercial code, the code of civil procedure, the penal code and the code of criminal procedure.⁴¹⁰

The overarching dividing point in the civil law tradition, however, is between public and private law.⁴¹¹ Civil and commercial law comprise private law,⁴¹² while constitutional, administrative, and

404. For example, the penal code covers criminal law.

405. J.H. MERRYMAN, *supra* note 228, at 13.

406. *Id.* at 6.

407. *Id.*

408. *Id.* at 90.

409. Ramos, *supra* note 15, at 30 (quoting 1 SANCHEZ ROMAN, ESTUDIOS DE DERECHO CIVIL 32 (1899)).

410. J.H. MERRYMAN, *supra* note 228, at 13.

411. *Id.* at 91.

412. *Id.* at 98.

criminal law make up public law.⁴¹³ This distinction stems from an ideological assumption of government's role in society.⁴¹⁴ First, private law represents that area of the law in which government solely functions to recognize and enforce private rights.⁴¹⁵ In private legal relations, the government serves as a referee, with the parties as equals before it.⁴¹⁶ In public law, however, the role of the government is not limited to the protection of private rights. Rather, governmental action effectuates the public interest.⁴¹⁷ In public legal relations, the state acts as a party, and since it represents the public interest, it remains superior to the private individual.⁴¹⁸

This distinction between private and public law, and the accompanying structure of codification, clarifies the Puerto Rican courts' reluctance to expand the concept of civil liability beyond its compensatory scheme. When a party injures another Puerto Rican citizen, his or her obligation is to make the victim whole.⁴¹⁹ However, when a party engages in conduct that is reprehensible or malicious, the public interest is affected, and the government must protect it through the criminal tribunals. Thus, having the government act as both a referee for, and a party to, a dispute between citizens, offends both the structure and division of the laws. This is one reason why the Puerto Rican courts reject the concept of punitive damages.

The Puerto Rican codes reflect this concept of division and structure. Title 31, section 5141 governs obligations citizens have to one another as a result of negligence or fault,⁴²⁰ and has been interpreted to limit damages to those necessary to compensate the victim for his or her injuries.⁴²¹ This idea comports with the premise that private law serves to adjudicate the rights of citizens. Awarding punitive damages in these cases would impermissibly join the public interest as a party to a private action. The beneficiary of the public's injury would not be the public, but the person to whom an obligation has already been fulfilled.

Reference to the Puerto Rico Penal Code completes the picture.

413. *Id.*

414. *Id.*

415. *Id.* at 92.

416. *Id.* at 93.

417. *Id.* at 92-93.

418. *Id.* at 93.

419. See P.R. LAWS ANN. tit. 31, § 5141 (1968); see *supra* text accompanying note 66.

420. P.R. LAWS ANN. tit. 31, § 5141 (1968).

421. See *Rivera v. Rossi*, 64 P.R.R. 683 (1945) (discussed in *supra* text accompanying notes 110-19).

First, Title 33, section 3261 provides that "[t]he penalties established in this subtitle do not affect or alter the civil liability of the persons convicted of any offense" ⁴²² It therefore establishes a clear distinction between actions brought under the Penal Code and Civil Code.

With regard to penalties under the Penal Code, Title 33, section 3284 provides in pertinent part: "[t]he general objectives that govern the imposition of the penalty are the following: . . . (b) Fair punishment of the person who committed the offense . . . (e) Consideration of the deterrent nature of the penalty." ⁴²³ In particular, with regard to fines, Title 33, section 3207 provides in pertinent part:

The penalty of a fine consists in the obligation imposed by the court on the convict to pay to the Commonwealth of Puerto Rico the amount of money determined in the sentence.

The amount of the fine shall be prudently determined by the court within the limits established in the present subtitle, taking into consideration the economic situation [of the convict] . . . degree of greed or profit shown in the commission of the punishable act ⁴²⁴

These statutory passages indicate that the same considerations which underlie the imposition and amount of punitive liability in California ⁴²⁵ are specifically set forth in the Puerto Rican Penal Code. Thus, interpreting Title 31, section 5141 given the rules of interpretation in Puerto Rico and civil law jurisdictions in general detailed above, ⁴²⁶ and the structural division of laws in the codes, the rationale behind the nonavailability of civil punitive liability becomes clear.

b. California

As to the structure of the California codes, the initial impulse seems to have been to effect a division similar to those common in civil law jurisdictions. The primary object of Field in drafting the Civil Code was to "restate in systematic and accessible form the common law as it ha[d] been modified to suit American conditions." ⁴²⁷

In his inaugural address in 1871, Governor Booth made the fol-

422. P.R. LAWS ANN. tit. 33, § 3261 (1983).

423. *Id.* § 3284.

424. *Id.* § 3207.

425. See *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 810, 819, 174 Cal. Rptr. 348, 382, 388 (1981); BAJI, *supra* note 345, § 14.72.2.

426. See *supra* text accompanying notes 71-73, 239-41.

427. Parma, *supra* note 259, at 17.

lowing comment regarding the just-completed work of the Code Commission of 1870: "the object has not been to change the laws, but to crystalize them in expression and do away with redundancies and with the incongruity of a written Constitution and vast body of unwritten law; to generalize the statutes and principles of common law into a science."⁴²⁸ Thus, at the time of codification in California, some effort was made to effectuate the ideal of a division between the various portions of the law. Indeed, the volumes of California codes evidence an attempt to divide the law, at least by subjects.⁴²⁹ However, the availability of punitive damages in civil actions, both in the original Civil Code, and in the subsequent case law, confirms that the ideal of a division in codification structure, as known in civil law jurisdictions, has not taken hold.

This problem has historically caused consternation in common law jurisdictions, as evidenced by the following passage from a New Hampshire case:

How could the idea of punishment be deliberately and designedly installed as a doctrine of civil remedies? Is not punishment out of place, irregular, anomalous, exceptional, unjust, unscientific, not to say absurd and ridiculous, when classed among civil remedies? What kind of a civil remedy for the plaintiff is the punishment of the defendant? The idea is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law.⁴³⁰

Some California cases, reflecting similar but less vigorous opinions, have adopted the view that punitive damages are disfavored by the law,⁴³¹ and that "[s]uch damages constitute a windfall, which, though supported by law in proper cases . . . creates the anomaly of excessive compensation which makes the remedy an unappealing one."⁴³² In general, however, the cases fail to notice this seeming aberration in structure, and instead retreat to the refuge of *stare decisis*, claiming that "[t]he concept of punitive damages is rooted in the English common law and is a settled principle of the common law of this

428. *Id.* at 16 (uncited quotation).

429. California has twenty-eight separate codes. CAL. CIV. CODE vol. 6 (§§ 1-653), at IX (1982).

430. *Fay v. Parker*, 53 N.H. 342, 382 (1873).

431. *Gombos v. Ashe*, 158 Cal. App. 2d 517, 526, 322 P.2d 933, 939 (1958).

432. *Rosener v. Sears, Roebuck & Co.*, 110 Cal. App. 3d 740, 750, 168 Cal. Rptr. 237, 242 (1980).

country."⁴³³

Two questions, therefore, must be considered. Does the concept of civil punitive damages actually violate the structure of the law? And if so, what difference does it truly make?

i. Violation of Structure and Its Consequences

(a) *Punitive Damages as a Violation of the Structure of the Law*

In response to the first query, one must look to the actual utilitarian structures of criminal and civil liability. On the one hand, criminal sanctions punish undesirable behavior and attempt to inhibit the actions of those who are otherwise disposed to commit crimes.⁴³⁴ In other words, the goals of punishment and deterrence underlie all criminal law.⁴³⁵ Compensation, on the other hand, is of no concern to the criminal law.⁴³⁶ The action is brought by the state, and the victim serves only as a potential witness, not as a party to the dispute.⁴³⁷ The victim will leave the court empty handed.⁴³⁸

Further, there is a strong moral emphasis in the criminal law.⁴³⁹ A crime is an offense against the public interest, and a prosecution serves to protect and vindicate that interest.⁴⁴⁰ Any compensation, therefore, should logically go to the public, whose interest has been violated.⁴⁴¹

As to civil liability, however, "[t]ort law defines the duties and responsibilities of persons with respect to each other in civil society, and adjusts between the parties to a civil suit for the losses incurred and injuries suffered as a result of the breach of such duties."⁴⁴² In essence, the goal of civil law is to compensate victims for injuries resulting from wrongdoers' conduct.⁴⁴³

It has been urged, however, that this definition of civil liability is

433. *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 807, 174 Cal. Rptr. 348, 380 (1981).

434. Metzger, *Corporate Criminal Liability for Defective Products: Policies, Problems, and Prospects*, 73 GEO. L.J. 1, 7-8 (1984); see W. LAFAVE & A. SCOTT, *supra* note 356, at 11.

435. W. PROSSER, *supra* note 64, at 7.

436. *Id.*

437. *Id.*

438. *Id.*

439. W. LAFAVE & A. SCOTT, *supra* note 356, at 11.

440. W. PROSSER, *supra* note 64, at 5, 7.

441. See L. SCHLUETER & K. REDDEN, *supra* note 307, § 2.2(A)(2).

442. Note, *Innocence by Association: Entities and the Person-Enterprise Rule Under RICO*, 63 NOTRE DAME L. REV. 179, 183 (1988).

443. W. PROSSER, *supra* note 64, at 7.

unnecessarily narrow. As with the criminal law, all civil doctrines equally attempt to enforce rules of behavior.⁴⁴⁴ Under this view, civil liability likewise advances the goals of deterrence and punishment.⁴⁴⁵

This argument overemphasizes the role of punishment and deterrence in civil liability. Undoubtedly, duty and breach figure into the calculus of liability. Civil law, however, concerns itself with "the allocation of losses arising out of human activities"⁴⁴⁶ The law of torts, in particular, focuses on an adjustment of these losses to "afford compensation for injuries sustained by one person as the result of the conduct of another."⁴⁴⁷ Thus, where the government truly only referees a dispute over the failure of one party to perform an obligation to another, the appropriate civil remedy is to make the wrongdoer compensate the victim for the injury caused by his or her acts.⁴⁴⁸

The proponents of punitive damages are correct, in a literal sense, when they assert that the civil law "punishes" by requiring a wrongdoer to reimburse his or her victim.⁴⁴⁹ The law, however, acts through its remedies.⁴⁵⁰ Any punitive effects are really ancillary to the primary purpose of the remedy which is to reimburse or protect the individual harmed.⁴⁵¹ The nature of the wrongdoer's conduct means little to the victim.⁴⁵² Rather the resulting physical and emotional injury is the central concern for both the victim and the civil legal remedy.⁴⁵³

444. Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 645 (1980); see Comment, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 522-23 (1957).

445. See Comment, *supra* note 444, at 523.

446. W. PROSSER, *supra* note 64, at 6.

447. *Id.*

448. See generally W. LAFAVE & A. SCOTT, *supra* note 356, at 11-12; W. PROSSER, *supra* note 64, at 7.

449. See Comment, *supra* note 444, at 522-24.

450. See O.W. HOLMES, *THE PATH OF LAW* 174 (1897).

451. See W. PROSSER, *supra* note 64, at 4.

452. As stated by the Wisconsin Supreme Court as early as 1877, "[i]t is difficult on principle to understand why, when the sufferer by a tort has been fully compensated for his suffering, he should recover anything more." *Bass v. The Chicago & N.W. R.R.*, 42 Wis. 654, 672 (1877).

Consider the situation of a typical personal injury plaintiff in California. Once compensated for his or her physical, emotional, and mental injuries the particular conduct of the defendant will make little difference. If anything, more egregious conduct on the part of the defendant will ease plaintiff's burden of proof on available compensatory damages. See 6 WITKIN, *supra* note 154, § 1410 for mental damages available under California law.

453. As Dean Prosser stated:

There remains a body of law which is directed toward the compensation of individuals, rather than the public, for losses which they have suffered in respect of all their

In the case of criminal liability, however, the conduct of the actor is key.⁴⁵⁴ The reprehensibility of the act has a direct impact on the punishment imposed. This is a just result, because unlike the civil law, the criminal law is concerned with the public's interest.⁴⁵⁵ In the criminal context, the law provides a remedy of punishment, thereby helping to deter similar conduct in the future.⁴⁵⁶

Viewed next to this utilitarian outline of criminal and civil liability, punitive damages, with their emphasis on the punishment and deterrence of wrongful conduct, clearly amount to the imposition of a criminal remedy in a civil proceeding.⁴⁵⁷ Beyond the formalistic aberration of mixing compensatory and punitive remedies, however, this anomaly raises more substantial concerns, which are discussed below.

(b) *Consequences of the Violation of Structure*

Potentially the greatest difficulty with the injection of criminal liability into a civil action lies in the remedy available to successful plaintiffs. Given the compensatory goals of the underlying civil action, punitive damages provide an unjustified windfall to the plaintiff.⁴⁵⁸ Society at large does not receive the proceeds from the remedy imposed on the wrongdoer.⁴⁵⁹ Why should the victim receive the pu-

legally recognized interests, rather than one interest only, where the law considers that compensation is required. This is the law of torts.

W. PROSSER, *supra* note 64, at 6. Thus, while the law of torts allows the state to extract compensation for an injury not currently protected against by the criminal law, the focus remains on the interests invaded, private versus civil. *See id.* at 7.

454. *See* W. LAFAVE & A. SCOTT, *supra* note 356, at 11.

455. *See* W. PROSSER, *supra* note 64, at 7.

456. *See id.*

457. *See id.* at 9, where Dean Prosser comments on punitive damages:

The idea of punishment, or of discouraging other offenses, usually does not enter into tort law In one rather anomalous respect, however, the ideas underlying the criminal law have invaded the field of torts. Where the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with a crime, all but a few courts have permitted the jury to award in the tort action "punitive" or "exemplary" damages, or what is sometime called "smart money." Such damages are given to the plaintiff over and above the full compensation for his injuries, for the purpose of punishing the defendant, of teaching him not to do it again, and of deterring others from following his example.

458. *See* Rosener v. Sears, Roebuck & Co., 110 Cal. App. 3d 740, 750, 168 Cal. Rptr. 237, 242 (1980); Duffy, *Punitive Damages: A Doctrine Which Should be Abolished*, in DEFENSE RESEARCH INSTITUTE, THE CASE AGAINST PUNITIVE DAMAGES 4, 8 (D. Hirsch & J. Pourous ed. 1969).

459. *See* Smith v. Wade, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting), where Justice Rehnquist expressed the view:

Punitive damages are generally seen as a windfall to plaintiffs, who are entitled to receive full compensation for their injuries—but no more. Even assuming that a

nitive proceeds? Solely because he or she has been injured?

Rather, if society determines through its courts that the conduct of the wrongdoer constitutes an egregious violation of its interests meriting punishment and deterrence, why should society itself not receive the proceeds? No legally justifiable reason exists to allow juries to bestow awards which should flow into the coffers of society, rather than the pockets of victims whom the law has already made whole.⁴⁶⁰

However, the uncertain state of punitive damages, particularly in the products liability context,⁴⁶¹ encourages victims to "roll the dice" and plead the punitive remedy, even if frivolous.⁴⁶² In response, some argue that this encourages victims to enforce the law.⁴⁶³ But the response begs the question. Whose law does the victim seek to enforce? His or her own? Society's in general? The judge or jury's?

Further, encouraging plaintiffs to pursue large monetary awards under an uncertain standard of liability promotes judicial inefficiency. The uncertain outcome in a products action involving punitive liability only increases the costs of litigating it.⁴⁶⁴ Costs can be expected to increase throughout pleading. Even a frivolous plea for punitive damages under a flexible standard of liability is relatively easy to state, and thereby difficult to strike at an early and inexpensive stage of litigation.⁴⁶⁵ Once stated, the plea broadens the applicable areas of relevant discovery for the plaintiff, quantitatively increasing the cost of litigation.⁴⁶⁶ Finally, uncertainty in outcome coupled with an incentive to litigate discourages parties from settling disputes, and increases the incentive to appeal, once a jury verdict has been rendered.⁴⁶⁷

Finally, injecting the underlying theories of criminal liability into civil litigation results in a total abrogation of legislative responsibility. As the *Grimshaw* court and the proponents of punitive liability assert, punitive damages allow courts to fill gaps in the criminal or consumer

punitive "fine" should be imposed after a civil trial, the penalty should go to the State, not to the plaintiff—who by hypothesis is fully compensated.

460. See Duffy, *supra* note 458, at 13; see generally K. REDDEN, *supra* note 307, § 1.1(C) (discussion of California Senate Bill 1070 introduced in the legislature in 1979, which would give punitive damage awards to public interest organizations).

461. See *supra* text accompanying notes 332-402.

462. In 1989, "one-third of jury verdicts in California led to punitive damages, which averaged \$3 million." Crovitz, *supra* note 354.

463. Mallor & Roberts, *supra* note 444, at 649-50; see J. GHIARDI & J. KIRCHER, *supra* note 307, § 2.02.

464. See Ellis, *supra* note 343, at 43-46.

465. See generally Ellis, *supra* note 343, at 51; Schwartz, *supra* note 298, at 120.

466. See Sales & Cole, *supra* note 307, at 1157.

467. See Ellis, *supra* note 343, at 45-46.

protection laws.⁴⁶⁸ The difficulty with this reasoning lies in the fact that individual litigants and courts can only develop such policy on an ad hoc, case-by-case basis.⁴⁶⁹ Courts are simply not forums conducive to the development of coherent and extensive consumer protection laws.

However, by shouldering the responsibility for consumer protection, California courts have not only picked up the slack for an unwilling legislature, they have given the legislature the political cover to not face this difficult political decision in other than a piecemeal fashion.⁴⁷⁰ As shown by the aftermath of the *Keeler* decision, there is no reason to believe that the California legislature cannot be forced to face this decision.⁴⁷¹ Political difficulties in enacting these laws notwithstanding, the legislature cannot delegate its duty to protect consumers to private litigants.⁴⁷²

Above all, the structural violation detailed above would present easily-ameliorated concerns if the conduct to be sanctioned was definite in character. In the products liability context, however, the problem is more acute. The general inaccessibility and confusion of the law in California, and the steadfast determination of the courts to enforce a de facto common law of crimes, provide the opportunity for what is, in effect, strict punitive products liability.

B. The Problem in California: Strict Punitive Products Liability?

In the punitive damages context, a California jury determines malice by using the "conscious disregard" standard derived from *Searle*.⁴⁷³ Although this formulation of "malice" was seen as liberalizing the strict *animus malus* or intent standard adopted in *Davis v. Hearst*,⁴⁷⁴ the *Searle* court noted that it was not departing from the requirement that "evil motive" be proved as an element of "malice."⁴⁷⁵ Rather, the court noted that the "evil motive" inquiry

calls upon the jury to assess the defendant's actual state of

468. *Grimshaw*, 119 Cal. App. 3d at 810, 174 Cal. Rptr. at 382; J. GHIARDI & J. KIRCHER, *supra* note 307, § 2.02.

469. *See* Duffy, *supra* note 458, at 10.

470. *See supra* text accompanying notes 136-43.

471. *See supra* text accompanying note 397.

472. *See* Grass, *The Penal Dimension of Punitive Damages*, 12 HASTINGS CONST. L.Q. 241 (1985).

473. 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (1975); *see supra* text accompanying notes 162-73.

474. 160 Cal. 143, 116 P. 530 (1911).

475. *See Searle*, 49 Cal. App. 3d at 31-32, 122 Cal. Rptr. at 224.

mind; it is not satisfied by characterizing his conduct as unreasonable, negligent, grossly negligent or reckless. . . . The accretion of judicial definitions of malice has pushed to the fore a number of imprecise verbal signals which—by color, nuance and suggestion—invite the jury to punish the defendant for violating the jurors' standards rather than the law's. Among these imprecise renditions of the statute are the terms *reckless disregard* and *reckless misconduct*. On the assumption that these terms reflect the statutory concept in any degree, their use in isolation distorts the statute. The central spirit of the exemplary damage statute, the demand for evil motive, is violated by an award founded upon recklessness alone.⁴⁷⁶

Thus, the standard for malice set forth by *Searle* in the products liability context, and adopted by the California Supreme Court in *Taylor v. Superior Court*,⁴⁷⁷ was significantly higher than mere negligence or recklessness. The new prerequisite for punitive damages was conduct characterized by a close relative of the evil motive required by *Davis*.

In practice, however, the courts do not adhere to this high standard. A case in point is *Siva v. General Tire & Rubber Co.*⁴⁷⁸ In *Siva*, General Tire agreed to recap and retread a tire originally sold to a customer by another company.⁴⁷⁹ After receiving the tire, operators at General Tire's Los Angeles plant did not comply with General Tire's specifications and improperly repaired the tire.⁴⁸⁰ In a subsequent field service call, the plaintiff, a General Tire employee was injured seriously when the tire exploded as he inflated it.⁴⁸¹

Plaintiff subsequently brought suit on a manufacturer's strict liability theory. Testimony at trial indicated that the plant manager issued cards to his foremen to note the repairs to be done on each tire.⁴⁸² Although General Tire admitted in answers to interrogatories that each tire was inspected before repair, and that a written report of the inspection was made, the manager, a Mr. Bannish, testified that "no written report was available."⁴⁸³ Furthermore, General Tire pro-

476. *Id.* (citations omitted).

477. 24 Cal. 3d 890, 157 Cal. Rptr. 693, 598 P.2d 854 (1979).

478. 146 Cal. App. 3d 152, 194 Cal. Rptr. 51 (1983).

479. *Id.* at 154, 194 Cal. Rptr. at 52.

480. *Id.* at 155, 194 Cal. Rptr. at 52-53.

481. *Id.*, 194 Cal. Rptr. at 53.

482. *Siva*, 146 Cal. App. 3d at 155, 194 Cal. Rptr. at 53.

483. *Id.*

duced no such reports at trial.⁴⁸⁴ The jury awarded the plaintiff both compensatory and punitive damages.⁴⁸⁵ On appeal, General Tire challenged the punitive damage award.⁴⁸⁶

The court of appeal noted that "[a] corporate employer will be liable for punitive damages based on an employee's conduct where . . . the managing agent ratified the employee's conduct."⁴⁸⁷ Further, it defined managing agent as "an individual who has the discretion to . . . [make] 'decisions that will ultimately determine corporate policy.'"

While there was "substantial evidence the operators' conduct evidenced a conscious disregard of the probability that their conduct would result in injury to others[.]"⁴⁸⁸ the court noted that there was "no evidence presented that the operators had the discretion to exceed General's written standards for repairs of this nature and accordingly the jury could not have found they were acting in a managerial capacity."⁴⁸⁹

The court did not adhere so strictly to the statute in assessing Mr. Bannish's culpability. The following summarizes the court's analysis as to how Bannish's "conduct" provided the basis for punitive liability against General:

The jury could reasonably infer from the conflict in Bannish's testimony and General's interrogatory responses that Bannish knew the extent of damage to the tire but failed to write an inspection tag. The jury then could have concluded that because at least two and possibly several other workers saw the extent of the repairs, there was an implicit local policy to disregard General's written standards. . . . The jury could thus infer the Los Angeles plant disregarded the corporation's specifications. Where there are production errors followed by other serious errors in a setting which indicates the managers are simply not looking at the final product, a jury can properly find the managers have instituted a policy which tacitly approves the work done. The tacit approval of misconduct in the circumstances of this case constitutes ratification of it.⁴⁹⁰

484. *Id.*

485. *Id.* at 154, 194 Cal. Rptr. at 52.

486. *Id.*

487. *Siva*, 146 Cal. App. 3d at 159, 194 Cal. Rptr. at 55, *citing* CAL. CIV. CODE § 3294 (1983)). For the complete text of section 3292(b), see *supra* note 132.

488. *Siva*, 146 Cal. App. 3d at 159, 194 Cal. Rptr. at 56.

489. *Id.*

490. *Id.*

Superimposed upon the standard for malice set down in *Searle*, one must ask where the evil motive was in *Siva*? The court points to no evidence that Bannish "consciously disregarded" corporate standards, or that he failed to enforce them in this instance. The court merely resorts to the most creative of mental gymnastics to infer Bannish's, and thereby General Tire's, "tacit approval" of the operator's negligence.⁴⁹¹ In fact, the *Searle* decision is curiously absent from the opinion. The *Siva* court merely cites to the *Grimshaw* opinion for the availability of punitive damages in products liability actions.⁴⁹²

Further, despite the court's emphasis, it points to no evidence that Bannish actually made decisions that "ultimately determin[e] corporate policy."⁴⁹³ Bannish, as the court notes, merely served as the local plant manager.⁴⁹⁴ In short, General Tire was subjected to punitive liability strictly as a result of the negligent supervision of some of its employees.

In light of *Searle*, *Siva* essentially stands for the proposition that prior to the 1987 amendment of section 3294,⁴⁹⁵ there was no standard for the imposition of punitive liability in products liability actions. As a result, a corporation, no matter how careful, could suffer punitive liability merely by placing its product, whose defectiveness resulted from the negligence of an employee, in the stream of commerce.

For all practical purposes, California, with its lack of an ascertainable standard for malice and its imposition of de facto criminal sanctions in civil trials, had adopted strict punitive products liability. The latin maxim, *caveat emptor*, whose effect originally gave rise to the doctrine of products liability, has given way to a doctrine of *caveat fabricator*. In California, truly, let the manufacturer beware.

V. CONCLUSION

California and Puerto Rico have a number of substantive legal doctrines in common. Their laws on products liability as well as other substantive and procedural doctrines are similar.⁴⁹⁶ This is largely due to the commonwealth's practice of adopting legal institu-

491. *Id.*

492. *Id.* at 158, 194 Cal. Rptr. at 56.

493. *Siva*, 146 Cal. App. 3d at 159, 194 Cal. Rptr. at 56.

494. *Id.* at 155.

495. *See supra* text accompanying notes 139-42.

496. *See supra* text accompanying notes 61, 66-99.

tions, prudently or not, from the mainland.⁴⁹⁷

The commonalities end, however, when one considers the availability of punitive damages in products liability. Puerto Rico rejects the doctrine; California, unfortunately, embraces it. In essence, California and Puerto Rico's laws regarding punitive damages in products liability reflect the institutional differences between civil and common law jurisdictions, and distinct views regarding civil liability in general.

These disparate approaches are, to some extent, a result of Puerto Rico's adherence to the structures and rationales behind codification,⁴⁹⁸ and California's near-complete abrogation of them.⁴⁹⁹ Further, the role of judges in administering the law highlights a critical difference between the two traditions, and, to a degree, also explains why California has moved to adopt the doctrine of punitive damages, while Puerto Rico has not.⁵⁰⁰

California's approach, however, has created legal, economic, and social problems for both the courts and the state as a whole. In particular, in giving the state's punitive damages statute a reading broad enough to reach the manufacture of defective products, the California courts have employed a "dynamic" form of statutory analysis based in large measure on an ambiguous historical record, subject to any interpretation the court deems appropriate.⁵⁰¹ Further, this resulting "standard" lacks any substantive boundaries,⁵⁰² which, in turn, creates inconsistencies both in the application of punitive liability,⁵⁰³ and between other substantive areas of the law.⁵⁰⁴

Finally, by failing to adhere to any separation between codified areas of the state's law and injecting what is essentially a criminal remedy in a civil proceeding, the California courts have created structural and economic difficulties for the state. These difficulties include inefficiencies in litigation,⁵⁰⁵ and ultimately a failure to adopt a coherent consumer protection policy.⁵⁰⁶

While this Comment criticizes punitive damages in products liability actions, it should not be construed as a recommendation that

497. See *supra* text accompanying notes 55-99.

498. See *supra* text accompanying notes 233-44, 405-26.

499. See *supra* text accompanying notes 245-91, 427-33.

500. See *supra* text accompanying notes 239-41, 270-88.

501. See *supra* text accompanying notes 302-31.

502. See *supra* text accompanying notes 332-37.

503. See *supra* text accompanying notes 340-54.

504. See *supra* text accompanying notes 355-400.

505. See *supra* text accompanying notes 464-67.

506. See *supra* text accompanying notes 468-72.

California adopt the institutions and methods of the civil law tradition. Although the *Grimshaw* court's infatuation with the flexibility and dynamic nature of the common law allowed it to advocate a de facto common law of crimes,⁵⁰⁷ this flexibility and dynamic nature also allows California the ability to adapt more quickly to changing social conditions.

However, mixing civil and criminal liability without the safeguards traditionally appurtenant to the latter is of questionable wisdom.⁵⁰⁸ Given its unreliable standard of "malice," California's doctrine of punitive damages in products liability actions, while designed to protect consumers, can easily work to consumers' detriment. Costs borne by manufacturers eventually are passed on to consumers.⁵⁰⁹ Consumers may be able to bear the cost when damages are limited to compensatory amounts.⁵¹⁰ But under strict products liability, the increasing frequency of potentially huge awards based on nothing more than negligence can cause manufacturers to question the feasibility of marketing even safe products in the state.⁵¹¹

It is an easy enough endeavor to criticize. It is more difficult to suggest an alternative. Although the legislature made some strides in the right direction with the 1987 amendments to section 3294,⁵¹² how the courts will treat these changes are presently unknown.

Rather, this Comment suggests that California should seek repayment for the doctrinal loans that were made to Puerto Rico, and adopt its view toward civil liability, at least in the case of products liability. By adopting a purely compensatory scheme, the state will return to the just compromise between consumer and manufacturer set down in *Greenman* when California initially adopted strict products liability.

As an alternative for cases like *Grimshaw*, in which management has clearly engaged in despicable conduct, one need only look to the court's own opinion. In advocating the necessity of punitive damages

507. See *supra* text accompanying notes 355-402.

508. See *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting), where Justice Rehnquist notes: "Moreover, although punitive damages are 'quasi-criminal,' their imposition is unaccompanied by the types of safeguards present in criminal proceedings. This absence of safeguards is exacerbated by the fact that punitive damages are frequently based upon the caprice and prejudice of jurors." *Id.* (citations omitted).

509. See *Sales & Cole*, *supra* note 307, at 1161-62.

510. See *id.*

511. See *Browning-Ferris v. Kelco Disposal*, 109 S. Ct. 2909, 2924 (1989) (O'Connor, J., concurring in part and dissenting in part); *Ellis*, *supra* note 343, at 46-53.

512. See *supra* text accompanying notes 139-42.

in that case, the *Grimshaw* court pointed to the fact that "[g]overnmental safety standards and the criminal law have failed to provide adequate consumer protection against the manufacture and distribution of defective products."⁵¹³

This must change. The legislature must move to enact stiffer criminal penalties to prevent the sort of corporate conduct condemned in *Grimshaw*. In particular, the legislature should delegate the investigation and prosecution of the marketers of defective products to the State Attorney General's office. A potential sanction arising out of any such prosecution would be the total ban of a manufacturer's product in the California market.⁵¹⁴ Such a solution, if administered with the protections incumbent to a criminal prosecution, would return some logic to both the California statutory scheme and courtrooms, and will provide a just result for a situation that is critically in need of justice.

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513. *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 810, 174 Cal. Rptr. at 382 (1981).

514. Such a sanction, however, would first need to be evaluated as a potential violation of the United States Constitution's dormant commerce clause. See *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981). Such an analysis, however, is beyond the scope of this Comment.

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