

RECALIBRATING THE SCALES OF JUSTICE THROUGH NATIONAL PUNITIVE DAMAGE REFORM

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INTRODUCTION

As little as 30 years ago, punitive damages awards were "rarely assessed" and usually "small in amount." Recently, however, the frequency and size of such awards have been skyrocketing. One commentator has observed that "hardly a month goes by without a multimillion-dollar punitive damages verdict in a product liability case." And it appears that the upward trajectory continues unabated. The increased frequency and size of punitive awards, however, has not been matched by a corresponding expansion of procedural protections or predictability. On the contrary, although some courts have made genuine efforts at reform, many courts continue to provide jurors with skeletal guidance that permits the traditional guarantor of fairness—the jury itself—to be converted into a source of caprice and bias.¹

Justice Sandra Day O'Connor

1. *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 500-01 (1993) (O'Connor, J., dissenting) (internal citations omitted).

Unfortunately, some manufacturers put corporate profit before public safety. The threat of punitive damage sanctions, however, serves to deter corporations from knowingly marketing unsafe products and from trading public safety for corporate profits. Punitive damage awards are a necessary restraint on the abuse of corporate power, curbing the often anti-social practices of the economic elite. As noted by Senator Ernest Hollings (D-S.C.), the imposition of punitive damage awards in product liability cases has increased the safety in the everyday lives of American consumers noticeably:

[W]e could spend an afternoon pointing out the good that product liability has done. We do not get blown up by that Pinto gas tank. Cars all have antilock brakes. That elevator is checked. The steps are marked. Little children do not burn up in flammable pajamas. The women of America are not threatened with Dalkon Shields.²

An increase in the magnitude and frequency of punitive damage awards, however, necessitates a reconsideration of the doctrine and precipitates the need for safeguards to protect the tort system from abuse. Punitive damage reform must be enacted, and must address the many criticisms of the current doctrine: that punitive damages cause unnecessary litigation; are unjustified and excessive; far exceed statutory penalties for similar conduct; subject defendants to multiple punishments for the same conduct; overcompensate plaintiffs; are detrimental to society because they handicap the competitiveness of American businesses; are responsible for rising insurance costs; and are unconstitutional on a variety of grounds.³ Perhaps most troubling, however, is the fact that although punitive damages are quasi-criminal in nature,⁴ they are imposed in the course of civil litigation without many of the procedural safeguards that accompany criminal penalties.⁵

2. 142 CONG. REC. S2344 (daily ed. Mar. 20, 1996) (statement of Sen. Hollings).

3. See, e.g., John L. Meredith & Brian P. Casey, *Taking Cover: Preserving Error When Hit with a Claim for Punitive Damages*, 47 BAYLOR L. REV. 923, 938 (1995) (noting that prejudicial awards that evidence no concern for deterrence or retribution are unconstitutional regardless of size of award (citing *TXO Prod. Corp.*, 509 U.S. at 467 (Kennedy, J., concurring))); *Developments in the Law—Jury Determination of Punitive Damages*, 110 HARV. L. REV. 1513, 1514-15 (1997) (listing potential harms resulting from excessive and indiscriminate punitive damage awards, including "deterrence of socially desirable activities [and] removal of useful products from the market").

4. See *infra* notes 26-31 and accompanying text (noting that punitive damages stand somewhere between tort law, whose purpose is restitutionary, and criminal law, whose purpose is retributive).

5. See *Smith v. Wade*, 461 U.S. 30, 59 (1983) (recognizing that although punitive awards are quasi-criminal in nature, defendants cannot take advantage of safeguards associated with criminal proceedings).

The rise in punitive damage awards and the need to implement safeguards have not gone unnoticed by state legislatures, the judiciary, and various other entities. Forty-six states have passed tort reform legislation;⁶ there is a new Restatement of Torts;⁷ the Supreme Court has rejected a punitive damage award as unconstitutionally excessive;⁸ and the National Conference of Commissioners on Uniform State Laws recently approved a Model Punitive Damages Act.⁹

Despite these efforts, punitive awards of enormous magnitude still are being exacted from unsuspecting corporate defendants for differing standards of misconduct. The problem with state tort reform is that actions that might warrant the imposition of punitive damages in one state might not warrant them in another. The current patchwork of state tort laws is ineffective against unjustified, excessive awards and undermines the efficacy of the punitive damage doctrine.

To date, the Supreme Court has considered whether punitive damage awards violate the Fifth, Seventh, Eighth, and Fourteenth Amendments.¹⁰ Despite visiting the issue numerous times, the Court has given little practical guidance regarding the propriety of punitive damage awards. Notwithstanding the creation of substantive due process, the Court is not the appropriate vehicle for weighing the costs and benefits of the tort system or for instituting the type of reform that is necessary to curb abuse of the punitive damage doctrine.¹¹ This is a legislative and not a judicial function.¹²

6. See Kimberly A. Pace, *The Tax Deductibility of Punitive Damage Payments: Who Should Ultimately Bear the Burden for Corporate Misconduct?*, 47 ALA. L. REV. 825, 843 (1996) (stating that 46 states have enacted tort reform legislation curbing punitive awards in response to increased frequency and size of such awards in recent years).

7. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Proposed Final Draft 1997).

8. See *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589 (1996).

9. See MODEL PUNITIVE DAMAGES ACT (1996) [hereinafter MODEL ACT]. The Model Act was passed by the National Conference of Commissioners on Uniform State Laws on July 18, 1996, to "tighten up" state procedures with respect to punitive damages. See Marcia Coyle, *Model Act Would Tighten Punitives*, NAT'L L.J., Aug. 5, 1996, at A12. The commissioners hope that the Model Act will be adopted by the states. See *id.* It is doubtful, however, that the states will abandon the effort expended in passing legislation that reflects their views on the appropriate means of tort reform in favor of the Model Act.

10. See *infra* notes 70-207 and accompanying text (analyzing Supreme Court review of damages under Fifth, Seventh, Eighth, and Fourteenth Amendments).

11. See Jim Fieweger, Note, *The Need for Reform of Punitive Damages in Mass Tort Litigation: Juzwin v. Amtorg Trading Corp.*, 39 DEPAUL L. REV. 775, 794-800, 823 (1990) (illustrating judicial system's inability to adapt to mass tort litigation).

12. See *id.* at 823 ("As a result of the state based nature of punitive claims, federal and state courts are powerless to individually remedy the shortcomings in mass tort punitive damages procedures. Congress, therefore, must step in to cure the ills of mass tort litigation."); Jonathan Hadley Koenig, Note, *Punitive Damage "Overkill" After TXO Production Corp. v. Alliance Resources: The Need for a Congressional Solution*, 36 WM. & MARY L. REV. 751, 768-69 (1995) (stressing need for legislative solution to punitive damage abuses).

Should the Supreme Court supplant the jury's assessment of reasonableness and sense of community outrage with its own?

The punitive damages problem is a national problem that has an enormous impact on interstate commerce, considering that seventy percent of all products manufactured in the United States cross state lines before they are sold.¹³ Consequently, this national problem requires a national solution.¹⁴ No individual state legislature or court has the ability to regulate beyond its geographic borders.¹⁵ The Supreme Court is not an efficient means for regulating excessive punitive damages—nor is it the appropriate branch of government to impose such standards.¹⁶ As demonstrated in this Article, national application of federal tort reform legislation is most capable of regulating the imposition of punitive damage awards and eviscerating the problems associated with these sanctions. The certainty and predictability concomitant with federal legislation is necessary to promote consistency, fairness, equality, predictability, and efficiency.

Part I of this Article describes the history, nature, and purpose of punitive damages as well as the assessment process for these awards. Part II details the current state of punitive damage awards and the need for reform. Part III considers the measures states have taken to regulate punitive damages within their borders. Part IV analyzes the Supreme Court decisions that have set the constitutional parameters of punitive damage awards. Part IV explores some of the undecided contemporary issues that plague the tort system, noting that the Supreme Court decisions in this area have not obviated the need for federal reform.

Finally, in Part V, this Article addresses the merits of federal tort reform legislation, concluding that federal tort reform, which would regulate the punitive damage system on a national level, is necessary to further the goals underlying punitive damage awards. Part V examines the various tort reform issues that have been proposed,

13. See 142 CONG. REC. S2560 (daily ed. Mar. 21, 1996) (statement of Sen. Rockefeller).

14. Although it is true that punitive damages traditionally have been a matter of state regulation, Congress alone has the power to protect interstate commerce. See U.S. CONST. art. I, § 8, cl. 3. States have been effective in regulating punitive damages within their borders, but they are incapable of doing so on a national level. See Janet V. Hallahan, *Social Interests Versus Plaintiffs' Rights: The Constitutional Battle over Statutory Limitations on Punitive Damages*, 26 LOY. U. CHI. L.J. 405, 406-07 (1995) (explaining that courts have upheld state laws restricting punitive damage awards).

15. See *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (indicating that Commerce Clause prohibits states from regulating commerce wholly outside its borders even if such commerce affects conditions within state).

16. See Fieweger, *supra* note 11, at 823 (stating that congressional solution to excessive punitive awards is needed to address problem on national scale).

including the issues of increasing the burden of proof and the liability standard to obtain punitive awards, bifurcating the trial of punitive damages from other issues in the case, capping punitive damage awards, and implementing a regulatory compliance defense.

Part V proposes enacting federal legislation to increase the burden of proof and liability standard in recognition of the quasi-criminal nature of punitive damages. Such reform will safeguard against undeserved punitive damage awards and infuse the system with the certainty and predictability necessary to discourage misconduct and reduce litigation. It also proposes bifurcation of trials to limit juror bias, and the articulation of factors for mandatory consideration in assessing the amount of punitive awards. It rejects capping punitive damage awards because it undermines the goals of the punitive damage doctrine and has a discriminatory impact on women and minorities.

Part V also considers the regulatory compliance defense, recognizing that although such a defense should be a factor considered in the assessment of punitive damage awards, using it as a conclusive defense would be extremely dangerous. Part V concludes by finding that the best solution is to have the regulatory and judicial systems working in tandem to police corporate behavior.

I. PUNITIVE DAMAGES

A. *The Nature and Purpose of Punitive Damages*

Punitive damages long have been a part of American common law,¹⁷ as they were a part of the preceding English common law.¹⁸ The debate regarding the legitimacy of the punitive damages doctrine has been raging since the doctrine's inception.¹⁹ Punitive damages,

17. See *Day v. Woodworth*, 54 U.S. 363, 371 (1851) (recognizing propriety of awarding punitive damages).

18. See *Wilkes v. Wood*, 98 Eng. Rep. 489, 498-99 (K.B. 1763) ("[Punitive d]amages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself."); see also *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 274 (1989) (tracing roots of punitive damages to thirteenth century England). For a detailed history of punitive damages, see Michael Rustad & Thomas Koenig, *Historical Continuity of Punitive Damage Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1284-1304 (1993).

19. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 8 n.4 (1991) (comparing *Fay v. Parker*, 53 N.H. 342, 382 (1872), with *Luther v. Shaw*, 147 N.W. 18, 20 (Wis. 1914)). The Court in *Fay* indicated, "The idea is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of law." *Fay*, 53 N.H. at 382. In comparison, the court in *Luther* saw punitive awards as a positive influence on society.

unlike compensatory damages,²⁰ are "awarded against a [manufacturer] to punish [it] for outrageous conduct and to deter [it] and others like [it] from similar conduct in the future."²¹ Although the general nature of tort law is a "private right," punitive damages are a "public remedy" for a "public wrong."²² In this way, punitive damages are state-imposed penalties for anti-social conduct, protecting society by imposing penalties on manufacturers for their conscious, flagrant indifference to human safety.²³ Because compensatory damages alone would be insufficient,²⁴ punitive damages are needed to

The law giving exemplary damages is an outgrowth of the English love of liberty regulated by law. It tends to elevate the jury as a responsible instrument of government, discourages private reprisals, restrains the strong, influential, and unscrupulous, vindicates the right of the weak, and encourages recourse to, and confidence in, the courts of law by those wronged or oppressed by acts or practices not cognizable, in or not sufficiently punished, by the criminal law.

Luther, 147 N.W. at 20.

20. Compensatory damages are awarded to compensate injured plaintiffs, to restore them to the position they would have been in if the injury never had occurred. See RESTATEMENT (SECOND) OF TORTS § 908(1) (1995) [hereinafter RESTATEMENT]. Compensatory damages reimburse the injured person for medical expenses, lost wages, lost earning capacity, and pain and suffering. See *id.* Punitive damages are not intended to compensate the individual plaintiff. See, e.g., *Enstan Group, Inc. v. Grassgreen*, 812 F. Supp. 1562, 1583 n.14 (M.D. Ala. 1993); *Freeman v. World Airways, Inc.*, 596 F. Supp. 841, 846 (D. Ma. 1984); *Morris v. Parke, Davis & Co.*, 573 F. Supp. 1324, 1326 (C.D. Cal. 1983).

21. RESTATEMENT, *supra* note 20, § 908(1); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (noting that punitive damages "are not compensation for injury . . . [but] are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence"); WILLIAM B. HALE, *HANDBOOK ON THE LAW OF TORTS* 234 (1896) (stating that punitive damages are awarded because of "the grossness of the wrong done, rather than as a measure of compensation").

22. See Angela P. Harris, *Rereading Punitive Damages: Beyond the Public/Private Distinction*, 40 ALA. L. REV. 1079, 1097-98 (arguing that conventional notion of tort law as a private right concerned only with compensation, and criminal law as a public right concerned with punishment, is inaccurate).

23. See F. Warren Jacoby, *The Relationship of Punitive Damages and Compensatory Damages in Tort Actions*, 75 DICK. L. REV. 585, 587 (1970) ("Punitive damages are not intended to remunerate the injured party for the damages he may have sustained. They are not to compensate; they are the penalty the law inflicts for gross, wanton, and culpable negligence, and are allowed as a warning or as an example to defendants or others."); see also *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1333 (5th Cir. 1995) ("Punitive damages . . . are fundamentally collective; their purpose is to protect society by punishing and deterring wrongdoing.").

24. See Douglas L. Carden, *Punitive Damages in Products Liability Cases*, 16 SANTA CLARA L. REV. 895, 922 (1976) (stating that compensatory damages alone may not deter wrongful conduct); see also *The Product Liability Fairness Act: Hearings on S. 565 Before the Subcomm. on Consumer Affairs, Foreign Commerce, and Tourism of the Senate Comm. on Commerce, Science, and Transp.*, 104th Cong. 234-36 (1995) [hereinafter *Product Liability Fairness Hearing*] (statement of Jonathan Massey, attorney, Washington, D.C.) (stating that compensatory damages alone are not enough of a deterrent to keep dangerous products off the market—punitive damages are necessary); *Punitive Damage Tort Reform, 1995: Hearings on S. 671 & S. 672 Before the Senate Judiciary Comm.*, 104th Cong. 79 (1995) [hereinafter *Punitive Damages Hearing*] (statement of Robert Creamer, Executive Director, Illinois Public Action). Mr. Creamer indicated that compensatory damages alone do not provide enough protection to consumers:

In the Ford Pinto case, an economic calculation was made that 180 violent deaths and 180 additional serious injuries would cost the company less than the \$11 per car

punish guilty wrongdoers and to deter the future misconduct of manufacturers.²⁵ Punitive damages are intended as both a specific deterrent, so that the offending defendant will not repeat her misconduct, as well as a general deterrent, so that others will be dissuaded from engaging in similar misconduct.

Punitive damage awards are quasi-criminal sanctions imposed on the wrongdoer to punish misconduct and to deter similar offensive conduct by the defendant and other potential wrongdoers.²⁶ "The concept of punitive damages lies in the borderland that both bridges and separates criminal law and torts."²⁷ These awards are not really damages at all; they serve the same purpose as fines and penalties.²⁸ "The very labels given 'punitive' or 'exemplary' damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions."²⁹ Punitive damages are civil payments imposed to punish or deter³⁰ socially reprehensible

necessary to prevent them. It is only the possibility that a jury might award substantial punitive damages of unknown size that prevents this kind of death calculus from being done by corporations every day.

Id.

25. See *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1383-84 (5th Cir. 1991) (upholding size of punitive damage award because of its deterrent effect on manufacturer); Lynda G. Wilson, Note, *Corporate Successor Liability for Punitive Damages in Products Liability Litigation*, 40 S.C. L. REV. 509, 513-14 (1989) (stating that punitive damages help in deterring misconduct and prove to be useful tool in preventing manufacturers' wrongful acts).

26. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 54 (1991) (O'Connor, J., dissenting) (describing punitive damages as "quasi-criminal punishment"); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275 (1989) ("[P]unitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law . . ."); *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) (explaining that punitive damage awards are "quasi-criminal"); see also David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1260 (1976) (detailing purpose of punitive damages in products liability litigation); Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problem of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37, 43 (1983) (addressing quasi-criminal nature of punitive sanctions).

27. *Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 2 (1982).

28. See RESTATEMENT, *supra* note 20, § 908 cmt. a (stating that purpose of punitive damages is same as purpose of criminal fines); see also David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 8 (1982) ("[T]he purpose of such damages is punishment and deterrence, rather than compensation . . ."); Seltzer, *supra* note 26, at 43 (explaining that purpose of punitive damages is to punish offenders).

29. *Landgraf v. USI Film Prod.*, 511 U.S. 244, 281 (1994); see also *Haslip*, 499 U.S. at 19 (noting that punitive damages serve same purposes as criminal punishment—"retribution and deterrence"); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82 (1971) (stating that punitive damages "serve the same function as criminal penalties and are in effect private fines").

30. See *Haslip*, 499 U.S. at 19 (finding that most states impose punitive damages "for purposes of retribution and deterrence"); *Day v. Woodworth*, 54 U.S. 363, 371 (1851) (explaining that juries often awarded additional compensation to plaintiffs in cases where defendants' acts were seen as wanton or malicious); *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1332-33 (5th Cir. 1995) (stating that punitive damages punish wrongdoers for their intentional or malicious acts and are used to deter similar future conduct); *Acosta v. Honda Motor Co.*, 717 F.2d 828, 836-37 (3d Cir. 1983) (providing arguments for and against using punitive damages

conduct that places public safety in jeopardy.³¹

B. *Arriving at a Proper Punitive Damage Award*

Two issues have been the subject of much debate in assessing a punitive damage award: (1) the factors that the decision-maker should take into account when determining the amount of punitive damages to award; and (2) whether the judge or jury should determine the amount of the award and at what point in the proceeding it should be determined.

1. *Factors to be considered in determining the amount of punitive damages to award*

Many factors can be taken into account when assessing a punitive damage award. Some states have legislated the factors that should be considered by the fact-finder when determining the amount of punitive damages. In Kansas, for example, where the judge, not the jury, determines the amount of punitive damages to award, the court may consider:

- (1) The likelihood at the time of the alleged misconduct that serious harm would arise from the defendant's misconduct;
- (2) the degree of the defendant's awareness of that likelihood;
- (3) the profitability of the defendant's misconduct;

to serve goals of punishment and deterrence); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 735-36 (Minn. 1980) ("The punitive damages remedy serves to punish a . . . manufacturer for and deter that manufacturer from willfully, wantonly, or maliciously marketing a [product] which is unreasonably dangerous . . ."); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 458-59 (Wis. 1980) (indicating that jury awards should not be more than necessary to serve purposes of punitive damages—punishment and deterrence); *see also* Model Act, *supra* note 9, § 1 at 3 (noting that "punitive damages" means an award of money made to a claimant solely to punish or deter"); Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 Ky. L.J. 1, 39, 70-71 (1986) (explaining economic model of punitive damages for purpose of deterrence); Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1146 (1989) (indicating that punishment and deterrence are goals of punitive damages); Ellis, *supra* note 27, at 8-9 (describing objective of punitive damage awards); Jacoby, *supra* note 23, at 587-88; Owen, *supra* note 28, at 8-9.

31. *But see* Robert D. Cooter, *Economic Analysis of Punitive Damages*, 56 SO. CAL. L. REV. 79, 90 (1982) (suggesting that courts may have additional motives for awarding punitive damages including rewarding plaintiffs who otherwise would not have sued and compensating victims fully); Ellis, *supra* note 27, at 3 (listing several purposes for imposing punitive damages including preserving the peace, inducing private law enforcement, compensating victims for otherwise uncompensated losses, and paying plaintiffs' attorney fees); David G. Owen, *A Punitive Damage Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 374 (1994) (articulating five functions of punitive damage awards: education, retribution, deterrence, compensation, and law enforcement); *see also* *Campus Sweater & Sportswear Co. v. M.B. Kahn Constr. Co.*, 515 F. Supp. 64, 105 (D.S.C. 1979) (holding that punitive damages deter manufacturers from misconduct, encourage production of safer products, and serve as "private revenge which is carried out in the courts rather than through duels or in back alleys"), *aff'd*, 644 F.2d 877 (4th Cir. 1981). This Article addresses only true punitive damage awards, not compensatory damages masked as punitive.

- (4) the duration of the misconduct and any intentional concealment of it;
- (5) the attitude and conduct of the defendant upon discovery of the misconduct;
- (6) the financial condition of the defendant; and,
- (7) the total deterrent effect of other damages and punishment imposed upon the defendant as a result of the misconduct, including but not limited to, compensatory, exemplary and punitive damage awards to persons in situations similar to those of the claimant and the severity of the criminal penalties to which the defendant has been or may be subjected.³²

In other states, the courts have fashioned the factors for consideration.³³

32. KAN. STAT. ANN. § 60-3701(b) (1994); *see also* MISS. CODE ANN. § 11-1-65(e) (Supp. 1996). The Mississippi Code also mandates that courts consider a variety of factors in assessing damages:

In all cases involving an award of punitive damages, the fact-finder, in determining the amount of punitive damages, shall consider, to the extent relevant, the following: the defendant's financial condition and net worth; the nature and reprehensibility of the defendant's wrongdoing, for example, the impact of defendant's conduct on the plaintiff, or the relationship of the defendant to the plaintiff; the defendant's awareness of the amount of harm being caused and the defendant's motivation in causing such harm; the duration of the defendant's misconduct and whether the defendant attempted to conceal such misconduct; and any other circumstances shown by the evidence that bear on determining a proper amount of punitive damages.

Id.

33. *See Coffey v. Fayette Tubular Prods.*, 929 S.W.2d 326 (Tenn. 1996). The court in *Coffey* enumerated the factors for consideration in assessing a punitive damage award:

[I]n *Hodges* we set forth a list of factors to guide the discretion of the fact finder in assessing the amount of punitive damages. We instructed the fact finder to consider:

- (1) The defendant's financial affairs, financial condition, and net worth;
- (2) The nature and reprehensibility of the defendant's wrongdoing, for example
 - (A) The impact of defendant's conduct on the plaintiff, or
 - (B) The relationship of defendant to plaintiff;
- (3) The defendant's awareness of the amount of harm being caused and defendant's motivation in causing the harm;
- (4) The duration of defendant's misconduct and whether defendant attempted to conceal the conduct;
- (5) The expense plaintiff has borne in the attempt to recover the losses;
- (6) Whether defendant profited from the activity, and if defendant did profit, whether the punitive award should be in excess of the profit in order to deter similar future behavior;
- (7) Whether, and the extent to which, defendant has been subjected to previous punitive damage awards based upon the same wrongful act;
- (8) Whether, once the misconduct became known to the defendant, defendant took remedial action or attempted to make amends by offering a prompt and fair settlement for actual harm caused;
- (9) Any other circumstances shown by the evidence that bear on determining the proper amount of the punitive award.

Id. at 328 (citing *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901-02 (Tenn. 1992)); *see also* *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 941 n.19 (D.C. 1995) (explaining factors drawn from common law used in determining punitive awards); *Schaffer v. Edward D. Jones & Co.*, 552 N.W.2d 801, 807 n.3 (S.D. 1996) (setting forth factors jury may consider when awarding punitive damages); *Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 539

The many factors that legislators and judges have created can be reduced to three basic considerations: (1) the character of the defendant's act; (2) the nature and extent of the plaintiff's injuries; and (3) the defendant's wealth.³⁴ A jury considers the character of the defendant's act so that the punishment will bear some relationship to the wrong committed.³⁵ The jury is told to take into account the nature and extent of the plaintiff's injuries so that the punitive damages awarded will have a rational relationship to the injury caused.³⁶ The jury also is instructed to consider the financial position of the defendant so that the punitive damage award actually will punish and deter the defendant.³⁷ This third factor has been the subject of considerable criticism.³⁸ The rationale behind consideration of the defendant's financial position is that the

N.W.2d 111, 122 (Wis. Ct. App. 1995) (noting that Wisconsin "case law establishes the factors to be considered in determining the proper amount to be awarded as punitive damages").

34. See RESTATEMENT, *supra* note 20, § 908(2) & cmts. b-e.

35. See Owen, *supra* note 28, at 9 (noting that juries consider the seriousness of defendant's misconduct when assessing punitive damages).

36. See TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 460 (1993) (noting that in calculating punitive damages, jury may consider potential harm that might have resulted from defendant's bad acts as well as harm that actually occurred, but requiring reasonable relationship between harm and punitive damage award (citing Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21 (1991))); Gurnes v. Fleming Landfill, Inc., 413 S.E.2d 897, 909 (W. Va. 1991) ("As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages."); see also Acosta v. Honda Motor Co., 717 F.2d 828, 839 (3d Cir. 1983) (recognizing that size of compensatory damage award should be considered when assessing punitive award); Tudor Assocs. Ltd., II v. AJ & AJ Servicing, Inc., 843 F. Supp. 68, 79 (E.D.N.C. 1993) (requiring punitive damage awards to "bear a rational relationship to the sum reasonably needed to punish the defendant for his conduct"); Owen, *supra* note 28, at 9 (explaining that some states mandate that punitive awards "bear a reasonable relationship" to compensatory award). But see Jacoby, *supra* note 23, at 603-04 (arguing that there is no logical basis for requiring punitive damages to be related to compensatory). The Supreme Court made clear in TXO, however, that the ratio of punitive damages to actual damages, although a factor to be considered, is not dispositive. See TXO, 509 U.S. at 462.

37. See, e.g., Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21-22 (1991) (stating that in assessing punitive damages, jury should consider "financial position" of defendant); Boyle v. Lorimar Productions, Inc., 13 F.3d 1357, 1359-60 (9th Cir. 1994) (noting that California's jury instructions require juries to consider defendant's financial condition in determining whether award is sufficient to punish and deter); Silkwood v. Kerr-McGee Corp., 485 F. Supp. 566, 603 (W.D. Okla. 1979) (instructing jury that consideration of defendant's wealth when assessing punitive damages is "consistent with the general purpose of such an award in deterring the defendant . . . from committing similar acts in the future, and for punishment of the defendant for such acts"); *aff'd*, 637 F.2d 743 (10th Cir. 1980).

38. See Kenneth S. Abraham & John C. Jeffries, Jr., *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 19 J. LEGAL STUD. 415, 416-20 (1989) (arguing that considering defendant's wealth when assessing a punitive award encourages punishment based solely on defendant's status, is incompatible with purposes of tort law and compensation, and does not deter socially undesirable conduct). Such criticism ignores the fact that punitive damages are not based merely in tort law, but actually stand between tort and criminal law; therefore, the fact that considerations of wealth make them incompatible with the traditional notions of tort compensation offers no support for excluding this information from the punitive damage assessment process.

deterrent benefit of punitive awards will be unrealized if the award does not cause the defendant to suffer.³⁹ Wealthy defendants, therefore, might have to pay more than poor defendants for committing the exact same offense.⁴⁰ In theory, the defendant's wealth should be irrelevant because society is equally harmed when a poor defendant acts with flagrant indifference as it is when a rich one behaves indifferently. Despite the characterization of the wrong as a public wrong, the goals of punitive awards—punishment and deterrence—will not be effectuated equally when the penalty impacts defendants differently because of their financial status. The fact-finder must consider the defendant's wealth so that the damage award will have an equally punitive effect on all wrongdoers, because it takes more to punish a wealthy defendant than it does to punish a poor one. A multi-billion dollar corporation, like Exxon, for example, would not be punished or deterred by a \$100,000 punitive damage award, but the same award could cripple a small business owner, like Joe's Gas Station.⁴¹ To punish and deter manufacturers effectively and equitably, therefore, the financial status of the defendant should be a factor in determining the amount of punitive damages to award.⁴² The defendant's wealth alone, however, should not justify

39. See *TXO*, 509 U.S. at 464 n.29 (noting that for punitive damages to be effective, courts must take into account all relevant factors, including defendant's financial position); cf. Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 628-29 (1997) (arguing that amount of punitive damages should reflect defendant's financial position).

40. The jury instruction given in *TXO* read in relevant part:

The object of [punitive damages] is to deter [product manufacturers] from committing like offenses in the future. Therefore the law recognizes that to in fact deter such conduct may require a larger fine upon one of large means than it would upon one of ordinary means under the same or similar circumstances.

TXO, 509 U.S. at 464 n.29.

41. See *TXO Prod. Corp. v. Alliance Resources Corp.*, 419 S.E.2d 880, 889 (W. Va. 1992) ("[A]n award that might be unreasonable if awarded against Jeff's Neighborhood Hot Dog Stand could be quite reasonable if awarded for the same conduct against McDonald's."), *aff'd*, 509 U.S. 443 (1993).

42. See *Haslip*, 499 U.S. at 21-22 (noting that in assessing punitive damages, jury should consider "financial position" of defendant); *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1333 (5th Cir. 1995) (indicating that because the purpose of punitive damages is to deter wrongdoing, damage awards are tailored to defendant's wealth); *Acosta v. Honda Motor Co.*, 717 F.2d 828, 839 (3d Cir. 1983) ("[T]his court has previously recognized that . . . the wealth of the defendant . . . should be taken into account in assessing punitive damages."); *Caron v. Caron*, 577 A.2d 1178, 1180 (Me. 1990) (noting that damages must have some relationship to defendant's financial status in order to act as deterrent); *Braley v. Berkshire Mut. Ins. Co.*, 440 A.2d 359, 363 (Me. 1982) (stating that punitive damage awards "must . . . bear some relationship to the actual wealth of the defendant"); *Whittington v. Whittington*, 535 So. 2d 573, 584 (Miss. 1988) (considering financial worth of defendant in computing punitive damages); *Bundy v. Century Equip. Co.*, 692 P.2d 754, 759 (Utah 1984) (finding that, in absence of evidence regarding defendant's net worth, an award of punitive damages cannot be sustained); see also KAN. STAT. ANN. § 60-3701 (1994) (stating that court must consider financial condition of defendant in assessing punitive damage award); MISS. CODE ANN. § 11-1-65(e) (Supp. 1996) (noting that fact-finder must consider "defendant's financial condition and net worth" in

imposition of a disproportionately large punitive damage award.⁴³

2. *Who decides how much to award and when*

Most states allow juries to determine the amount of punitive damage awards.⁴⁴ Judges, however, retain the power to remit or reverse the award if they believe that it reflects a prejudice or passion on the part of the jury.⁴⁵

With regard to when punitive damages are determined, many states permit some form of bifurcation of the punitive damage issues. Illinois permits all issues related to punitive damages to be tried separately but by the same fact-finder at the defendant's request.⁴⁶ Other states, like Kansas and Montana, allow the jury in the first proceeding to determine whether to award punitive damages and then require a separate, second proceeding to determine the amount of such an award.⁴⁷ Some states have determined that evidence of the defendant's wealth should not be admitted until the separate proceeding on the amount of punitive damages, because such evidence tends to prejudice the jury.⁴⁸ Jurors tend to be biased

determining amount of punitive damages to award); RESTATEMENT, *supra* note 20, § 908(2) & cmts. b-c.

43. See *Haslip*, 499 U.S. at 22.

While punitive damages in Alabama may embrace such factors as the heinousness of the civil wrong, its effect upon the victim, the likelihood of its recurrence, and the extent of the defendant's wrongful gain, the factfinder must be guided by more than the defendant's net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket.

Id.

44. See *Owen*, *supra* note 28, at 9. But see CONN. GEN. STAT. ANN. § 52-240b (West 1991) (noting that judge shall determine amount of punitive damages to be awarded in products liability cases); KAN. STAT. ANN. § 60-3701 (1994) (allowing jury to decide if punitive damages are appropriate, but shifting determination of amount from jury to judge); OHIO REV. CODE ANN. § 2307.80 (Anderson 1995) (mandating that court determine amount of damages); *Owen*, *supra* note 26, at 1320-22 (advocating that judges, not juries, should determine amount of punitive damage awards); Lisa M. Sharkey, Comment, *Judge or Jury: Who Should Assess Punitive Damages*, 64 U. CIN. L. REV. 1089 (1996) (arguing that judges, not juries, should decide amount of punitive damage awards).

45. See, e.g., *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Cal. Ct. App. 1981) (upholding trial court's remittitur to \$3.5 million of a jury award of \$125 million in punitive damages); 735 ILL. COMP. STAT. ANN. 5/2-1207 (West 1992) (noting that trial court has discretion to enter remittitur if punitive damage award is excessive). In fact, in *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), the Supreme Court held that an amendment to a state constitution that prohibited judicial review of punitive damage awards was a violation of due process. See *id.* at 432.

46. See 735 ILL. COMP. STAT. ANN. 5/2-1115.05(c) (West Supp. 1996); see also MINN. STAT. ANN. § 549.20 (West Supp. 1996) (permitting separate proceeding to determine punitive damages); N.C. GEN. STAT. § 1D-30 (1995) (allowing defendant to request that liability for compensatory and punitive damages be tried separately).

47. See, e.g., KAN. STAT. ANN. § 60-3701 (1994); MONT. CODE ANN. § 27-1-221(7)(a) (1991).

48. See MONT. CODE ANN. § 27-1-221(7)(a) (1995) (stating that evidence of defendant's financial condition is not admissible until fact finder determines, in a separate proceeding,

against large, wealthy corporations, particularly when the corporation does not have strong ties to the state.⁴⁹

II. THE CURRENT STATE OF PUNITIVE DAMAGES

Courts and commentators have found that punitive damage awards are increasing at an alarming pace.⁵⁰ Dissenting in *Pacific Mutual Life Insurance Co. v. Haslip*,⁵¹ Justice O'Connor noted:

Recent years . . . have witnessed an explosion in the frequency and size of punitive damages awards. A recent study by the RAND Corporation found that punitive damages were assessed against one of every ten defendants who were found liable for compensatory damages in California. The amounts can be staggering. Within nine months of our decision in *Browning-Ferris*, there were no fewer than six punitive damages awards of more than \$20 million. Medians as well as averages are skyrocketing, meaning that even routine awards are growing in size. The amounts "seem to be limited only by the ability of lawyers to string zeros together in drafting a complaint."⁵²

amount of punitive damage award, at which point defendant's financial condition must be considered); see also UTAH CODE ANN. § 78-18-1(2) (1996) (noting that evidence of defendant's wealth is admissible only after finding liability for punitive damages); *Oberg*, 512 U.S. at 432 ("[T]he presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.").

49. See *Oberg*, 512 U.S. at 432 (recognizing jury bias against large out-of-state firms); see also *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132, 138 (6th Cir. 1996) (deciding that review of arbitrators' punitive awards is unwarranted "because arbitrators do not share juries' bias against big business defendants").

50. See, e.g., *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 54-55 (1991) (O'Connor, J., dissenting) ("Over the last 20 years, the Court has repeatedly criticized common-law punitive damages procedures on the ground that they invite discriminatory and otherwise illegitimate awards." (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974))); *id.* at 39 (Scalia, J., concurring) ("[P]unitive damages assessed under common-law procedures are far from a fossil, or even an endangered species. They are (regrettably to many) vigorously alive. To effect their elimination may well be wise, but is not the role of the Due Process Clause."); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., and Stevens, J., concurring in part and dissenting in part) ("Awards of punitive damages are skyrocketing. As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was \$250,000. Since then, awards more than 30 times as high have been sustained on appeal.") (internal citations omitted); see also *Product Liability Fairness Hearing*, *supra* note 24, at 432 (statement of Theodore B. Olson, Esq., Gibson, Dunn & Crutcher LLP) (stating that "punitive damage awards are exploding out of control"). But see Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 57-58 (1992) (finding that from 1965 to 1990, there were only 355 punitive damage awards in products liability cases and more than half of these punitive damage awards were reduced in settlement or were reduced by appellate courts).

51. 499 U.S. 1 (1991).

52. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 61-62 (1991) (O'Connor, J., dissenting) (internal citations omitted).

Nowhere is the proof of out-of-control awards more evident than in the staggering jury verdicts themselves and in the trial or appellate court treatment of such verdicts on review:

In August, September, and October 1994, for example, juries imposed punitive exactions of \$5 billion against Exxon; \$109 million against Blockbuster Entertainment Corp.; \$80 million against Hughes Aircraft; \$70 million against a director of Amerco, the corporate parent of U-Haul; \$65 million against Southern California Physicians Insurance Exchange; \$58 million against Maryland Casualty Co.; \$57.5 million against Key Pharmaceutical; \$50 million against Mercury Finance; \$31 million against Chevron U.S.A.; \$15 million against Merrell Dow Pharmaceuticals, Inc.; \$8 million against Schering-Plough Corp.; \$7 million against Nash Finch Co.; \$6.9 million against the law firm Baker & McKenzie; \$6.6 million against Farmers Insurance Co.; \$6.5 million against Wal-Mart; \$5 million against the Hilton Hotel Corporation; and \$2.7 million against McDonald's.⁵³

Most of these jury awards subsequently were reduced by trial or appellate judges and other cases were settled for less than the amount awarded.⁵⁴ In fact, thirty of the seventy-two jury verdicts in 1994 for

53. Petition for Writ of Certiorari at 26, *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589 (1996) (No. 94-896).

54. For example, in the well-publicized McDonald's case in which a customer spilled coffee into her lap, the jury's award of \$2.7 million in punitive damages was reduced by the judge to \$640,000. See *Liebeck v. McDonald's Restaurants, Inc.*, No. CV-93-02419, 1995 WL 360309, at *1 (D.N.M. Aug. 18, 1994); Benjamin Weiser, *Tort Reform's Promise, Peril; Legislation Could Mean Tight Limits on Liability*, WASH. POST, Sept. 14, 1995, at A1 (stating that \$2.7 million award later was reduced by judge to \$640,000). The \$70 million verdict against a director of Amerco was reduced to \$7 million. See *In re Shoen*, 193 B.R. 302, 305 (Bankr. D. Ariz. 1996) (reducing jury damages award in remittitur proceeding based on jury finding that defendants reduced plaintiff's stock value in contested corporation by \$1.4 billion). The \$58 million verdict against Maryland Casualty for breach of contract and bad faith also was reversed as excessive. See *Dempsey v. Maryland Cas. Co.*, BC-033631 (Super. Ct. Los Angeles Co., Oct. 27, 1994) (invalidating \$61 million jury award based on Maryland Casualty's breach of contract and bad faith in refusing to pay fire insurance claim); *Verdicts Reversed by Judges*, NAT'L L.J., Feb. 6, 1995, at C14 (listing *Dempsey* as one of 11 of 1994's largest damage award reversals). In the Mercury Finance case, the judge found the \$50 million award excessive and offered the plaintiff a choice between a new trial or a remitted award of \$2 million. See *Johnson v. Mercury Fin. Co. of Ala.*, No. CV-93-072 (Cir. Ct. Barbour Co. Ala., Jan. 27, 1995) (reducing award through undisclosed settlement when trial court deemed \$90,000 compensatory and \$50 million punitive awards excessive based on used car sale in which \$1000 was added to \$2700 automobile purchase price to cover financing acquisition fee); Alvin C. Harrell, *Disclosure of "Acquisition Fees" in Assignments of Consumer Chattel*, 49 CONSUMER FIN. L.Q. REP. 145, 147-48 (1995) (describing political climate in Barbour County, Alabama, including historical ties between plaintiff's attorney, 6000 member jury pool, and judge presiding over case which led to excessive award in "aberrational" decision of otherwise "well-settled" legal principle in consumer chattel paper transfer). The parties reportedly settled rather than seek a new trial. See *id.* at 148. The \$6.9 million punitive damage award against Baker & McKenzie for sexual harassment subsequently was reduced by the judge to \$3.5 million. See *Weeks v. Baker & McKenzie*, 66 Fair Empl. Prac. Cas. (BNA) 581, 584-85 (Cal. Super. Ct. Nov. 28, 1994) (finding 138:1 ratio of punitive to compensatory award excessive where law firm defendant took corrective action before trial by forcing offending partner to

\$10 million or more were reduced or set aside.⁵⁵ Two truths can be deduced from this fact: (1) juries *are* awarding unjustified and excessive punitive damages with increasing frequency; and (2) the check of judicial review is functioning in some cases as an effective safeguard against the unbridled discretion of juries.⁵⁶

Judicial remittitur is not enough, however. Even with that mechanism, the amounts affirmed by appellate courts are rising exponentially along with jury verdicts.⁵⁷ Moreover, appellate courts are not guided by any "perceptible formula" in remitting awards.⁵⁸ There is no uniform method to the courts' punitive damage award reductions; often there is no explanation as to why the verdict is excessive or why the remitted amount was chosen as the appropriate punishment. Judicial review of punitive awards, like the jury verdicts themselves, is guided only by the general rule that the award not be excessive. Finally, because the fear of excessive jury verdicts drive settlements,⁵⁹ the fact that judicial remittitur permits after-the-fact correction of unconstitutional awards does not provide a valid

leave firm and reducing award from \$6.9 million to \$3.5 million). The judge reversed the \$80 million verdict against Hughes for racial discrimination, finding the award excessive and "grossly disproportionate." *Lane v. Hughes Aircraft Co. Inc.*, BC-075519 (Super. Ct., Los Angeles Co., Oct. 19, 1994) (finding that prejudicial evidence was admitted improperly and that plaintiff's counsel improperly used inflammatory language in arguments to jury); *Verdicts Reversed by Judges*, NAT'L L.J., Feb. 6, 1995, at C14 (citing *Hughes Aircraft* as one of 11 of 1994's largest damage award reversals). The \$109 million judgment against Blockbuster for "maliciously defrauding one of its investors" was settled. *See* Owen McDonald, *Out-of-Court Settlement Reached in Blockbuster Investor Suit*, Jan. 7, 1996, available in 1996 WL 8351823. The \$5 million judgment against Hilton Hotel for negligence and for maliciously and oppressively denying the plaintiff her right to safety subsequently was reduced by the judge to \$3.9 million. *See* Coughlin v. Hilton Hotels Corp., 879 F. Supp. 1047, 1053 (D. Nev. 1995) (reducing compensation contribution and punitive treble damage amounts by \$400,000 previously paid by separate defendant); Robin Abcarian, *Balancing Safety and the Bottom Line in Nevada*, L.A. TIMES, June 7, 1995, at 1 (reporting Nevada state legislative efforts to reduce hotel liability for safety and security related negligence involving hotel guests).

55. *See* Weiser, *supra* note 54, at A1 (outlining proposed tort reform legislation). In his exhaustive 1992 study of punitive damages, Professor Michael Rustad found that half of all punitive awards are appealed and half of those appealed are reversed or reduced. *See* Rustad, *supra* note 50, at 57-58. Yet even this study does not reflect accurately how many awards would have been reduced by the court because many plaintiffs settle for less than the amount rewarded before the court has the opportunity to reduce. *See id.*

56. *See* Darryl K. Brown, *Structure and Relationship in the Jurisprudence of Juries: Comparing the Capital Sentencing and Punitive Damages Doctrine*, 47 HASTINGS L.J. 1255, 1301 (1996) (arguing that courts have regulated the imposition of punitive damages by focusing "jury deliberation on factors deemed relevant by the legislature and minimiz[ing] consideration of irrelevant factors").

57. *See* *Product Liability Fairness Hearing*, *supra* note 24, at 432 (statement of Theodore B. Olson, Esq., Gibson, Dunn & Crutcher LLP) ("[T]he frequency and magnitude of punitive damage awards are exploding out of control when measured either by jury verdicts or by amounts affirmed on appeal . . .").

58. *See id.*

59. *See* Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2680-81 (1995) (describing effect of jury verdicts and settlement process on future litigation).

solution. Safeguards should be implemented to prevent the abuse earlier in the trial process, thereby saving the parties and the courts time and money. Moreover, if the rise in the magnitude and frequency of punitive damage awards is unjustified, then inappropriate punitive damage judgments are being awarded, unfairly subjecting defendants to the social stigma of being branded a wrongdoer and forcing defendants to spend time and money defending against undeserved penalties.⁶⁰

III. STATE TORT REFORM LEGISLATION

As a result of the increase in frequency and magnitude of punitive damage awards in the last ten years, state legislatures have been actively passing tort reform legislation. Forty-six states either have prohibited punitive damages or have enacted legislation aimed at reducing their frequency and size.⁶¹

Due to the perceived increase in awards of punitive damages in products liability litigation,⁶² states have started to regulate punitive damages more heavily to ensure that they are administered fairly. Most state statutes prescribe the purposes behind punitive damages,⁶³ the conditions on which punitive damages may be awarded,⁶⁴ the burden of proving liability for such an award,⁶⁵ and the factors that

60. See *Punitive Damages Hearing*, *supra* note 24, at 85-94 (statement of George L. Priest, Professor of Law and Economics, Yale Law School). According to one study, there has been a dramatic increase in punitive damage claims filed in tort cases. See *id.* at 87.

61. See *Pace*, *supra* note 6, at 841.

62. See Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 ALA. L. REV. 919, 919 (1989) ("The last two decades have witnessed dramatic growth in both the frequency and size of punitive damages awards in product liability litigation. . . . Today, hardly a month goes by without a multimillion-dollar punitive damages verdict in a product liability case."); see also James B. Sales, *The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on the Citadel*, 14 ST. MARY'S L.J. 351, 391-92 (1983) (noting that product suppliers are threatened by number and size of punitive damages awards facing manufacturing industry). But see Stephen Daniels & Joanne Marín, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 35-62 (1990) (presenting empirical evidence to contradict claims regarding size and frequency of punitive damages awards); Rustad, *supra* note 50, at 23 ("Every empirical study of punitive damages awards concludes that there is simply no evidence that punitive damages are routinely awarded.").

63. See, e.g., GA. CODE ANN. § 51-12-5.1(c) (1993 & Supp. 1996) ("[P]unitive damages shall be awarded not as compensation to a plaintiff but solely to punish, penalize, or deter a defendant . . ."); KY. REV. STAT. ANN. § 411.184(1)(f) (Banks-Baldwin 1995) ("'[P]unitive damages' includes exemplary damages and means damages, other than compensatory and nominal damages, awarded against a person to punish and to discourage him and others from similar conduct in the future . . .").

64. See, e.g., ALA. CODE § 6-11-20(a) (Supp. 1992); CAL. CIV. CODE § 3294(a) (West Supp. 1992); CONN. GEN. STAT. ANN. § 52-240(b) (West 1997); GA. CODE ANN. § 51-12-5.1(d), (e) (1993 & Supp. 1996); 735 ILL. COMP. STAT. ANN. 5/22107 (West Supp. 1996); OHIO REV. CODE ANN. § 2307.801(A) (Banks-Baldwin 1994); OR. REV. STAT. § 30.925(1) (1995).

65. See, e.g., ALA. CODE § 6-11-20(a); ALASKA STAT. § 09.17.020 (Michie Supp. 1996); CAL. CIV. CODE § 3294(a); GA. CODE ANN. § 51-12-5.1(b); IDAHO CODE § 6-1604(1) (1992); 735 ILL.

the jury may consider in assessing the award.⁶⁶ Some states have raised the burden of proof necessary to obtain a punitive damage award from "a preponderance of the evidence" to "clear and convincing evidence."⁶⁷ Other states have placed a ceiling on the amount of the punitive damage award,⁶⁸ and some have barred punitive damages if the wrongdoer had complied with existing government regulations.⁶⁹

COMP. STAT. ANN. § 5/21115.05(b); IND. CODE ANN. § 34-4-34-2 (West Supp. 1996); IOWA CODE ANN. § 668A.1 (West 1992); KAN. STAT. ANN. § 60-3701(c) (1995); KY. REV. STAT. ANN. § 411.184; MINN. STAT. ANN. § 549.20(a) (West 1996); MISS. CODE ANN. § 11-1-65(1)(a) (1995); MONT. CODE ANN. § 27-1-221(5) (1991); NEV. REV. STAT. ANN. § 42.005 (Michie 1995); N.J. STAT. ANN. § 2A:15-5.12 (West Supp. 1996); N.C. GEN. STAT. § 1D-15(b) (1995); N.D. CENT. CODE § 32-03.2-11 (Supp. 1995); OHIO REV. CODE ANN. § 2307.80 (products liability cases); *id.* § 2315.21(c)(3) (all other tort actions); OKLA. STAT. ANN. tit. 23, § 9(A) (West 1987); OR. REV. STAT. § 18.537; S.C. CODE ANN. § 15-33-135 (Law. Co-op. 1993); S.D. CODIFIED LAWS § 60-3701(c) (Michie 1993); UTAH CODE ANN. § 78-18-1(a) (1992). The state of Colorado raised the burden of proof to "beyond a reasonable doubt" before punitive damages can be imposed. *See* COLO. REV. STAT. ANN. § 13-25-127(2) (West 1989). The state of Maryland requires proof of actual malice. *See* MD. CODE ANN., CTS. & JUD. PROC. § 3-504(b) (1995); *see also* Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633, 653 (Md. 1992) (holding that proof of actual malice is required to award punitive damages).

66. *See, e.g.*, OHIO REV. CODE ANN. § 2307.801(B); OR. REV. STAT. § 30.925(2); TEX. CIV. PRAC. & REM. CODE ANN. §§ 41.011(a), 41.012 (West 1997).

67. *See supra* note 65 and accompanying text.

68. *See, e.g.*, COLO. REV. STAT. ANN. 13-21-102 (West Supp. 1996) (stating that punitive damage awards cannot exceed compensatory damages); CONN. GEN. STAT. ANN. § 52-240(b); FLA. STAT. ANN. § 768.73(1) (West 1992 & Supp. 1993) (limiting punitive damages to three times compensatory damages unless plaintiff proves by clear and convincing evidence that higher award is not excessive); 735 ILL. COMP. STAT. 5/2-1115.05(a) (limiting punitive damages to three times economic damages); IND. CODE ANN. § 34-4-34-4; KAN. STAT. ANN. § 60-3701; MONT. CODE ANN. § 27-1-221; NEV. REV. STAT. ANN. § 42.005 (imposing \$300,000 cap on punitive damages when actual damages are less than \$100,000); N.J. STAT. ANN. § 2A:15-5.14(b) (limiting punitive damages to five times compensatory damages or \$350,000, whichever is greater); N.C. GEN. STAT. § 1D-25(b) (capping punitive damages at greater of three times compensatory damages or \$250,000); N.D. CENT. CODE § 32-03.2-11(4) (stating that punitive damages cannot exceed two times compensatory damages or \$250,000, whichever is greater); OHIO REV. CODE ANN. § 2307.80; OKLA. STAT. ANN. tit. 23, § 9; TEX. CIV. PRAC. & REM. CODE ANN. § 41.007 (capping punitive damages at greater of \$200,000 or four times compensatory damages); VA. CODE ANN. § 8.01-38.1 (Michie 1992) (capping all punitive damages at \$350,000). *But see* GA. CODE ANN. § 51-12-5.1(e)(1) ("In a tort case in which the cause of action arises from product liability, there shall be *no limitation* regarding the amount which may be awarded as punitive damages.") (emphasis added). Georgia does, however, offer defendants some protection in that only one punitive award can be recovered for any act regardless of the number of separate causes of action that might arise from that act. *See id.* § 51-12-5.1(e)(1). Although this may aid corporations being sued in Georgia, it has no bearing on actions brought in other states, because Georgia's power to legislate stops at its borders. *See supra* notes 14-15 and accompanying text (discussing national scope of tort award problems).

69. *See, e.g.*, 735 ILL. COMP. STAT. 5/2-2107 (stating that if defendant's conduct "was approved by or was in compliance with standards set forth in an applicable federal or state statute or in a regulation" then no punitive damages may be awarded); OHIO REV. CODE ANN. § 2307.80 (compliance with FDA regulations bars punitive damage awards); 1987 TEX. GEN. LAWS § 81.008 (same). *But see* *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 735-36 (Minn. 1980) (holding that compliance with minimal federal standards of product flammability testing in children's clothing materials does not preclude award of punitive damages).

By limiting and regulating the award of punitive damages, states are sanctioning their imposition. Such regulation makes punitive damages look more like fines and penalties imposed by the state to punish intolerable conduct than like damage awards. As the states have recognized, procedural safeguards are needed to protect defendants from the wrongful imposition of these quasi-criminal sanctions and to protect the integrity of the legal system.

IV. JUDICIAL REFORM OF PUNITIVE DAMAGES

As the frequency and magnitude of punitive damages have grown, so have the challenges to their constitutionality.⁷⁰ The Supreme Court has considered whether punitive damage awards violate the Fifth, Seventh, Eighth, and Fourteenth Amendments.⁷¹ Until recently, the Court merely has criticized runaway jury verdicts in punitive damage cases and stressed the need for legislative reform to curtail these abuses.⁷² In its recent decision, *BMW of North America, Inc. v. Gore*,⁷³ the Court expressed its willingness to use judicial discretion to strike down awards that are deemed excessive.⁷⁴ Many questions surround the Supreme Court's scrutiny of the constitution-

70. See, e.g., *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1604 (1996) (due process challenge); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 418 (1994) (procedural due process challenge); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 446 (1993) (procedural and substantive due process challenge); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 7 (1990) (procedural due process challenge); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276-77 (1989) (due process and excessive fines challenge); Paul M. Sykes, Note, *Marking a Road to Nowhere? Supreme Court Sets Punitive Damages Guideposts in BMW v. Gore*, 75 N.C. L. REV. 1084, 1086 n.9 (1997) (listing recent Supreme Court decisions involving constitutional challenges to punitive damages awards).

71. See U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . ."); U.S. CONST. amend. VII ("In Suits at common law . . . no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."); U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed . . ."); U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .").

72. See, e.g., *Haslip*, 499 U.S. at 41 (Kennedy, J., concurring) (urging legislators to consider measures that address size and unpredictability of punitive damages awards).

73. 116 S. Ct. 1589 (1996).

74. See *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1602-03 (1996) ("As in *Haslip*, [499 U.S. 1 (1991)], we are not prepared to draw a bright line marking the constitutionally acceptable punitive damages award. Unlike that case, however, we are fully convinced that the grossly excessive award imposed in this case transcends the constitutional limit."). At least a majority of the Court held that the award was unconstitutionally excessive. Unfortunately, the Justices are no more uniform in their views regarding the regulation of punitive damage awards than the 50 states. See Timothy S. Lykowsky, *Tightening the Constitutional Noose Around Punitive Damages Challenges: TXO, What It Means, and Suggestions That Address Remaining Concerns*, 68 S. CAL. L. REV. 203, 228-38 (1994) (providing comparative analysis of various Supreme Court Justices' approaches to punitive damages awards including Justice Scalia's "traditional approach," Justice Stevens' "reasonableness" approach, Justice Kennedy's "comparative" approach, and Justice O'Connor's "most limiting" approach).

ality of punitive damages and, in particular, whether there is any legitimate constitutional basis for overturning such jury awards. The following analysis of Supreme Court cases that have considered the constitutionality of punitive damage awards reveals that the Supreme Court has not yet spoken on many contemporary issues. A survey of these cases further raises the questions of whether the Supreme Court's reform of punitive damages has helped to clarify the law at all, and whether these decisions have highlighted the need for federal legislation to regulate such damages.

A. *The Fifth Amendment—Double Jeopardy Clause*

*[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . .*⁷⁵

In *United States v. Halper*,⁷⁶ the Supreme Court held that the Double Jeopardy Clause of the Fifth Amendment limits the amount the government can recover (for punishment) in a civil action after the defendant already has been criminally punished.⁷⁷ In *Halper*, the defendant was convicted of violating sixty-five counts of the criminal false claims statute, was sentenced to two years imprisonment, and then was assessed a \$5000 fine when the government brought a subsequent civil suit.⁷⁸ The Supreme Court held that the civil penalty was unconstitutional under the Double Jeopardy Clause because it amounted to two separate punishments for the same offense.⁷⁹

The Court further stated, however, that "nothing in today's opinion precludes a private party from filing a civil suit seeking damages for conduct that previously was the subject of criminal prosecution and punishment. The protections of the Double Jeopardy Clause are not triggered by litigation between private parties."⁸⁰ Despite this statement, when a portion of the punitive damage award is paid to the state, the Double Jeopardy Clause, like the Excessive Fines Clause, could be implicated.⁸¹ Although being punished twice in the civil

75. U.S. CONST. amend. V.

76. 490 U.S. 435 (1989).

77. *United States v. Halper*, 490 U.S. 435, 446 (1989).

78. *See id.* at 437-38.

79. *See id.* at 448-49. The Court held that if the civil payment had been remedial, as opposed to punitive, it would have been constitutional. *See id.*

80. *Id.* at 451.

81. *See infra* notes 90-96 and accompanying text (considering Double Jeopardy Clause implications of splitting plaintiffs' damage awards in light of growing state efforts to recoup portions of punitive damage awards into state treasuries and victims' compensation funds); *see also* Clay R. Stevens, Comment, *Split-Recovery: A Constitutional Answer to the Punitive Damages*

justice system may not be unconstitutional under the Fifth Amendment, the constitutional prohibition against double jeopardy generally supports the argument that repetitive punishment is fundamentally unfair.⁸²

*B. The Eighth Amendment—Are Punitive Damage Awards
Excessive Fines?*

*Excessive bail shall not be required, nor excessive fines imposed, nor cruel
and unusual punishments inflicted.*⁸³

Punitive damages awards also have been attacked on Eighth Amendment grounds because they can allegedly constitute excessive fines. The Supreme Court, in *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*,⁸⁴ rejected a claim that a \$6 million punitive damage award was unconstitutional under the Excessive Fines Clause of the Eighth Amendment.⁸⁵ The Court held that the Excessive Fines Clause does not apply to awards in litigation between private parties.⁸⁶ The Court explained that the excessive fines clause "does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action *nor has any right to receive a share of the damages awarded.*"⁸⁷

This language implies that a punitive damage award, if apportioned between the plaintiff and the state, could raise constitutional concerns under the Eighth Amendment.⁸⁸ In *Browning-Ferris*, the Court

Dilemma, 21 PEPP. L. REV. 857, 885 (1994) (arguing that Court in *Halper* implicitly suggested that split recovery of punitive damages implicates Double Jeopardy Clause).

82. See Stevens, *supra* note 81, at 884.

83. U.S. CONST. amend. VIII.

84. 492 U.S. 257 (1989).

85. See *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 260 (1989). Until 1980, Browning-Ferris was the sole provider of roll-off waste collection service (large scale trash removal) in Burlington, Vermont. See *id.* That year, a former Browning-Ferris local manager entered the market himself, creating a company named Kelco. See *id.* Kelco had 40% of the roll-off waste market within one year and 43% within two years. See *id.* When Browning-Ferris was unable to buy out its only competition, the company reacted by trying to drive Kelco out of business by cutting its price by 40% for all new business. See *id.* Browning-Ferris' regional vice-president ordered the Burlington office to "put [Kelco] out of business. Do whatever it takes. Squish him like a bug." *Id.* A salesman in the Burlington office was told to put Kelco out of business, being instructed that if "it means give the stuff away, give it away." *Id.* at 260-61. Kelco brought suit against Browning-Ferris alleging that Browning-Ferris' illegal pricing strategy violated section 2 of the Sherman Act. See *id.* at 261. A Vermont jury found that Browning-Ferris tried to monopolize the roll-off waste disposal market by interfering with Kelco's contractual relations and awarded Kelco \$51,000 in compensatory damages (later trebled) and \$6 million in punitive damages. See *id.* at 260-61.

86. See *id.* at 260. The court found this interpretation consistent with the intent of the Framers, which was to place limits on the powers of the new government. See *id.* at 266.

87. *Id.* at 264 (emphasis added).

88. See Stephen R. McAllister, *A Pragmatic Approach to the Eighth Amendment and Punitive Damages*, 43 U. KAN. L. REV. 761, 780-87 (1995) (arguing that Excessive Fines Clause should

explicitly left open the question of whether a suit brought by a private party in the name of the United States, in which the government would share in any damage award, violates the Eighth Amendment.⁸⁹

This issue has become increasingly important since a number of states have passed legislation that apportion punitive damages between the plaintiff and the state.⁹⁰ In these states, a portion of the punitive damage award must be paid either directly to the state's treasury or into a state-sanctioned fund.⁹¹ Commentators long have argued that punitive damages should be paid to the state or to a public fund, or apportioned between the state and the plaintiff.⁹² Two reasons exist for awarding the state a portion of any punitive award: (1) punitive damages are a windfall for the plaintiff,⁹³ and

apply where states require that a percentage of a punitive damage award be paid into the state treasury or to a state-sponsored fund).

89. See *Browning-Ferris*, 492 U.S. at 276 n.21 ("We leave [this] question open for purposes of the Eighth Amendment's Excessive Fines Clause.").

90. See, e.g., COLO. REV. STAT. ANN. § 13-21-102(4) (repealed 1995) (one-third of all punitive damage awards must be paid into state treasury); FLA. STAT. ANN. § 768.73(2)-(4) (West Supp. 1992) (thirty-five percent of punitive damage awards must be paid into state funds); GA. CODE ANN. § 51-12-5.1(e)(2) (1993 & Supp. 1997) (seventy-five percent of all punitive damage awards are paid into state treasury); 735 ILL. COMP. STAT. ANN. 5/2-1207 (West Supp. 1996) (statute allows trial court to apportion punitive damage award between plaintiff, his attorney, and State's Department of Rehabilitation at its discretion); IOWA CODE ANN. § 668A.1(1)-(2) (West 1987) (statute requires that seventy-five percent of punitive damage award be paid into civil fund); KAN. STAT. ANN. § 60-3402(e) (1994) (fifty percent of all punitive damage awards in medical malpractice cases must be paid into state treasury); MO. ANN. STAT. § 537.675.2 (West Supp. 1992) (fifty percent of punitive damage award paid to the Tort Victims Compensation Fund); N.Y. C.P.L.R. § 8701 (McKinney Supp. 1995) (statute requires that 20% of punitive damage awards be paid to state); OR. REV. ST. § 18.540 (1994) (after plaintiff's attorney fees have been paid, 50% of remaining punitive damage award will go to state's Criminal Injuries Compensation Fund); UTAH CODE ANN. § 78-18-1(3) (1992) (after plaintiff's attorney fees and court costs have been paid, 50% of punitive damage award in excess of \$20,000 will go to state's General Fund). In a 1992 amendment, the state of Florida reduced its portion of the punitive damage award from 60% to 35% to prevent the state's take from discouraging lawyers who work on a contingency basis from pursuing cases where the recovery would almost exclusively be punitive damages (a case with low compensatory damages—such as an injured homemaker without lost wages). See FLA. STAT. ANN. § 768.73(2)(b) (West Supp. 1992).

91. See *supra* note 90 and accompanying text.

92. See, e.g., E. Jeffrey Grube, Note, *Punitive Damages: A Misplaced Remedy*, 66 S. CAL. L. REV. 839, 845-55 (1993) (arguing that windfalls from punitive damage awards could go directly to states without undermining deterrent rationale); Leo M. Stepanian II, Comment, *The Feasibility of Full State Extraction of Punitive Damage Awards*, 32 DUQ. L. REV. 301, 327-28 (1994) (arguing in favor of awarding punitive damages directly to the state instead of the plaintiff). But see James D. Ghiardi, *Punitive Damages: State Extraction Practice Is Subject to Eighth Amendment Limitations*, 26 TORT & INS. L.J. 119, 130-31 (1990) (maintaining that awarding punitive damages to state brings these awards within purview of Eighth Amendment's Excessive Fines Clause, which may result in them being held unconstitutional).

93. The plaintiff already has received full compensation for her injuries through compensatory damages. Allowing the plaintiff to keep a punitive damage award, therefore, provides the plaintiff with a windfall. See *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 841 (2d Cir. 1967) (denying punitive damage award when evidence was insufficient to meet New York recklessness requirement and citing increased government regulation, criminal penalties, and compensatory awards as sufficient deterrence measures); *Molenaar v. United Cattle Co.*, 553

(2) punitive damages are awarded to punish the defendant for a public wrong, an offense against societal welfare.⁹⁴ A few lower courts have considered the propriety of state apportionment laws,⁹⁵ but the Supreme Court has yet to consider the issue.

What will the Supreme Court do with a case in which the punitive award is apportioned between the state and the plaintiff? In light of the wide-spread proliferation of state tort reform efforts to regulate the procedures for imposing, assessing, and apportioning punitive damages, punitive damages awarded in lawsuits between private parties have become sufficiently governmental in character to invoke Eighth Amendment scrutiny—if not for the entire award, at least for the portion being paid to the state. Thus far, however, the Supreme Court has rejected one opportunity (by denying certiorari) to determine whether a state's sharing of a punitive damage

N.W.2d 424, 427 (Minn. App. 1996) ("State legislatures have imposed other reforms, such as avoiding a windfall by requiring the punitive damages to be paid to the state rather than a litigant."); see also Note, *An Economic Analysis of Plaintiff's Windfall from Punitive Damage Litigation*, 105 HARV. L. REV. 1900, 1907-08 (1992) (arguing that punitive damage awards create plaintiff windfalls leading to inefficient economic results and proposing legislative response requiring payment to state fund). But see Stevens, *supra* note 81, at 908 n.77 ("[T]he plaintiff is not completely undeserving because she must expend time, effort, and money as the catalyst who brings the defendant to justice for the sake of society.").

94. See Harris, *supra* note 22, at 1102 (stating that punitive damages are concerned with injuries to community). Commentators also have argued that if the state were awarded all punitive damage awards, it would increase the number of times parties settled and thereby reduce litigation of these types of cases. See Stepanian, *supra* note 92, at 325-27. Full state extraction enhances the incentive to settle because plaintiffs likely would settle for any amount greater than their compensatory damages. This result is based on the premise that plaintiffs would be able to keep the money in excess of compensatory damages, whereas that excess amount would go to the state if the case went to trial. See *id.*

95. See *McBride v. General Motors Corp.*, 737 F. Supp. 1563, 1569-70, 1578 (M.D. Ga. 1990) (finding that state statute allocating 75% of all products liability punitive damage awards to state was a violation of Excessive Fines Clause and was a violation of due process and equal protection because it applied only to product liability suits); *Kirk v. Denver Publ'g Co.*, 818 P.2d 262, 272 (Co. 1992) (holding that state statute that required one third of punitive damage award to be paid to public treasury was unconstitutional taking under both United States and Colorado Constitutions because punitive damage judgment is private property right); *Gordon v. State*, 585 So. 2d 1033, 1035-38 (Fla. Dist. Ct. App. 1991), *aff'd*, 608 So. 2d 800 (Fla. 1992) (finding Florida provision apportioning punitive damage awards between plaintiff and state constitutional because a plaintiff does not have a cognizable right to recover punitive damages); see also *Burke v. Deere & Co.*, 780 F. Supp. 1225, 1242 (S.D. Iowa 1991) (holding that state statute that requires portion of punitive award to be paid to civil reparations fund administered by courts does not provide state with any interest in award and, therefore, does not implicate Eighth Amendment concerns), *rev'd*, 6 F.3d 497 (8th Cir. 1993); *Fuller v. Preferred Risk Life Ins. Co.*, 577 So. 2d 878, 887 (Ala. 1991) (Shores, J., concurring) (suggesting that court has inherent power to apportion punitive damages between plaintiff and state general fund or "some special fund that serves a public purpose or advances the cause of justice"); *Shepard Components, Inc. v. Brice Petrides-Donohoe & Assocs., Inc.*, 473 N.W.2d 612, 619 (Iowa 1991) (requiring 75% of punitive damage award to be paid to state does not violate due process or equal protection because plaintiffs do not have vested property rights in punitive damage awards).

award—apportioned pursuant to a state statute—invokes Eighth Amendment scrutiny.⁹⁶

Applying the Excessive Fines Clause to punitive damage awards raises another question: What constitutes an excessive fine? Because the Eighth Amendment prohibits only excessive fines, not all fines, the Supreme Court would have to determine whether the portion of a particular punitive award paid to the state is excessive. Such a finding probably would require the Court to articulate “guideposts” for determining what is excessive under the Eighth Amendment.

Will the Supreme Court apply the same “guideposts” to determine excessiveness under the Eighth Amendment that it articulated in *BMW*,⁹⁷ or will it craft even more factors for judges to consider? In the past, the Court has refused to create a substantive federal excessiveness standard, holding that “[a]lthough petitioners and their amici would like us to craft some common-law standard of excessiveness that relies on notions of proportionality between punitive and compensatory damages, or makes reference to statutory penalties for similar conduct, these are matters of state, not federal, common law.”⁹⁸

In light of the recent decision in *BMW of North America, Inc. v. Gore*, where the Court expressed its willingness to overturn excessive awards on a due process basis,⁹⁹ the Excessive Fines Clause now seems

96. See *Owens-Corning Fiberglas Corp. v. Dudley*, 667 So. 2d 783, 783 (Fla. Dist. Ct. App.) (per curiam), cert. denied, 116 S. Ct. 2498 (1996) (affirming without comment trial court verdict awarding \$4.06 million in compensatory damages, \$8.25 million in punitive damages, and \$3320 in plaintiff's costs in asbestos personal injury action).

97. See *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1591-92 (1996) (providing three “guideposts” used to indicate the excessiveness of a punitive damage award: (1) the degree of reprehensibility of defendant's conduct; (2) the ratio between plaintiff's compensatory damages and the punitive damage award; and (3) the difference between the award and the civil or criminal sanctions that could be imposed for comparable misconduct). The “guideposts” articulated in *BMW* look surprisingly similar to the considerations Justice O'Connor proposed in her dissent in *Browning-Ferris*. Justice O'Connor stated:

First, the reviewing court must accord “substantial deference” to legislative judgments concerning appropriate sanctions for the conduct at issue. Second, the court should examine the gravity of the defendant's conduct and the harshness of the award of punitive damages. Third, because punitive damages are penal in nature, the court should compare the civil and criminal penalties imposed in the same jurisdiction for different types of conduct, and the civil and criminal penalties imposed by different jurisdictions for the same or similar conduct.

Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 301 (1989) (O'Connor, J., dissenting).

98. *Browning-Ferris*, 492 U.S. at 279.

99. See *BMW*, 116 S. Ct. at 1595 (“Only when an award can fairly be categorized as ‘grossly excessive’ . . . does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.”).

unnecessary in the analysis of punitive damage awards.¹⁰⁰ If the total amount of the punitive damage award is not excessive under the Due Process Clause, then a state's smaller share of that amount logically cannot be excessive.

C. *The Fourteenth Amendment—Can a Punitive Damage Award Violate Due Process?*

*[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .*¹⁰¹

The Supreme Court has held that although the Double Jeopardy and Excessive Fines Clauses do not apply to punitive damage awards paid to private litigants, the Due Process Clause of the Fourteenth Amendment does.¹⁰²

1. *Pacific Mutual Life Insurance Co. v. Haslip*

In *Pacific Mutual Life Insurance Co. v. Haslip*,¹⁰³ the Supreme Court upheld the constitutionality of the punitive damage award against a challenge that the award violated due process.¹⁰⁴ The Court explains:

We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit in every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.¹⁰⁵

100. In addition to its analysis under the Eighth Amendment, *Browning-Ferris* is significant for its foreshadowing of substantive due process review of punitive damage awards. Justice Brennan, joined by Justice Marshall, issued a concurring opinion expressing his belief that the Due Process Clause imposes both procedural and substantive limitations on punitive awards. See *Browning-Ferris*, 492 U.S. at 280-81 (Brennan, J., concurring). Justice Brennan actually suggested the "grossly excessive" test, which subsequently was endorsed by the Court. See *id.* at 281 (Brennan, J., concurring). Justice O'Connor, joined by Justice Stevens, dissented on the Excessive Fines Clause issue and agreed with Justice Brennan regarding the substantive limitations imposed by the Due Process Clause. See *id.* at 283 (O'Connor, J., dissenting).

101. U.S. CONST. amend XIV, § 1.

102. See *infra* note 186 and accompanying text.

103. 499 U.S. 1 (1991).

104. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) ("[W]e cannot say that the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be *per se* unconstitutional.").

105. *Id.*

In *Haslip*, Lemmie L. Ruffin, an agent for Pacific Mutual, made a proposal to supply health and life insurance for the employees of Roosevelt City, Alabama.¹⁰⁶ The city approved the proposal and began issuing payments, which were effected through deductions from its employees' paychecks, to Ruffin.¹⁰⁷ Instead of remitting these payments to Union Fidelity, the health insurance company, Ruffin misappropriated the money.¹⁰⁸ When the insurance company did not receive the payments, it sent notices to Ruffin that it was discontinuing health coverage to the city.¹⁰⁹

In 1982, Cleopatra Haslip, a city employee, was hospitalized and the insurance company refused to cover the expenses.¹¹⁰ Haslip, along with other injured city employees, sued Ruffin and Pacific Mutual for intentional fraud, alleging that Ruffin stole their insurance premiums and allowed their policies to lapse.¹¹¹ The jury agreed, awarding Haslip compensatory and punitive damages in the amount of \$1,040,000.¹¹² On appeal, the Alabama Supreme Court rejected Pacific Mutual's claim that the punitive damage award was a product of inadequate judicial review and a violation of due process and upheld the punitive damage award.¹¹³ The Supreme Court subsequently affirmed the state court's holding on appeal, again finding that the requirements of due process had been met.¹¹⁴ The Court held that in order to determine "whether a punitive award is reasonably related to the goals of deterrence and retribution," a court should consider:

106. *See id.* at 4.

107. *See id.* at 5. An arrangement was made for Union Fidelity to send its billings for the city's health insurance premiums to Ruffin at one of Pacific Mutual's branch offices. *See id.* Once received, Ruffin was responsible for remitting the payments to Union Fidelity. *See id.*

108. *See id.*

109. *See id.* The cancellation notices never were forwarded to the city. *See id.*

110. *See id.* The insurance company refused to extend coverage to Haslip and, as a result of her inability to pay, her doctors placed the account with a collection agency, adversely affecting Haslip's credit. *See id.*

111. *See id.* Ruffin was sued individually and as a proprietorship, and Pacific Mutual was sued under a theory of *respondeat superior*. *See id.*

112. *See id.* at 6-7. The jury was instructed that if it found the defendants liable for fraud, it could award punitive damages to the plaintiff. *See id.* at 6. The jury also was directed to take into consideration "the character and the degree of the wrong as shown by the evidence and necessity of preventing similar harm" when fixing the amount. *Id.* at 6 n.1.

113. *See Pacific Mut. Life Ins. Co. v. Haslip*, 553 So. 2d 537 (Ala. 1989), *aff'd*, 499 U.S. 1 (1991). The Alabama Supreme Court determined that the trial judge appropriately had reviewed the punitive damages awarded by the jury, held a hearing, and set forth on the record the reasons why he felt the law did not authorize a remittur. *See id.* at 543.

114. *See Haslip*, 499 U.S. at 21, 23-24. "This appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and deter its repetition." *Id.* at 21.

(a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.¹¹⁵

After *Haslip*, courts were left to determine whether the punitive damage award was reasonable using the preceding "totality of the circumstances" test.

2. TXO Production Corp. v. Alliance Resources Corp.

In an effort to decide whether the punitive damage award in *TXO Production Corp. v. Alliance Resources Corp.*¹¹⁶ was reasonable, the Supreme Court of West Virginia engaged in a comparative analysis of all post-*Haslip* court decisions searching for a pattern of what courts find reasonable. The court placed the cases into three categories: (1) "really stupid defendants;"¹¹⁷ (2) "really mean defendants;"¹¹⁸ and, (3) "really stupid defendants who could have caused a great deal of harm by their actions but who actually caused minimal harm."¹¹⁹ The West Virginia court held that TXO fell within the "really mean" category.¹²⁰

115. *Id.* at 21-22. The Supreme Court reiterated the criteria set forth by the Alabama Supreme Court in *Hammond v. City of Godsen*, 493 So. 2d 1374, 1379 (Ala. 1986), for determining whether a punitive award is excessive or inadequate. See *Haslip*, 499 U.S. at 20.

116. 419 S.E.2d 870 (W. Va. 1992), *aff'd*, 509 U.S. 443 (1993).

117. See *TXO Prod. Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870, 888 (W. Va. 1992), *aff'd*, 509 U.S. 443 (1993). According to the court, "really stupid defendants" are those who have harmed victims unintentionally as a result of extreme carelessness. See *id.* The court held that in those "really stupid" cases, punitive damages generally should be limited to five times the compensatory damages. See *id.* at 889.

118. See *id.* at 889. "Really mean defendants" are those who have committed intentional acts that they knew were harmful. See *id.* The court held that in these cases, punitive damages that are 500 times compensatory damages are not per se unreasonable. See *id.*

119. See *id.* at 887-88. The court held that when actual compensatory damages are minimal and the potential for harm from defendant's stupidity was great, a punitive award exceeding five times the compensatory award may be justified. See *id.* at 889.

120. See *id.* Because the type of fraudulent action intentionally undertaken by the defendant could have caused millions of dollars in damages to other victims, the court found the defendant within the "really mean" category and, consequently, subject to substantial punitive damages. See *id.*

In this case, punitive damages were awarded to punish TXO for its unscrupulous business dealings. TXO wanted oil and gas rights to a 1000-acre tract in West Virginia in which Alliance held a leasehold interest.¹²¹ After trying to purchase Alliance's rights without success, TXO made Alliance a "phenomenal" offer on the condition that the offer would be reduced if less than full oil and gas mineral and leasehold rights were conveyed.¹²² TXO, looking for a way to reduce its payments to Alliance, located a grant of some mineral rights to a third party, Mr. Signaigo.¹²³ As Mr. Signaigo explained to TXO, however, the grant concerned only coal rights and, therefore, did not involve Alliance's oil and gas rights.¹²⁴ TXO tried to force Mr. Signaigo to lie in an affidavit by claiming that the oil and gas rights may have been included in the grant, but Mr. Signaigo refused.¹²⁵ TXO, fully informed that the grant did not affect oil and gas rights, then bought the grant and threatened Alliance with it, trying to force Alliance to accept reduced royalties.¹²⁶ When Alliance refused to comply, TXO brought suit and Alliance counter-claimed.¹²⁷

At trial, Alliance demonstrated that TXO acted in bad faith because it knew that it had no claim against Alliance for the oil and gas rights.¹²⁸ Alliance also offered evidence that TXO was a large company; that the revenues from the oil and gas rights at issue were substantial; and that TXO "had engaged in similar nefarious activities in its business dealings in other parts of the country."¹²⁹ The jury found TXO at fault and awarded Alliance its actual damages totaling \$19,000, the costs of defending the TXO action, and \$10 million in punitive damages.¹³⁰ The Supreme Court of West Virginia upheld the award, stating:

121. See *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 447-49 (1993).

122. See *id.* at 447 (quoting *TXO*, 419 S.E.2d at 875). TXO would pay Alliance \$20 per acre in cash, 22% of the oil and gas revenues in royalties, and all of the development costs as part of the "phenomenal" offer. See *id.*

123. See *id.* at 448.

124. See *id.*

125. See *id.* at 449.

126. See *id.*

127. See *id.* at 449-50.

128. See *id.* at 450.

129. See *id.* at 450-51. Alliance introduced evidence that TXO had been caught in four similar instances of fraud and misrepresentation preceding the activities in this case. See *TXO Prod. Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870, 881-83 (W. Va. 1992), *aff'd*, 509 U.S. 443 (1993); see also Sandra L. Nunn, *The Due Process Ramifications of Punitive Damages*, 63 U. CIN. L. REV. 1029, 1032 n.22 (1995) (discussing videotaped depositions of four attorneys concerning matters in which TXO and each of its clients were involved).

130. See *TXO*, 509 U.S. at 451.

The type of fraudulent action intentionally undertaken by TXO in this case could potentially cause millions of dollars in damages to other victims. As for the reprehensibility of TXO's conduct, we can say no more than we have already said, and we believe the jury's verdict says more than we could say in an opinion twice this length. Just as important, an award of this magnitude is necessary to discourage TXO from continuing its pattern and practice of fraud, trickery and deceit.¹³¹

The United States Supreme Court affirmed the lower court's decision, holding that the \$10 million punitive damage award, which was 526 times the actual damages, was not "grossly excessive" and thus did not violate due process.¹³² As in *Haslip*, the Court refused to adopt a bright line test, instead focusing on the "reasonableness" of the punitive damages to determine whether the award was grossly excessive.¹³³ The Court rejected TXO's argument that the award was unreasonable,¹³⁴ adding that it was appropriate to consider the harm that could have occurred as a result of the defendant's conduct when assessing the reasonableness of a punitive damage award.¹³⁵

By rejecting the notion that due process requires a particular ratio between punitive and compensatory damages, the Supreme Court in *Haslip* and *TXO* left lower courts without concrete guidance as to what constitutes an unreasonable award. To this point, the Court endorsed a variety of factors used by state courts to assess and review punitive damage awards, without articulating any sort of hierarchy among them. Moreover, the court made clear that no single factor is dispositive no matter how seemingly outrageous.¹³⁶ The Court held that a "grossly excessive" award would violate due process, but left the

131. *TXO*, 419 S.E.2d at 889-90. In deciding whether the \$10 million punitive damage award in this case met the "reasonable relationship" test under West Virginia law, the court considered three factors: "(1) the potential harm that TXO's actions could have caused; (2) the maliciousness of TXO's actions; and, (3) the penalty necessary to discourage TXO from undertaking such endeavors in the future." *Id.* at 889.

132. See *TXO*, 509 U.S. at 462.

133. See *id.* at 458.

134. See *id.* at 462. The Supreme Court held that "the disparity between the punitive award and the potential harm does not, in our view, 'jar one's constitutional sensibilities.'" *Id.* (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991)). The Court held that the "dramatic disparity" is not dispositive in light of the potential harm to which Alliance was subject, TXO's bad faith, TXO's wealth, and the fact that TXO had a long standing pattern of fraud, trickery, and deceit. See *id.*

135. See *id.* at 460. The Supreme Court noted that the "shocking disparity" stressed by TXO dissipates when one considers the possible loss of royalties payments to Alliance had TXO succeeded in its wrongful plan. See *id.* at 462.

136. A "dramatic disparity" between actual damages and punitive damages (even one 526 times the actual damages) is not determinative of excessiveness in light of other factors involved in the case. See *id.* at 459-62.

courts to determine on a case-by-case basis whether a particular punitive award was grossly excessive.¹³⁷

3. *Honda Motor Co. v. Oberg*

Not every punitive damage case has resulted in victory for the plaintiff. In *Honda Motor Co. v. Oberg*,¹³⁸ for example, the Supreme Court struck down an amendment to a state constitution that prohibited judicial review of punitive awards as violative of due process.¹³⁹ In *Honda*, Oberg brought a product liability suit against Honda, who manufactured and sold three-wheeled all-terrain vehicles that had a propensity to overturn—a fact that Honda knew or should have known.¹⁴⁰ When Oberg's vehicle overturned, he suffered severe and permanent injuries.¹⁴¹ The jury awarded Oberg \$919,000 in compensatory damages, which was reduced to \$735,000 because the jury found that the plaintiff's negligence contributed to the accident, and \$5 million in punitive damages.¹⁴² Honda appealed, arguing that the punitive award violated the Due Process Clause because it was excessive and because Oregon courts lacked the authority to review and correct excessive jury awards.¹⁴³ The Supreme Court held that the amendment to the Oregon Constitution, which prohibited post-verdict judicial review of the amount of a jury award unless there was no evidence to support the award, violated procedural due process.¹⁴⁴

Even though the Court reversed the punitive award on constitutional grounds, *Honda* has had little impact on punitive damage cases because of the narrow holding and the unusual facts, in that Oregon was the only state that barred post-verdict judicial review of punitive damage awards.¹⁴⁵

137. See Nunn, *supra* note 129, at 1085 (recognizing that because the Supreme Court's line of constitutional impropriety moves on a case-by-case basis, "[e]xactly what will cause a punitive damages award to cross this moving line in a given case remains unanswered").

138. 512 U.S. 415 (1994).

139. See *Honda Motor Co. v. Oberg*, 512 U.S. 415, 435 (1994).

140. See *id.* at 418.

141. See *id.*

142. See *id.*

143. See *id.*

144. See *id.* at 430-32. Although Oregon provides pre-verdict safeguards against arbitrary awards, the safeguards do not protect the defendant adequately from the possibility that juries may disregard specific instructions and may impose excessive punitive damages. See *id.* at 429.

145. See *id.* at 426.

4. BMW of North America, Inc. v. Gore

The most recent due process challenge to a punitive damage award was brought in *BMW of North America, Inc. v. Gore*.¹⁴⁶ In *BMW*, the jury awarded the plaintiff \$4000 in compensatory damages and \$4 million in punitive damages because BMW failed to inform the plaintiff that the "new" car they sold him had been partially refinished.¹⁴⁷ On appeal, the state supreme court reduced the punitive damage award to \$2 million.¹⁴⁸ BMW appealed to the Supreme Court, claiming that the punitive damage award was unconstitutional because it was grossly excessive and because it constituted extraterritorial punishment.¹⁴⁹

In a 5-4 decision, the Supreme Court held that the \$2 million punitive damage award was so grossly excessive that it "transcend[ed] the constitutional limit."¹⁵⁰ Justice Stevens, writing for the five-member majority, articulated three "guideposts" which the Court considered in its due process calculus: (1) the degree of reprehensibility of the conduct; (2) the disparity between the harm suffered by Gore and the punitive damage award; and, (3) the difference between this remedy and the civil (and criminal) penalties authorized or imposed in comparable cases.¹⁵¹

146. 116 S. Ct. 1589 (1996).

147. See *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1593-94 (1996). Apparently, Gore requested that the jury award punitive damages in the amount of \$4000 for each of the approximately 1000 partially refinished cars that BMW sold as new during a ten-year period, even though many of these sales took place outside the state and in states where it was not illegal to withhold this information from the customer. See Brief for Petitioner at 7, *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589 (1996) (No. 94-896), available in 1995 WL 126508.

148. See *BMW*, 116 S. Ct. at 1595. The Alabama Supreme Court found that the jury improperly included sales outside the state in computing the amount of punitive damages. See *id.* The court held that the state could not punish BMW for acts that occurred outside state borders. See *id.* The court determined that a \$2 million punitive damage award would be "constitutionally reasonable" under the circumstances. See *id.*

149. See *id.* at 1592-93.

150. See *id.* at 1604. The Court held: "Only when an award can fairly be categorized as 'grossly excessive' in relation to [the state's legitimate interests in punishment and deterrence] does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." *Id.* at 1595.

151. See *id.* at 1598-99. In his concurrence, Justice Breyer, articulated seven factors that appellate courts should use to determine whether a punitive damage award is grossly excessive: (1) the award must bear a "reasonable relationship" to the harm that is likely to occur from defendant's conduct as well as the harm that actually has occurred; (2) the "degree of reprehensibility" of defendant's conduct; (3) the award must "remove the profit" of the illegal activity; (4) the financial condition of the defendant; (5) the costs of the litigation and the state's desire to encourage plaintiffs to bring wrongdoers to trial; (6) whether criminal sanctions have been imposed; and (7) whether other civil actions have been filed against this defendant for the same conduct. See *id.* at 1606-07 (Breyer, J., concurring) (citing *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 223-24 (Ala. 1989)).

Justice Scalia, joined by Justice Thomas, dissented on federalism grounds.¹⁵² Justice Scalia, although agreeing that punitive damage reform may be needed, believed that it was not the role of the Court to impose its subjective assessment of reasonableness on the states.¹⁵³ The Court's decision, according to Justice Scalia, "was really no more than a disagreement with the community's sense of indignation or outrage expressed in the punitive award of the Alabama jury."¹⁵⁴ Justice Scalia did not believe that such an action was authorized by the Due Process Clause's procedural guarantees.¹⁵⁵ Finally, Justice Scalia criticized the lack of guidance the decision gave to the states:

In truth, the "guideposts" mark a road to nowhere; they provide no real guidance at all. As to "degree of reprehensibility" of the defendant's conduct, we learn that "'nonviolent crimes are less serious than crimes marked by violence or the threat of violence,'" and that "'trickery and deceit'" are "more reprehensible than negligence." As to the ratio of punitive to compensatory damages, we are told that a "general concern of reasonableness . . . enters into the constitutional calculus,"—though even "a breathtaking 500 to 1" will not necessarily do anything more than "raise a suspicious judicial eyebrow." And as to legislative sanctions provided for comparable misconduct, they should be accorded "substantial deference." One expects the Court to conclude: "To thine own self be true."

These criss-crossing platitudes yield no real answers in no real cases.¹⁵⁶

The legal effect of the "guideposts" articulated by the Court establishes federal standards governing what traditionally has been the exclusive province of the states.¹⁵⁷ In actuality, however, the Supreme Court's "guideposts" offer little real guidance.¹⁵⁸ The Court did not say that the articulated guideposts were the only factors for consideration, leaving courts free to employ other factors when

152. See *id.* at 1610 (Scalia, J., dissenting). Justice Scalia stated, "Since the Constitution does not make that concern any of our business, the Court's activities in this area are an unjustified incursion into the province of state governments." See *id.* (Scalia, J., dissenting). Justice Ginsburg, joined by the Chief Justice, also dissented on federalism grounds with Justice Ginsburg arguing that the Court was encroaching on decisions more appropriately left to the states. See *id.* at 1614 (Ginsburg, J., dissenting).

153. See *id.* at 1610-11 (Scalia, J., dissenting).

154. *Id.* at 1611 (Scalia, J., dissenting).

155. See *id.* at 1611-12 (Scalia, J., dissenting).

156. See *id.* at 1612 (Scalia, J., dissenting) (internal citations omitted).

157. See *id.* at 1613 (Scalia, J., dissenting).

158. See *supra* note 156 and accompanying text.

assessing the constitutionality of damage awards.¹⁵⁹ Moreover, the vagueness of the guideposts lends further credence to the notion that federal tort reform, where Congress can delineate the precise penalties for selected improper behavior, is necessary.¹⁶⁰

Although the first two guideposts, the reprehensibility of the defendant's conduct and the relationship between the actual harm and the punitive damages, long have been part of the punitive damage assessment process in most states, the third guidepost, which requires a comparison with statutory penalties, is relatively new.¹⁶¹ Requiring that a punitive award bear some resemblance to statutory penalties for similar conduct raises some concern because statutory penalties often are outdated and obsolete.¹⁶² Statutory penalties, once fixed, rarely are adjusted for inflation. In fact, punitive damages are generally most beneficial in areas where regulation is unable to police or to keep abreast with advancement.¹⁶³ The Supreme Court in *BMW*, however, apparently believed there should be some degree of deference to legislative judgments concerning sanctions for particular conduct.

The fact that criminal sanctions accompany potential civil sanctions presents another impediment to a comparison of the statutorily prescribed civil sanctions with punitive damage awards.¹⁶⁴ How do

159. See *BMW*, 116 S. Ct. at 1613 (Scalia, J., dissenting) (noting that loophole in guideposts will cause state courts to uphold large awards for the protection of consumers).

160. See *infra* note 163 and accompanying text (explaining why current system does not work).

161. See Marcia Coyle, *Punies Decision Gives Business Potent Ammo*, NAT'L L.J., June 3, 1996, at A11.

162. See *infra* notes 317-21 and accompanying text (explaining that statutory and regulatory penalties offer only minimum standards and are often outdated because of rapidly changing technology).

163. See Teresa Moran Schwartz, *Prescription Products and the Proposed Restatement (Third)*, 61 TENN. L. REV. 1357, 1385 (1994) [hereinafter Schwartz, *Prescription Products*] (declaring that tort system takes over when regulation fails). Regulation often is inadequate to police corporate wrongdoing because: (1) regulatory agencies are understaffed and underfunded; (2) the regulations are outdated; (3) there is generally a "lag time" between technological advances and regulations to cover those advances; and (4) regulatory violations often are difficult to police. The tort system in general and punitive damage awards in particular play a vital role in policing corporate wrongdoing when the agencies and regulations fall short. See generally Teresa Moran Schwartz, *The Impact of the New Products Liability Restatement on Prescription Products*, 50 FOOD & DRUG L.J. 399, 405-06 (1995) [hereinafter Schwartz, *Impact of the New Restatement*] (describing lack of clarity in current FDA regulations); Schwartz, *Prescription Products*, *supra*, at 1385-87 (explaining how regulations and tort system can work together to deter unsafe practices); Teresa Moran Schwartz, *Punitive Damages and Regulated Products*, 42 AM. U. L. REV. 1335, 1343-44 (1993) [hereinafter Schwartz, *Punitive Damages*] (detailing judicial treatment of regulations and listing concerns about process); Teresa Moran Schwartz, *The Role of Federal Safety Regulations in Products Liability Actions*, 41 VAND. L. REV. 1121, 1146-52 (1988) [hereinafter Schwartz, *Products Liability*] (articulating reasons why federal regulatory standards do not work).

164. See Lykowski, *supra* note 74, at 247 (citing factors that limit usefulness of comparison with criminal penalties).

criminal penalties for proscribed conduct factor into the civil penalty comparison? Certainly, if criminal penalties exist for similar conduct, the punitive award need not resemble the available civil penalty. How does criminal incarceration translate into monetary sanctions? If a defendant could be sentenced to five years in jail and \$100,000, should the punitive damage award be limited to the \$100,000? Commentators have observed the difficulty associated with comparing criminal penalties to civil punishment.¹⁶⁵

The *BMW* decision has spurred a great deal of debate over whether federal tort reform is necessary now that the Court has struck down a grossly excessive award.¹⁶⁶ This Article argues that although *BMW* is a milestone in the war against excessive damage awards, it will have little actual impact in the trenches. District and appellate courts may scrutinize awards more closely, but *BMW* is sufficiently amorphous to provide no real guidance.¹⁶⁷ In fact, after the Supreme Court rendered its decision in *BMW*, some expected the Court to remand the pending sixteen cases for application of the guideposts.¹⁶⁸ The Court only remanded a few cases for further consideration in light of *BMW*, however, and denied certiorari in the rest, thereby leaving the lower court rulings in effect.¹⁶⁹ The denial of certiorari lends further credibility to the argument that *BMW* did not change anything operationally, and that federal tort reform is as necessary now as it was before the *BMW* decision was rendered.¹⁷⁰

The Supreme Court simply is incapable of policing every excessive punitive award, and because every state has its own standards and regulations, there is very little predictability in the law.¹⁷¹ The Supreme Court, which can do no more than overturn those awards that constitute blatant violations of the Constitution, is not the appropriate vehicle for tort reform. Reform must come from the

165. See *id.* (recognizing that tools such as maximum fine levels and imposition of fines per incident give judges "infinite flexibility" when determining damage award).

166. See Peter A. Antonucci, *BMW v. Gore: What Signal Is the Supreme Court Really Sending on Punitive Damages?*, Nov. 22, 1996, available in 1996 WL 672396 (calling *BMW* and subsequent cases "the vehicles that will drive the next chapter in the nation's battle to reform the tort system").

167. See *supra* note 156 and accompanying text (describing why Supreme Court's guideposts articulated in *BMW* are not helpful).

168. See Marcia Coyle, *Court Disposes of Punitive Lawsuits*, NAT'L L.J., June 10, 1996, at A12 (speculating that cases with excessive awards would be remanded for application of guideposts).

169. The Court remanded *Ford Motor Co. v. Spera*, 116 S. Ct. 1843 (1996), *Combustion Eng'g, Inc. v. Johansen*, 116 S. Ct. 1843 (1996), and *Apache Corp. v. Moore*, 116 S. Ct. 1843 (1996).

170. See Mark I. Levy, *High Court Takes Care of Business*, NAT'L L.J., July 29, 1996, at C8 (suggesting that denial of review of cases means Justices see limits of decision).

171. See S. REP. NO. 104-69, at 5-6 (1995) (calling current product liability litigation system "a lottery").

legislature, which is uniquely suited to balance the interests involved and to weigh the benefits of the punitive damages system against its abuse.¹⁷²

5. *Undecided due process challenges—multiple punitive damage awards*

With the exception of the due process questions raised and answered by the Supreme Court in *BMW*, the Court has left a number of due process concerns unresolved. One such issue is whether multiple punitive damage awards against a single defendant for the same act or course of conduct violates due process. The threat of multiple punitive damage awards against a single defendant arises most frequently in the context of mass torts evident with products such as asbestos,¹⁷³ Agent Orange,¹⁷⁴ the Ford Pinto,¹⁷⁵ and the Dalkon Shield.¹⁷⁶

Imposition of multiple punitive damage awards for the same act poses a number of serious problems. If early plaintiffs are awarded large punitive damage amounts, they could render the defendant bankrupt and unable to adequately compensate later plaintiffs for actual damages.¹⁷⁷ In addition, multiple punitive awards discourage the development of new and potentially valuable products.¹⁷⁸ The

172. See *id.* at 14 (stating that only federal legislation can create uniformity necessary in liability system).

173. See *Moran v. Johns-Manville Sales Corp.*, 691 F.2d 811, 816 (6th Cir. 1982) (awarding punitive damages to insulation installer for disease suffered due to asbestos).

174. See *In re Agent Orange Prod. Liab. Litig.*, 506 F. Supp. 762, 773-74 (E.D.N.Y. 1980) (barring chemical companies that produced Agent Orange from seeking contribution or indemnification from federal government).

175. See *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 820 (1981) (awarding damages to individuals severely burned in Ford Pinto).

176. See *In re Dalkon Shield IUD Prods. Liab. Litig.*, 526 F. Supp. 887 (N.D. Cal. 1981), *vacated and remanded on other grounds sub nom. Abed v. A.H. Robins Co.*, 693 F.2d 847 (9th Cir. 1982).

177. See Note, *Class Actions for Punitive Damages*, 81 MICH. L. REV. 1787, 1791 (1983) (viewing multiple punitive damage awards as harmful because defendants' assets may be exhausted prematurely). Judge William W. Schwarzer explained to Congress how this problem may exist presently in asbestos litigation:

There are now some 100,000 asbestos cases pending in federal and state courts, and it is expected that over the next ten years an equal number will be filed. Considering that nearly every one of these cases includes a prayer for punitive damages, should such damages be awarded in many of these cases, the aggregate amount would be far in excess of what the defendants would be able to pay. Even without considering punitive damages, the compensation claims alone currently exceed the aggregate assets of the asbestos industry.

Asbestos Litigation Crisis in Federal and State Courts: Hearings Before the Subcomm. on Intellectual Property and Judicial Admin. of the House Comm. on the Judiciary, 102d Cong. 137 (1992) (statement of Judge William W. Schwarzer, Director, Federal Judicial Center) (footnote omitted).

178. See Judith Camille Glasscock, Comment, *Emptying the Deep Pocket in Mass Tort Litigation*, 18 ST. MARY'S L.J. 977, 993 (1987) (listing discontinuation of beneficial products as possible outcome of multiple punitive awards).

possibility of multiple awards also impedes settlements and forces higher settlements than the defendant should pay, because each plaintiff has an incentive to wait for the windfall generated by a punitive award.

The Third Circuit recently addressed the constitutionality of multiple punitive awards in *Dunn v. Hovic*.¹⁷⁹ In *Dunn*, the plaintiff was injured by asbestos products manufactured by the defendant, Owens-Corning Fiberglass Corporation ("OCF").¹⁸⁰ The district court awarded the plaintiff \$500,000 in compensatory damages and \$2 million in punitive damages.¹⁸¹

On appeal to the Third Circuit, OCF argued that repeated imposition of punitive damages for the same act was an arbitrary deprivation of property without due process and violated the Fourteenth Amendment.¹⁸² Although the appeals court rejected OCF's due process argument,¹⁸³ it held that corporate defendants may introduce evidence of past punitive awards imposed on them for the jury to consider when assessing the amount of punitive damages that should be awarded in the present case.¹⁸⁴ The Third Circuit, like many other courts, expressed the need for legislation to address the national issue of multiple punitive damage awards.¹⁸⁵

Considering the inappropriateness of repetitive punitive damage awards, Professor Gary T. Schwartz has argued that the Due Process Clause should incorporate the prohibition against double jeopardy of

179. 1 F.3d 1371 (3d Cir. 1993).

180. See *Dunn v. Owens-Corning Fiberglass*, 774 F. Supp. 929, 933-34 (D.V.I. 1991).

181. See *Dunn v. Hovic*, 1 F.3d 1371, 1373 (3d Cir. 1993). The Third Circuit remitted the punitive award to \$1 million. See *id.*

182. See *id.* at 1374.

183. See *id.* at 1389 (ruling that evidence produced by defendant fell short of due process violation).

184. See *id.* at 1391 (suggesting that "punitive damages overkill" can be solved by scrutinizing past awards paid and ability of defendant to pay future awards). The defendant, however, may not always want to admit evidence concerning other punitive awards that have been imposed. On the one hand, evidence of prior awards of punitive damages could persuade the jury that the defendant already has received sufficient punishment for his act and that no further deterrence is necessary. See John A. Albers, Note & Comment, *State of Confusion: Substantive and Procedural Due Process with Regard to Punitive Damages After TXO Production Corp. v. Alliance Resources Corp.*, 26 U. TOL. L. REV. 159, 201 (1994) (acknowledging that previous punitive damage award payouts may promote sympathy for defendants). On the other hand, such evidence could infuriate the jury, demonstrating to them just how egregious others perceive the defendant's acts to be. See Dennis N. Jones, *Multiple Punitive Damage Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process*, 43 ALA. L. REV. 1, 29-30 (1991) (noting that jury might decide to award similarly high damages).

185. See *Dunn*, 1 F.3d at 1386 ("[N]o single court can fashion an effective response to the national problem flowing from mass exposure to asbestos products."); see also *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 480 (N.J. 1986) (admitting that courts are powerless in this area); *Davis v. Celotex Corp.*, 420 S.E.2d 557, 565-66 (W. Va. 1992) (discussing unfairness in allowing courts to determine punitive damages).

the Fifth Amendment, like it does the prohibition against excessive fines from the Eighth Amendment; therefore, multiple punitive awards could be a violation of due process.¹⁸⁶ As another commentator stated, "[A]t some point, justifiable punishment ends and overkill begins."¹⁸⁷ There should be safeguards implemented to prevent such repeated punishment.

Whether the aggregate of all punitive awards against a single defendant for a single act would be grossly disproportionate to the misconduct and thereby violate due process is an appropriate matter for federal legislators. As the following discussion explains, neither the judiciary nor the state legislatures are capable of effectively regulating against the imposition of multiple punitive awards.

Despite their concern about a defendant's due process rights, courts thus far have been unwilling to articulate a "one bite" or a "first comer" rule, citing both their inability to prevent other jurisdictions from awarding punitive damages and their concern about whether the first jury is capable of granting a single award to account fully for the defendant's misconduct.¹⁸⁸ Because the punitive damage award should be based in part on the amount of injury the defendant has caused and this information may not be known fully at the time of the assessment of the first punitive award, a "first comer"

186. See Gary T. Schwartz, *Mass Torts and Punitive Damages: A Comment*, 39 VILL. L. REV. 415, 422-23 (1994). Professor Schwartz argued:

This inappropriateness is seen as rooted in our legal system's norm against double jeopardy - let alone multiple jeopardy. . . . *United States v. Halper* seemingly indicates that the Double Jeopardy Clause does not pertain to private suits seeking punitive damages. Yet, whatever the limitations of the Excessive Fines Clause, when a punitive damage award becomes sufficiently excessive, it violates the substantive norms included in the Due Process Clause. (This point was raised by the Court as a possibility in *Browning-Ferris*, and was confirmed by the Supreme Court's later opinions in *Pacific Mutual Life Insurance v. Haslip* and *TXO*.) Similarly, the core of the prohibition against double jeopardy is probably included in the Due Process guarantee.

Id. (footnotes omitted).

187. See Seltzer, *supra* note 26, at 55.

188. See *Juzwin v. Amtorg Trading Corp.*, 718 F. Supp. 1233, 1235 (D.N.J. 1989) (citing diversity of treatment by courts as reason not to have one-award rule), *rev'd sub nom.* *Juzwin v. Asbestos Corp.*, 900 F.2d 686 (3d Cir. 1990). The Court pointed out:

[T]his court does not have the power or the authority to prohibit subsequent awards in other courts, notwithstanding its opinion that such subsequent awards violate the due process rights of the defendants against whom such verdicts are entered. Until there is uniformity either through Supreme Court decision or national legislation, this court is powerless to fashion a remedy which will protect the due process rights of this defendant or other defendants similarly situated.

Id. Congress once considered enacting a national "first comer" statute, but ultimately rejected this legislation because the first punitive award assessed against a defendant may not punish it sufficiently for its misconduct. See S. 44, 98th Cong. § 12f (1984).

rule may not punish the defendant adequately for her misconduct.¹⁸⁹ The first award may be low because the extent of actual damages to all injured parties may not be known at the time of the first case to consider punitive awards.¹⁹⁰ Moreover, if new evidence of wrongdoing on the part of the defendant is discovered after the first punitive award, it would be inappropriate not to permit the imposition of more than one award.¹⁹¹ Courts repeatedly have urged a national legislative solution to the punitive damage problems because no single court has the power to prohibit subsequent awards in other courts.¹⁹²

Similarly, individual state legislatures cannot prevent the imposition of multiple punitive awards for a single act because a state's power to regulate conduct stops at its borders.¹⁹³ For example, Georgia's tort law permits only one punitive award for any act regardless of the

189. See *Juzwin*, 718 F. Supp. at 1235 (realizing that jury instructions stating that punitive award must relate to actual harm suffered directly conflicted with "first-come" statute that accounts for all of defendant's misconduct). Although it seems unfair that the first plaintiff gets the entire punitive damage award, the first plaintiff has the heaviest burden in bringing suit. Once the first plaintiff blazes a trail, it will be easier for others to follow. A punitive damage award is not a reward or compensation; it is not earned by the plaintiff. Rather, it is a punitive sanction against the defendant for misconduct.

190. See *id.* (recognizing impossibility of ensuring that one award covers all of defendant's misconduct).

191. See Victor E. Schwartz & Mark A. Behrens, *The American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury: A Timely Call for Punitive Damages Reform*, 30 SAN DIEGO L. REV. 263, 281 (1993) (advocating proposal in which subsequent claimants could seek punitive damages only by presenting new evidence of defendants' "conscious and deliberate misconduct"); see also *Punitive Damages Hearing*, *supra* note 24, at 100 (testimony of Victor E. Schwartz, Esq., General Counsel, American Tort Reform Association) (agreeing with Senator Hatch's proposed solution to problem of multiple damage awards). Such evidence could include the fact that the defendant destroyed or hid damning evidence in the first trial. See *id.* at 102 (allowing further punishment of defendant in such instances).

192. See, e.g., *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 472 (1993) (Scalia, J., concurring) (stating that punitive damage reform should be undertaken by "the proper institutions of our society," legislatures, not courts); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 39 (1991) (Scalia, J., concurring) (noting that state and federal legislatures should work to restrict punitive damages); *Dunn v. Hovic*, 1 F.3d 1371, 1399 (3d Cir. 1993) (Weis, J., dissenting) ("Unquestionably, a national solution is needed."); *Cantrell v. GAF Corp.*, 999 F.2d 1007, 1017 (6th Cir. 1993) (noting that relief from multiple punitive awards should be sought from legislature, not courts); *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1096-97 (5th Cir. 1991) (realizing problems in law as it stands); *Edwards v. Armstrong World Indus., Inc.*, 911 F.2d 1151, 1155 (5th Cir. 1990) ("If no change occurs in our tort or constitutional law, the time will arrive when [a defendant's] liability for punitive damages imperils its ability to pay compensatory claims and its corporate existence."); *rev'd sub nom. Celotex Corp. v. Edwards*, 514 U.S. 300 (1995); *Juzwin*, 718 F. Supp. at 1235 (urging national legislation or Supreme Court decision to promote uniformity and protect due process rights); *W.R. Grace & Co. v. Waters*, 638 So. 2d 502, 505 (Fla. 1994) (noting that the only "realistic solution" to imposition of multiple punitive awards is "federal legislation").

193. See John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damage Awards*, 72 VA. L. REV. 139, 147 (1986) (explaining that repetitive nature of damages cannot be stopped unless national solution is attempted).

number of separate causes of action that might arise from that act.¹⁹⁴ Although this may aid corporations being sued in Georgia, it has no bearing on actions brought in other states.¹⁹⁵ Plaintiffs could avoid the Georgia statute simply by bringing their action elsewhere.

D. The Seventh Amendment—Does Judicial Review of Jury Verdicts For Excessiveness Violate the Re-Examination Clause?

*In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.*¹⁹⁶

The most recent constitutional challenge to a jury's verdict on damages, *Gasperini v. Center for Humanities, Inc.*,¹⁹⁷ did not, like most of the recent decisions, address such issues as when an award is excessive or which factors should be used in making this determination. Instead, *Gasperini* pertained to the constitutionality of appellate review of the excessiveness of damage awards.¹⁹⁸

The *Gasperini* appeal stemmed from a jury award of \$450,000 in damages to a photographer when the Center for Humanities, a company that produces educational videos, lost 300 slide transparencies after producing his video.¹⁹⁹ The Second Circuit found the damage award excessive and ordered the photographer to accept a remitted award of \$100,000 or suffer through a new trial on damages.²⁰⁰

On appeal to the Supreme Court, *Gasperini* contended that the appellate court's remittitur was a violation of his Seventh Amendment rights.²⁰¹ The Supreme Court held that, as long as the standard of review was "abuse of discretion," appellate review of the district court's

194. See GA. CODE ANN. § 51-12-5.1(e)(1) (Supp. 1996); see also MO. ANN. STAT. § 510.263(4) (West Supp. 1997) (crediting defendant with prior punitive damage payments).

195. See U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . ."); see also *Punitive Damages Hearing*, *supra* note 24, at 100 (testimony of Victor E. Schwartz, Esq., General Counsel, American Tort Reform Association) (noting that Congress should respond to the request by "federal and state judges, as well as state legislators," for multiple punitive damages fairness legislation).

196. U.S. CONST. amend. VII.

197. 116 S. Ct. 2211 (1996).

198. See *Gasperini v. Center for Humanities, Inc.*, 116 S. Ct. 2211, 2215 (1996).

199. See *Gasperini v. Center for Humanities, Inc.*, 66 F.3d 427, 428 (2d Cir.) (awarding \$1500 for each lost slide), *vacated*, 116 S. Ct. 2211 (1996).

200. See *id.* at 431.

201. *Gasperini*, 116 S. Ct. at 2215 (questioning whether New York's practice of appellate review of jury awards is compatible with Seventh Amendment right to trial by jury).

findings regarding excessive damages was reconcilable with the Seventh Amendment.²⁰²

The Court also considered whether federal courts in diversity cases should use a federal standard,²⁰³ which is extremely deferential to jury verdicts, or a state standard,²⁰⁴ which is less deferential to jury verdicts, to determine whether a jury award is excessive.²⁰⁵ The Court held that New York's standard used to check excessive damages should be applied by the federal court to avoid state and federal courts in the same jurisdiction reaching different conclusions on the same issues.²⁰⁶ Thus, the district court was charged with determining whether the jury's verdict "materially deviated" from reasonable compensation, and the appellate court reviews the district court's application of this test for an abuse of discretion.²⁰⁷

Unlike the substantive due process cases, *Gasperini* involved an issue that certainly was within the province of the judiciary and has been resolved with relative ease, clarity, and precision. Substantive due process, on the other hand, lacks clarity and precision because it requires the Court to analyze excessiveness on a case-by-case basis. The judiciary is ill-equipped to address problems requiring it to assess a community's sense of outrage or social conscience.

202. See *id.* at 2222-24. *Gasperini* was a major victory for the business community. Had the Court held that appellate review was not constitutional, there would be virtually no check on unbridled power of juries to award unjustified amounts of punitive damages. In 1992, an exhaustive punitive damage study of the 355 punitive damage awards in product liability cases over the 25 years preceding 1992 found that more than half of all punitive awards were appealed, and that more than half of those appealed were reversed or reduced. See Rustad, *supra* note 50, at 57. Absent the check of judicial review/remittitur, all of the awards determined to be unreasonable and excessive would have stood.

203. See *Gasperini*, 116 S. Ct. at 2217-18 (citing "shock the conscience" as federal standard).

204. See *id.* (citing "deviates materially" as N.Y. state standard). In its 1986 effort to reform tort law, New York codified a standard of judicial review on the size of jury verdicts. See N.Y. C.P.L.R. § 5501(c) (McKinney 1995). According to the New York legislature, the federal "shock the conscience" test was an insufficient check on damages awards. Therefore, New York enacted a standard that would invite more careful appellate scrutiny of damage awards: "the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation." *Id.*

205. See *Gasperini*, 116 S. Ct. at 2219-24 (examining *Erie* doctrine and ruling that Seventh Amendment does not preclude federal courts from using "deviates materially" standard).

206. See *id.* at 2220-21 (acknowledging that the "twin aims" of the *Erie* doctrine, "discouragement of forum-shopping and avoidance of inequitable administration of the laws," forces such a decision (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 (1965))). Although the state law was procedural, the state's objective in enacting the law was substantive. See *id.* at 2220. If the federal courts continued to apply the federal standard to cases arising out of New York law, there would be a substantial difference in the outcome of the cases, thereby implicating the twin aims of *Erie*. See *id.*

207. See *id.* at 2220-21 (stating that "abuse of discretion" is standard currently used by federal circuits when faced with assertion of inadequacy or excessiveness).

V. FEDERAL TORT REFORM LEGISLATION

The public's perception that punitive damages are "running wild" and "skyrocketing" has given rise to a call for national tort reform. Federal tort reform supporters claim that the interstate nature of product sales, as well as the inability of states to regulate conduct outside their boundaries, makes federal legislation appropriate and necessary.²⁰⁸ The goal of the recently proposed national tort reform legislation is to protect corporate manufacturers from excessive punitive damage awards.²⁰⁹ Proponents of national tort reform claim that punitive damages have the potential to cripple U.S. industry and thereby inhibit their competitiveness in the global market.²¹⁰

A. *The Common Sense Product Liability Legal Reform Act*

Federal tort reform legislation has been considered by Congress in every year since 1982.²¹¹ Recently, House Bill 956, labeled "The Common Sense Product Liability Legal Reform Act of 1996," passed both Houses of Congress.²¹² House Bill 956, which would have applied to all product liability actions,²¹³ would have reformed tort

208. See Robert Bork & Theodore Olson, Commentary, *Trial Lawyers and Other Closet Federalists*, WASH. TIMES, Mar. 9, 1995, at A21 (explaining that "litigation explosion disregards state lines"). Congressional power to regulate punitive damage awards in products liability cases comes from the Commerce Clause. See U.S. CONST. art. I, § 8 ("The Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States . . .").

209. See S. REP. NO. 104-69, at 1-2 (1995) (charging current liability system with stifling innovation and with keeping beneficial products off market).

210. See *id.* at 2 (explaining that American companies are hampered by liability system when competing in global market). Research and development in American industry are being halted or discouraged by the threat of excessive punitive damage awards, thereby making American businesses less competitive in the international market. Consequently, the punitive damages problem is a direct threat to the economic stability of corporate America. See *id.* at 10-11; see also 141 CONG. REC. S6398 (daily ed. May 10, 1995) (statement of Sen. Glenn) (advocating that legislation is needed to reform system). But see *Product Liability Fairness Hearing*, *supra* note 24, at 505 (statement of Stephen Daniels, Ph.D., American Bar Foundation) (challenging notion that punitive damages are source of problem). Proponents also claim that ultimately, consumers are paying for excessive punitive damage awards as companies will pass the burden onto the consumer in the form of higher prices for their goods and services. See 141 CONG. REC. S6397 (daily ed. May 10, 1995) (statement of Sen. Domenici) (noting that Americans no longer can afford to pay tort tax).

211. See S. REP. NO. 104-69, at 14-17 (1995) (providing history of tort reform legislation in Congress).

212. See H.R. 956, 104th Cong. (1996); see also Otto G. Obermaier & Lee Dranikoff, *Congressional Legislation Seeks Litigation Reform*, N.Y. L.J., Oct. 23, 1995, at S1 (listing different pieces of legislation recently passed by Congress).

213. See H.R. 956 § 2(b) (setting forth purposes of Act). If tort reform is as urgent as proponents claim, then it should be applicable to all cases in which punitive damages can be assessed. In 1996, product liability actions represented only 10% of all federal civil cases filed. See Annual Report of the Director of the Administrative Office of the United States Courts,

law radically by preempting state law in what traditionally has been an area of state regulation.²¹⁴ It recommended raising the burden of proof to "clear and convincing evidence"²¹⁵ and articulated a single standard for awarding punitive damages: the defendant's conduct would have to exhibit "a conscious, flagrant indifference to the rights or safety of others."²¹⁶ The bill also placed a cap on punitive damage awards²¹⁷ and would have permitted either party to bifurcate the trial of punitive damages from liability and compensatory damages.²¹⁸ President Clinton, however, vetoed H.R. 956 on May 2, 1996.²¹⁹

Table C-2A, at 138 (1996). Limiting these reforms to product liability actions thus would not have the widespread impact some might expect.

214. See H.R. 956, § 102. The federal bill would not have preempted more restrictive state laws. See *id.* § 108(b)(3)(D). The federal bill would have set only the minimum standards for reforming punitive damage awards. If the state law were more restrictive of punitive awards—for instance, if a state had a higher burden of proof, like Colorado where the burden is beyond a reasonable doubt, or if it had a lower cap, like Virginia where all punitive damage awards are capped at \$350,000—then the more restrictive state law would have continued to prevail in that jurisdiction. There was no logical reason supporting such a one-sided application of law. Certainly, the federal legislature was not doing this to preserve state sovereignty, because the bill would have preempted all those states which had less restrictive laws. Moreover, such a provision would have undermined the uniformity and predictability that would have been created by enacting a national law. A federal law would be most beneficial if it preempts all state laws, both those that are more restrictive and those that are more lenient. If the federal legislature insisted upon this one-sided preemption, however, it should have limited the law to cut-and-dry issues such as the amount of the cap, as opposed to issues involving more discretion and potential ambiguity such as the liability standard.

215. See *id.* § 108(a) (awarding punitive damages only if there is "clear and convincing" evidence of defendant's misconduct).

216. *Id.*

217. See *id.* § 108(b) (placing cap on punitive damage awards of two times economic and noneconomic loss or \$250,000, whichever is greater).

218. See *id.* § 108(c) (permitting either party to request a separate proceeding, to be held after the determination of the amount of compensatory damages, on whether to award punitive damages and the amount of the award).

219. See Veto Message from the President, 142 CONG. REC. H4425 (daily ed. May 6, 1996). Many claim that Clinton is controlled by the American trial lawyers who do not want to limit runaway juries because it would reduce their earnings. See John F. Harris, *Clinton Vetoes Products Liability Measure; Move Triggers Barrage of Accusations Between White House and Hill Republicans*, WASH. POST, May 3, 1996, at A14 (quoting Bob Dole as saying, "It is the trial lawyers who are calling the shots at the White House."); see also John E. Yang, *House Fails to Override Liability Veto*, WASH. POST, May 10, 1996, at A23 (charging President Clinton with putting interests of trial lawyers before other Americans). Some also claim that the Republicans were not pushing tort reform very hard because it was an important GOP fund-raising tool, and in an election year, they wanted the manufacturers' lobby to keep funneling money their way. See T.R. Goldman, *Tort Reform: What Happened, What's Next*, LEGAL TIMES, July 8, 1996, at 1 (quoting GOP House staffer as saying, "If federal tort reform efforts had concluded in 1995 the influence of trial lawyer money on the Democratic presidential campaign would have been seriously eroded, and with it, a lucrative GOP fund-raising tool as well.").

B. *Why Do We Need Federal Tort Reform?*

Federal tort reform is necessary to safeguard against undeserved and excessive awards and to protect the defendant, the public, and the integrity of the judicial process.²²⁰ Reform is necessary to combat the vagueness in determinations of liability and assessments of amounts of punishment.²²¹ Such vagueness leaves juries without guidance, inviting them to make improper awards based on their personal biases and prejudices.²²² Moreover, not only are each state's liability and damage assessment standards vague, they are all different—resulting in 49 different laws for a manufacturer to adhere to. The application of the patchwork of state laws and vague standards which make up the punitive damage system has been erratic at best. This uncertainty has been unfair both to consumers who never can be certain of their rights and to manufacturers who never can be sure of their responsibilities.²²³

A single, uniform law of punitive damages would reduce the number of punitive damage claims being brought and reduce transaction costs. If both plaintiffs and manufacturers can recognize legitimate claims against a manufacturer, the number of frivolous suits brought will be reduced and settlement will be encouraged. Predictability and uniformity of result are of particular importance in

220. The use of, and demand for, excessive awards as a social reform tool has become too wide-spread. Multimillion dollar punitive awards have become the rule rather than the exception and as such, area threat to the viability of the manufacturing community and the stability of American industry.

221. See Ellis, *supra* note 27, at 34-53 (arguing that vague punitive damage standards and broad jury discretion is unfair and inefficient).

222. See *id.* at 56 (stating that uncertain criteria for arriving at punitive amounts invariably will lead to unpredictability and disparate awards); Owen, *supra* note 31, at 384 (noting that standards for determining defendant's liability and assessing punitive damages are too vague).

223. The current punitive damage system leaves manufacturers without any definite notion of what conduct is prohibited and what punishment will be imposed. See Nadine E. Roddy, *Punitive Damages in Strict Products Liability Litigation*, 23 WM. & MARY L. REV. 333, 347 (1981) (noting that manufacturers often contend that standards for punitive damages do not give proper notice). Without a clear idea of what conduct is prohibited, manufacturers cannot alter their behavior in order to be law abiding. As one commentator noted:

People cannot obey the law unless they know it; they cannot know the law unless they know which law to learn. If I am to know the law that governs an act or transaction, I must be able to identify, before I act, the one state empowered to govern. It is no answer to say that I can usually comply with the more restrictive rule, because that eliminates the political authority of the more permissive state. Nor is it an answer to say that I do not need to know rules of compensation, loss allocation, and the like. I believe that one should generally obey the applicable law even if the sanctions for violation are light, but this view is not universally shared. If we give even a little credence to the insights of law and economics, my need to know the law extends to rules that specify the consequences of compliance and violation.

Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 319 (1992) (footnotes omitted).

areas where the parties are likely to give advance thought to the legal consequences of their actions.²²⁴ Without certainty and predictability, the efficacy of punitive damage awards will be undermined substantially.²²⁵

Moreover, the integrity of the judicial system is threatened when there is unpredictability in the law and its application.²²⁶ Instability in the law and its application breeds discontent and disrespect for the law which, in turn, erodes public confidence in the legal process.²²⁷

In addition, the current patchwork of state laws increases forum shopping.²²⁸ Because manufacturers generally sell their products across state lines,²²⁹ suits could be brought in many states. Informed plaintiffs simply bring suits in states that have more consumer-friendly laws. National legislation would solve this problem by creating a single standard of liability.

By clarifying the muddled state laws, federal tort reform would provide more certainty and predictability. The goals of punitive damages—punishment and deterrence—would be furthered if the law were made more exact, definite, and predictable. Manufacturers would be able to predict, by reference to pre-existing situations which had been resolved, what conduct is prohibited. The implementation

224. See *In re A.H. Robins Co.*, 880 F.2d 709, 730 n.29 (4th Cir. 1989).

Two goals of tort law should be predictability and uniformity. As a practical matter, until the legality of a particular course of conduct has been adjudicated, potential defendants are guided only by a general standard . . . and by analogous cases decided under that standard. What may appear to be inconsistent adjudications in similar situations can generally be rationalized because of differences in the facts. But if various fact finders reach inconsistent conclusions about the same set of facts, the defendant (and others in similar circumstances) is left without any guidance concerning the legality of its conduct, which may serve important legitimate aims.

Id.

225. See Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1145 (1989) (mentioning that uncertain punitive damages are neither fair nor efficient).

226. Martin A. Kloter, *Reappraising the Jury's Role as a Finder of Fact*, 20 GA. L. REV. 123, 127 (1985) (discussing idea that unpredictability impairs judicial process).

227. See FRIEDRICH AUGUST VON HAYEK, *THE ROAD TO SERFDOM* 78 (1944) ("One could write a history of the decline of the Rule of Law . . . in terms of the progressive introduction of these vague formulas into legislation and jurisdiction, and of the increasing arbitrariness and uncertainty of, and the consequent disrespect for, the law and the judiciary."); see also Jason Scott Johnston, *Uncertainty, Chaos, and the Torts Process: An Economic Analysis of Legal Form*, 76 CORNELL L. REV. 341, 341 (1991) (noting that certainty is central concern of modern jurisprudence); Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136, 136-37 (1992) (stating that law involves search for order and predictability); Roscoe Pound, *Justice According to Law*, 13 COLUM. L. REV. 696, 705 (1913) (arguing that society administers justice according to law by fixing standards that individuals may determine prior to controversy, thereby providing reasonable assurance that all individuals receive similar treatment).

228. See Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1689 (1990) (stating that forum shopping is caused by disparate results among various state systems).

229. Seventy percent of all products manufactured are sold in other states. See 142 CONG. REC. S2560 (daily ed. Mar. 21, 1996) (statement of Sen. Rockefeller).

of federal legislation ultimately would provide manufacturers with more notice as to both the prohibited conduct and the severity of the punishment.²³⁰ Through repeated application, the federal standard would become increasingly definite and would clarify the conduct that is prohibited, thereby reducing the need for litigation.

Federal tort reform would also establish, on a national level, the safeguards necessary to ensure against abuse of the punitive damages sanction. The quasi-criminal nature of the punitive damages doctrine demands safeguards that are not normally associated with damages awarded in the civil context.²³¹ The criminal law has built-in protections to prevent excessive punishment in a single proceeding (the Excessive Fines Clause)²³² or multiple punishments assessed in different proceedings for the same act (the Double Jeopardy Clause).²³³ Federal tort reform could create the appropriate safeguards to identify and address the problems that plague the punitive damages doctrine.

C. Federal Tort Reform Proposal

1. The burden of proof—clear and convincing evidence

As proposed in the federal bill and the Model Act, the burden of proof necessary to prove entitlement to punitive damage awards should be “clear and convincing” evidence.²³⁴ Because punitive damages are “quasi criminal,”²³⁵ standing somewhere between tort and criminal law, it seems appropriate to apply an intermediate evidentiary burden of proof. The purpose of tort law is to compensate victims (restitutionary),²³⁶ using a “preponderance of the evidence” burden of proof, which means that the plaintiff need prove only that it is more likely than not that the defendant committed the

230. The notions of fairness and justice require that individuals have notice as to what constitutes socially reprehensible conduct and as to the punishment for non-compliance. See *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1598-99 (1996) (explaining that fairness under Constitution requires notice of possible punishment).

231. See *supra* notes 26-31 and accompanying text (discussing why punitive damages may be described as “quasi-criminal”); *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) (discussing special legal categorization for punitive damages).

232. See discussion *supra* Part IV.B.

233. See discussion *supra* Part IV.A.

234. See H.R. 956, 104th Cong. § 108(a) (1996); Model Act, *supra* note 9, § 5(2).

235. See *supra* notes 26-31 and accompanying text; see also Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1810-13 (1992) (analyzing distinctions between criminal and civil penalties).

236. But see Steven D. Smith, *The Critics and the “Crisis”: A Reassessment of Current Conceptions of Tort Law*, 72 CORNELL L. REV. 765, 766 (1987) (rejecting restitutionary aspect of tort law, instead proposing dispute resolution as essential function of tort law).

alleged act. The purpose of criminal law is to punish and deter (retributive), using a "beyond a reasonable doubt" burden of proof, which means that the prosecutor must prove that there is no reasonable question that the defendant committed the act.²³⁷ Like criminal sanctions, punitive damages are awarded to victims to punish and deter misconduct; but like tort awards, they are awarded in a civil suit to the plaintiff. It makes sense, therefore, that the burden of proof for punitive damages lie somewhere in between the burden for criminal sanctions and the burden for tort awards.

The "clear and convincing" evidence standard, which is a lighter burden than "beyond a reasonable doubt" but heavier than proving by a preponderance of the evidence, falls within this intermediate ground. Clear and convincing evidence is "that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established."²³⁸ The clear and convincing evidence burden of proof should be adopted as a safeguard for the defendant's rights in recognition of the criminal component of the penalty and to offset potential bias in favor of the plaintiff and against the corporate manufacturer.

2. *The liability standard—"a conscious, flagrant indifference to the rights or safety of others"*²³⁹

Under the current rubric of punitive damages, every state has a different way of characterizing and defining what form of conduct gives rise to the imposition of punitive damage awards.²⁴⁰ Pursuant to the various state tort reform statutes, punitive damages can be awarded when the defendant's conduct was grossly negligent, intentional, willful, wanton, malicious, reckless, outrageous or when the defendant exhibited a flagrant disregard for others.²⁴¹ Most

237. See *In re Winship*, 397 U.S. 358, 363-64 (1970).

238. H.R. 956, § 101(4).

239. *Id.* § 108(a) (emphasis added).

240. See *infra* notes 241-42 (providing examples of differing approaches to punitive damages).

241. Alabama's statute, for example, permits punitive damages "in a tort action where it is proven by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff." ALA. CODE § 6-11-20(a) (1993 & Supp. 1996). Florida's statute permits punitive damages for "willful, wanton, or gross misconduct." FLA. STAT. ANN. § 768.73(1)(a) (West 1994 & Supp. 1995). Georgia allows punitive damages when "defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences." GA. CODE ANN. § 51-12-5.1(b) (1982 & Supp. 1997). Illinois allows for punitive damage awards only when the "defendant's conduct was with evil motive or with reckless and outrageous indifference to a highly unreasonable risk of harm and with a conscious indifference to the rights and safety of others." ILL. COMP. STAT. ANN. 5/2-

states, however, offer no definition of these vague terms.²⁴² Having so many different standards for defining prohibited conduct makes it much more difficult for corporations who do business in many states to determine the character and nature of the prohibited conduct.

Although commentators may bicker over which standard should define the nature of the conduct that gives rise to punitive damage awards, no one can dispute the value of having a single national definition for this conduct. The proposed federal standard in the most recent bill described actions deserving punitive damage awards as those that are "carried out by the defendant with a conscious, flagrant indifference to the safety of others."²⁴³ The passage of a federal bill to regulate the imposition of punitive damage awards nationally would provide a single uniform definition. Certainly, a uniform standard would provide more reliability and predictability than the current menagerie of standards promulgated, yet undefined, by the many states. Moreover, through its application, the single standard would become increasingly definite over time, making the class of prohibited conduct increasingly clear and reducing the need for litigation.²⁴⁴

A "flagrant indifference" standard would require a degree of intentional action not present in some current state statutes that allow punitive damages for simple or gross negligence. Intent should be a necessary element in order to justify punitive damages.²⁴⁵ The

1115.05(b) (West 1993). Mississippi permits the imposition of punitive damages for a wide range of conduct; the plaintiff must prove "that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud." MISS. CODE ANN. § 11-1-65(1)(a) (Supp. 1996). Perhaps the broadest of all states' tort reform laws, Mississippi's statute allows punitive damages upon proof of anything from "actual malice," which implies a high degree of intentionality, to "gross negligence," which merely can be a reckless disregard of others. *See id.*

242. Vagueness in the standard for awarding punitive damages is particularly destructive because these damages, standing somewhere between criminal and tort law, publicly condemn a defendant's actions as socially reprehensible. *See* David G. Owen, *The Moral Foundations of Punitive Damages*, 40 ALA. L. REV. 705, 727-28 (1989) (noting that vague standard is harmful because damages often lead to public stigma and society should be certain such condemnation is appropriate).

243. H.R. 956, § 108(a). This also is the standard adopted by the Model Act recently approved by the uniform law commissioners. *See* Model Act, *supra* note 9, § 5(2) (noting that "defendant acted with a malicious or fraudulent intent to cause the injury or a conscious and flagrant disregard for the rights or interests of others in causing the injury"). The single federal standard, however, is preferable to the Model Act standard which seems to articulate a number of different kinds of conduct that will give rise to punitive damages.

244. *But see* E. Donald Elliot, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 ALA. L. REV. 1053, 1057-58 (1989) (arguing that "conscious indifference" standard is too vague).

245. *See* Ellis, *supra* note 27, at 22-23 (arguing that even if standards for assessing punitive damages were consistent, any movement away from "purposeful harm" standard would be

criminal component of punitive damages mandates that a defendant act intentionally before this form of punishment may be imposed upon him. Otherwise, the justifications for imposing punitive damages, punishment and deterrence, break down. That a defendant should not be punished for unintentional conduct seems obvious. Such a defendant is not deserving of punishment because only blameworthy conduct should be subject to punishment. In addition, the effectiveness of deterrence decreases when defendants are punished for unintentional conduct, because such conduct is more difficult for individuals to identify and control.²⁴⁶

3. *Bifurcation of punitive damage issues*

The proposed federal bill, if enacted, would have allowed either party to bifurcate the trial of punitive damages from the other issues in the case.²⁴⁷ The primary reason for bifurcation is to prevent jury bias and prejudice.²⁴⁸ For example, although defendant's wealth must be considered when determining punitive damages,²⁴⁹ some concern exists that juries might improperly consider such evidence when assessing plaintiffs' compensatory damages. To avoid this impropriety, bifurcation should be permitted.²⁵⁰ It must be acknowledged, however, that bifurcation would lead to more costly and time consuming trials, which in turn would be detrimental to the injured victim.

4. *Capping punitive damage awards*

Recently proposed federal legislation would cap punitive damage awards in products liability cases at twice the economic²⁵¹ and

problematic).

246. See Gregory J. Sexto, *Corporate Insurability of Punitive Damages Arising from Employee Acts*, 11 J. CORP. L. 99, 113 (1985) (observing that it is more difficult to deter unintentional conduct than intentional conduct).

247. See H.R. 956, § 108(c) (stating that bifurcation is permissible).

248. See John T. Simpson, Jr., *Discovery of Net Worth in Bifurcated Punitive Damages Cases: A Suggested Approach After Transportation Insurance Co. v. Moriel*, 37 S. TEX. L. REV. 193, 228 (1996) (asserting jury prejudice is negated because defendant's net worth is not admissible until jury finds defendant liable for punitive damages).

249. See TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 880, 889 (W. Va. 1992) (discussing role wealth should play in computing appropriate punitive award), *aff'd*, 509 U.S. 443 (1993).

250. See Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 272 (1983) (noting that bifurcation may be necessary to ensure due process protections). *But see* Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 17 (1991) (holding that common law method of determining punitive damages is not "so inherently unfair as to deny due process and be per se unconstitutional").

251. See H.R. 956, § 108(8). Economic losses are those actual out-of-pocket expenses suffered by the injured party such as medical bills and lost wages. See *id.*

noneconomic loss,²⁵² or \$250,000, whichever is greater.²⁵³ Whether to place an arbitrary cap on the amount of punitive damages that can be awarded or to limit them to a multiple of the actual damages suffered is perhaps the most controversial of all tort reform issues.

- a. *Even if punitive damages cost consumers good products, they should not be limited*

Cap supporters argue that the cap provides necessary relief for corporations who currently are subject to unbridled jury discretion in awarding punitive damages.²⁵⁴ They also argue that the threat of excessively large punitive damage awards discourages companies from marketing new products, thereby depriving the public of beneficial products and rendering American businesses unable to compete in a global market.²⁵⁵ The conference report on the recently proposed federal legislation stated:

American manufacturers must contend with the uncertainty created by 51 different product liability jurisdictions in their own domestic market. The result is a de facto "liability tax" which chills interstate commerce and deprives consumers of product choices available to

252. See *id.* § 101(12). Noneconomic loss is pain and suffering or non-pecuniary damages. See *id.*

253. See *id.* § 108(b). The bill, however, contains an additur provision that permits a judge to raise a punitive damage award if the court determines that the statutory cap "would result in an award of punitive damages that is insufficient to punish the egregious conduct of the defendant against whom the punitive damages are to be awarded or to deter such conduct in the future." *Id.* § 108(b)(3)(A). Although this provision attempts to placate those who oppose capping punitive damage awards, its constitutionality is suspect under existing precedent. See *Dimick v. Schiedt*, 293 U.S. 474, 495 (1935) (finding that additur could not be utilized by federal courts because procedure violates Seventh Amendment); see also Irene Deaville Sann, *Remittitur (and Additur) in the Federal Courts: An Evaluation with Suggested Alternatives*, 38 CASE W. RES. L. REV. 157, 163-64 (1987) (stating that federal courts may not add to jury awards because of possible Seventh Amendment violation). But see *Gasperini v. Center for Humanities, Inc.*, 116 S. Ct. 2211, 2222 n.16 (1996) (hinting that federal additur soon may be held constitutional by Supreme Court, because four Justices in *Dimick* conceded that nothing in Seventh Amendment precludes federal court from forcing additur (citing *Dimick*, 293 U.S. at 495)).

There is no logical reason for the different constitutional treatment of additur and remittitur, and at least two states currently authorize judicial additur of punitive damage awards. See MO. ANN. STAT. § 510.263(6) (West Supp. 1997) ("The doctrines of remittitur and additur . . . shall apply to punitive damage awards."); TENN. CODE ANN. § 20-10-101(a)(10) (Supp. 1996) ("[T]he trial judge may suggest an additur in such amount or amounts as the trial judge deems proper.").

254. See Amelia J. Toy, Comment, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 EMORY L.J. 303, 323 (1991) (outlining argument of cap supporters and stating that corporations could be driven to bankruptcy unless statutory caps are imposed).

255. It is hard to follow the argument that American competitiveness in the global marketplace is hampered by punitive awards. Foreign manufacturers that do business in the United States are subject to the same conditions as American manufacturers. Moreover, it seems that manufacturing better, safer products will improve American competitiveness far more than limiting punitive damage awards will.

consumers in other nations throughout the world. Unfortunately, instead of encouraging the development of safer products, the present system often forces manufacturers to increase product prices or withdraw products from the market altogether.²⁵⁶

Cap supporters argue that because of fear of unquantifiable liability exposure, the cautious manufacturers would be over-deterred and unwilling to invest in research and development for potentially valuable products.²⁵⁷ The threat of large punitive damage awards can discourage the use of safe products, taking choices and valuable products away from consumers. For example, decades after the Dalkon Shield disaster, many doctors still refuse to prescribe new, safe, reliable IUDs for women,²⁵⁸ despite the fact that experts find the IUD to be a low risk, dependable form of birth control.²⁵⁹ Doctors are not alone. Apparently, even manufacturers are not interested in marketing the product in the United States because of the threat of excessive punitive awards.²⁶⁰

Cap supporters also argue that limiting punitive damages would be beneficial because it would put the defendant on notice regarding his potential liability for inappropriate conduct. The Supreme Court in *BMW* noted the importance of "fair notice" as to both the type of conduct that will give rise to punitive awards and the severity of the potential punishment that will be imposed.²⁶¹

Capping punitive damages, however, is a double-edged sword, the costs of which far outweigh the benefits. Even if all of the arguments put forth by supporters of a cap are true,²⁶² those arguments still are

256. *Conference Report on H.R. 956, Common Sense Product Liability Reform of 1996*, 142 CONG. REC. H3190 (daily ed. Mar. 29, 1996) (statement of Rep. Bliley).

257. See Ausness, *supra* note 30, at 85-86 (stating that potential exposure to liability leads to significant social costs); Ellis, *supra* note 27, at 47 (noting that uncertainty as to amount of punitive damages causes considerable losses to society).

258. See Patricia Cohen, *The IUD: Birth-Control Device that the United States Market Won't Bear*, WASH. POST, Aug. 6, 1996, at A1, A10 (observing that doctors in United States are reluctant to prescribe IUD devices even though they are freely prescribed and widely used in European markets).

259. See *id.* (pointing out that some experts on women's health believe that IUD is excellent option for many women).

260. See *id.* (stating that many manufacturers believe that introducing device to U.S. market is not worth potential exposure to liability).

261. See *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1598-99 (1996) (discussing how common notions of fairness mandate that people receive fair notice of punishment they may face).

262. See Rustad, *supra* note 50, at 83 (proposing that punitive damages do not harm American corporations any more than foreign corporations because both are subject to U.S. law); *Product Liability Standards: Hearings on H.R. 1910 Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce*, 103d Cong. 329, 332 (1994) (statement of Andrew F. Popper, Professor of Law and Deputy Dean, Washington College of Law) (arguing that there is no tort crisis sufficient to justify congressional intervention). There does not seem to be sufficient objective evidence to conclude that American businesses

insufficient to justify a superficial, arbitrary limit on punitive awards. Punitive damage awards operate to deter the conduct society wishes to abolish.²⁶³ A punitive award, therefore, must be high enough to achieve this goal. Limiting punitive damage awards would undermine the deterrent value of the threat of such awards.

The essential purpose of punitive damages would be thwarted if we required that they conform to any mathematical equation. In *Rideout's-Brown Service, Inc. v. Holloway*, [the district court] said that for punitive damages to be effective the amount of damages "ought to be large enough to hurt. It ought to sting in order to deter, that is its purpose."²⁶⁴

Although the threat of punitive awards may discourage manufacturers from developing some products, more importantly, it keeps many dangerous products off the market. Economic efficiency, not economic perfection, is all that is required by our tort system.²⁶⁵

Tort law's goal of promoting efficient resource allocation also supports not capping punitive damage awards.²⁶⁶ Because a business is an economically-rational, profit-seeking entity, it will evaluate the costs and benefits of undertaking any activity, manufacturing decision, or design choice.²⁶⁷ If a company believes that the benefits of a particular action outweigh the costs, it will undertake that action.²⁶⁸

are harmed as badly as cap supporters claim or that consumers are deprived of a large number of products by over-deterrence. Although it is beyond the scope of this Article, a great deal of empirical evidence is needed to support these claims. Without sufficient objective evidence, it is impossible to draw a conclusion either way. This Article, therefore, presumes that consumers lose out on some products when American businesses are hampered by large punitive damage awards.

263. See Wilson, *supra* note 25, at 513-14 (indicating that punitive damages assist in deterring misconduct).

264. See *Associates Fin. Servs. Co. of Ala. v. Barbour*, 592 So. 2d 191, 199 (Ala. 1991) (reciting reasoning of earlier case in which court found that only substantial monetary fines will ensure that purpose of punitive damages is carried out (quoting *Rideout's-Brown Serv., Inc. v. Holloway*, 397 So. 2d 125, 127 (Ala. 1981))) (citation omitted).

265. Although it may be true that the punitive damage system occasionally deprives the public of valuable products, it also protects the public from exposure to dangerous products. No remedy is perfect.

266. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 4-5 (1987) (discussing early thinking on tort law and positive economic theory). Judge Learned Hand articulated his famous negligence formula, $B < PL$, in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). According to Judge Hand, harmful activity should be deterred when the cost of that harm (L) multiplied by its probability (P) is greater than the cost of preventing the harm (B). Thus, if $B < P$ there is no harmful activity. See *id.*; see also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 163-68 (1992) (explaining Judge Hand's formula for determining negligence liability).

267. See Jerry J. Phillips, *A Comment on Proposal for Determining Amounts of Punitive Awards*, 40 ALA. L. REV. 1117, 1118 (1989) (noting that cost-benefit analysis often is utilized when considering which activities and designs to avoid).

268. See *id.* (stating that company will take action only if cost of such action is less than its potential benefits).

Tort law's deterrent effect is based on utilitarian values; more specifically, punitive damages liability deters socially unacceptable behavior by increasing the cost of such behavior so that it no longer is economically rational to act in that manner.²⁶⁹ Punitive damages awarded in tort cases have the effect of regulating social conduct by punishing and deterring conduct that society deems unacceptable. In order to achieve these goals, the threat of punitive damages must be greater than the benefit achieved by the misconduct. Because corporations are the only parties with perfect information on this equation, deterrence will be effective only if the threat of large punitive damages continues to loom over those willing to place corporate profit ahead of human safety.²⁷⁰

If punitive damages are capped, they would cease to be an effective deterrent. Capped damages would enable defendants to calculate their maximum exposure and thereby permit an economic analysis similar to the one conducted by Ford in the Pinto case.²⁷¹ In the

269. See LANDES & POSNER, *supra* note 266, at 4-5 (discussing view that tort liability discourages behavior that is unjustified by utilitarian standards).

270. Commentators have argued that punitive damages are inappropriate when the manufacturer weighed the costs and benefits of a particular activity and undertook the activity because the cost was less than the benefit. See Wheeler, *supra* note 62, at 953 (arguing that juries should be instructed to consider cost-benefit analysis in assessing liability). Such an argument presupposes that socially desirable conduct turns on a pure economic analysis of available options. This premise overlooks the fact that punitive damages are awarded to punish a manufacturer for socially reprehensible conduct. They are a form of regulation. Punitive damages are not awarded simply for economic inefficiency, because a corporation took an action even though costs exceed benefits; they are also awarded when potential societal costs exceed potential societal benefits. Societal costs and benefits cannot be measured purely in monetary terms. For example, under an economic efficiency analysis of the costs and benefits of excluding the rubber bladder from vehicle design, Ford properly concluded that it would be more economically efficient to exclude the bladder. See *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 361 (1981). Despite the correctness of the economic analysis, few dispute the appropriateness of imposing damages for such conduct.

271. See *Grimshaw*, 174 Cal. Rptr. at 361 (discussing design changes that were examined by Ford but rejected due to their additional expense). The plaintiffs were passengers in a Ford Pinto when it was rear-ended and burst into flames. See *id.* at 359. Plaintiff Gray died and Plaintiff Grimshaw suffered severe burns to his entire body. See *id.* The court found that Ford knew of the design defect in the Pinto and knew that the gas tank would explode in rear-end collisions even at low speeds. See *id.* at 361-62. Ford had conducted several crash tests that demonstrated the Pinto's susceptibility to fire. See *id.* at 385. Despite this knowledge, Ford chose not to correct the design problem after conducting a risk/benefit analysis. See *id.* at 361. Ford discovered that it would cost \$11 per vehicle to install rubber bladders in 11 million Pintos and 1.5 million trucks, totaling \$137 million; and it estimated that it would cost only \$49.5 million if instead they paid the compensatory damages of the 360 people they anticipated would die or be injured in fires resulting from this design flaw. See Owen, *supra* note 28, at 56 n.264 (reproducing Grush-Saunby Report that Ford had prepared on costs and benefits of correcting Pinto's defective gas tank). Ford performed a straight forward cost-benefit analysis and chose the least expensive alternative. See *Grimshaw*, 174 Cal. Rptr. at 361. Grimshaw was awarded \$2,516,000 in compensatory damages and \$125 million in punitive damages, which the trial court reduced to \$3.5 million. See *id.* at 358.

end, capped damages effectively would lower safety standards. As Representative John Conyers (D-Mich.) noted:

The cap of \$250,000 on punitive damages is tragic. No Fortune 500 company, or some not even Fortune 500, will be deterred from placing dangerous products on the market because of a quarter of a million dollar threat of punitive damages. It will be factored into the pricing.²⁷²

For example, suppose Compact Cars wants to manufacture a new 1997 model Pinto. Compact's design engineers approach management with a design choice: should they include rubber bladders around the gas tank to reduce explosions when there are rear-end collisions, or should they forgo the bladder in order to reduce costs? Compact's preliminary tests show that upon rear impact at thirty miles per hour, the gas tank has a four percent chance of exploding. Management retains an economist to conduct a cost/benefit analysis on the rubber bladder. The economist finds that it will cost Compact \$50 per car to include the rubber bladder. Compact plans to sell five million Pintos. So, the cost of including the bladder is \$250 million.

The Compact economist then turns to the cost savings, or benefit, of excluding the bladder. He estimates that Compact will be sued for 100 burn deaths and 200 serious burn injuries as a result of gas tank explosions.²⁷³ He estimates the compensatory damages for each human life at \$250,000 and each human injury at \$100,000. The damages Compact will sustain, therefore, are \$45 million.

If the new federal tort reform bill²⁷⁴ including a cap on punitive damages had passed, the economist would calculate the cost associated with the punitive damages.²⁷⁵ If every death resulted in the maximum punitive damage award under the new statute, Compact would owe \$50 million²⁷⁶ and if every injured plaintiff also received the maximum punitive damage award, Compact would owe an

272. *Conference Report on H.R. 956, Common Sense Product Liability Reform Act of 1996*, 142 CONG. REC. H3188 (daily ed. Mar. 29, 1996) (statement of Rep. Conyers, Jr.).

273. Of course, the actual number of injuries will be much higher than those who actually sue Compact. Many injured individuals will not sue at all; some will collect from their insurance company or from the insurance company of the driver who rear-ended them. Only those plaintiffs or their attorneys who realize that there may have been a design defect in the car will bring suit against Compact.

274. H.R. 956, 104th Cong. (1996).

275. Although it is true that the federal bill did allow for additur in certain circumstances and, therefore, did not have an absolute cap, Congress' clearly expressed intent is that judges should do so only in the rarest of cases. See H.R. CONF. REP. NO. 104-481, at 31 (1996).

276. The statute provided for \$250,000 or two times compensatory damages, whichever is greater. See H.R. 956, § 108(b). In the case of the 100 burn deaths, where compensatory damages are estimated at \$250,000, punitive damages would be two times the compensatory damages or \$50 million.

additional \$50 million.²⁷⁷ Thus, Compact's total potential punitive damages liability would be \$100 million.

The economist would determine that while the cost of including the bladder would be \$250 million, it would cost Compact only an estimated \$145 million in damages if they chose to exclude the bladder. Compact's management, being economically rational business people, would decide that the costs of excluding the bladder exceed its benefits, and would direct the engineers not to include the bladder in the new Pinto.

This example, while admittedly rudimentary in its economic analysis, demonstrates how companies could factor punitive damages into the cost-benefit analysis of any given design choice. If corporations can do this, they will continue to put corporate profit ahead of human safety and the goals of our punitive damage system will be eviscerated.

Unless punitive damages are greater than the full economic profit of the misconduct, corporations will not be deterred; no economic incentive to avoid socially reprehensible conduct will be created.²⁷⁸ If the total potential cost in damages is less than the benefit of profit or expenditures saved, then manufacturers will continue to engage in unsafe practices.²⁷⁹ Further, because corporations control all of the information regarding design choices and manufacturing decisions, it is virtually impossible to determine properly the amount of economic benefit the defendant might reap from the corporation's misconduct.²⁸⁰

Moreover, simply capturing the defendant's profits, the exact amount defendant benefitted, is not enough to function as a deterrent even if it were possible to determine accurately the amount. Because not all defendants are caught and brought to justice, many defendants would undertake the misconduct with the hope that they would not get caught. If corporations stand to lose

277. In the case of the 200 injured plaintiffs, \$250,000 is more than two times their compensatory damages, which are only \$100,000 in this example. Thus, each injured plaintiff would receive \$250,000 for a total of \$50 million.

278. Of course, there is the loss of public confidence in the corporation and litigation expenses that add to the "expense" of committing socially reprehensible actions. In fact, one commentator has recommended that punitive damage awards and the reasons for the punishment be highly publicized to effectuate a more powerful social sanction. See Andrea A. Curcio, *Painful Publicity—An Alternate Punitive Damages Sanction*, 45 DEPAUL L. REV. 341, 372 (1996) (arguing that publicizing corporate misconduct and resulting penalties on the Internet will best effectuate intended punishment and deterrence).

279. See generally Rustad & Koenig, *supra* note 18, at 1316 (discussing *Gearhart v. Uniden Corp. of Am.*, 781 F.2d 147 (8th Cir. 1986), in which defendant accepted liability for known defendant as "a mere cost of doing business").

280. See *id.* at 1312.

exactly the amount that they would gain from the conduct, and there is a chance that they will not get caught, corporations will favor misconduct. To deter effectively, the potential loss must exceed the potential gain. The rationales that justify punitive damage awards, punishment and deterrence, are effective precisely because of the unpredictability of the size of such awards. Therefore, one of the biggest complaints of tort reform advocates, that the size of punitive damage awards is unpredictable,²⁸¹ is precisely what makes them an effective deterrent.

Capping punitive awards at a multiple of compensatory damages would eviscerate the punitive and deterrence goals underlying punitive damage awards. Professors Michael Rustad and Thomas Koenig argue that:

Lopsided ratios between punitive and compensatory damages awards are often necessary for the punishment and deterrence of powerful corporations. The remedy's effectiveness in doing so stems from its unpredictability. Capping punitive damages would undermine the deterrent effect of the remedy by making it possible for corporations to calculate their maximum exposure and therefore make a profit-based determination as to whether "really mean behavior" is good business practice.²⁸²

Another problem inherent in making punitive damages a multiple of compensatory damages arises when the manufacturer could have caused an enormous amount of harm but fortuitously escaped with minimal actual damage. In cases where the actual damages are low, the jury will be unable to take into account the nature of the misconduct or the potential harm that could have resulted from the defendant's actions.²⁸³ Punitive damages should be based, at least in part, on the outrageousness of the defendant's conduct, not solely on the severity of the actual harm caused.

Limiting potential punitive damage liability would put ethical corporations, ones which spend funds testing a product's safety prior to marketing, at a competitive disadvantage. Ethical corporations would be forced to charge a higher price for their products because of the added expenses of testing.

281. See Elliott, *supra* note 244, at 1057 (claiming that unpredictability is the "central failing" of punitive damages).

282. Rustad & Koenig, *supra* note 18, at 1277.

283. Presumably, the additur provisions of the federal bill would have permitted higher awards in such cases at the judge's discretion. See H.R. 956, 104th Cong. § 108(b)(3)(A) (1996). Congress' intention, however, was that "occasions for additional awards will be very limited indeed." H.R. CONF. REP. NO. 104-481, at 31 (1996).

Punitive damages are consistent with the self-interest of the business community in terms of long-run competitiveness. The remedy keeps the ethical corporation from being at a competitive disadvantage. Restricting this remedy tempts corporations to put profits before public safety. In the long run, the American emphasis on safety, backed by punitive damages against those corporations which violate this important American value, will produce the top quality products needed to compete in the international marketplace.²⁸⁴

Therefore, even if punitive damage awards do hamper the development of some new products and do threaten American competitiveness, they should not be capped. Capping punitive damages would weaken their value as a deterrent by permitting manufacturers to calculate the potential loss associated with manufacturing dangerous products, and then determine whether such socially reprehensible conduct is good business. Moreover, the egregiousness of the defendant's conduct and the potential harm it could have caused no longer would factor into the punishment. And finally, corporations that do test their products and make design choices that weigh human impact more heavily than corporate profit would be at a competitive disadvantage. Capping punitive damages would encourage the misconduct society seeks to prevent, resulting in a cure that would be worse than the disease.

b. Even if punitive damages cost consumers money in the form of higher prices, they should not be limited

Proponents of limiting a defendant's liability for intentional misconduct also argue that large punitive damage awards actually harm consumers, employees, and shareholders of the corporation, because the corporation ultimately must pass these expenses on to them.²⁸⁵ When a corporation is forced to pay punitive damages, it raises corporate operating expenses.²⁸⁶ Corporations, then, cover these increased costs by raising prices and forcing the consumer to bear the burden assessed for corporate misconduct.²⁸⁷ Such price

284. Michael Rustad & Thomas Koenig, *Punitive Damages in Products Liability: A Research Report*, 3 PROD. LIAB. L.J. 85, 94 (1992).

285. See *Product Liability Fairness Hearing*, *supra* note 24, at 89 (testimony of William Fry, Executive Director, HALT, an organization of Americans for Legal Reform) (noting that punitive damages, or fear of them, are passed on "to consumers in the form of higher prices or products not getting to the market").

286. See 141 CONG. REC. S5884 (daily ed. May 1, 1995) (statement of Sen. Hatch) (discussing need for U.S. manufacturers to add costs of punitive damages into price of products thus affecting U.S. consumers and competitiveness of U.S. corporations in global marketplace).

287. Proponents for national tort reform contend that punitive damage awards need regulation because consumers, especially the low income purchasers, ultimately bear the costs

raising often is referred to as a "tort tax" or a "hidden tax."²⁸⁸ Thus, instead of defendants bearing tort award costs directly, consumers actually would subsidize tort damages awarded to victims.²⁸⁹

In a competitive market, however, it is unlikely that a manufacturer could pass all of these costs on to its consumers and still maintain its competitive market position.²⁹⁰ In a purely captive consumer situation, corporations would be able to pass off any expense incurred by raising prices.²⁹¹ In a competitive market, however, a corporation could not raise its prices too high or consumers would switch to a competitor's product.²⁹² Even when there is no competitive market and the corporation has a monopoly over a product or service,²⁹³ at some point the utility derived from the product or service would be outweighed by the cost. Simply put, if a corporation raises the price too high, the consumer will stop buying the product. Corporations, therefore, will try to avoid incurring punitive damage judgments because they often cannot pass off all the costs on consumers. In this way, punitive damage payments allow society to regulate corporate conduct.

The "pass-through" economic argument—that consumers, not the corporation, bear the extra burden associated with punitive damages in the form of higher prices—does not support capping punitive

of punitive damage payments. See *id.* at S5882 (statement of Sen. Hatch) ("The effect of the greater frequency and magnitude of punitive damages recoveries of modern times has been to increase the price level for all products and services provided in the U.S. economy."); see also *id.* at S5801 (daily ed. Apr. 27, 1995) (statement of Sen. Snowe) (claiming that consumers must pay higher prices due to runaway awards). One problem with this theory, however, is that it assumes that the consumer is a captive and would continue to buy the corporation's product or service regardless of the increases in price. One cannot ignore the argument that in a competitive market, a corporation would not be able to raise its prices too high or consumers simply would switch to a competitor's product. See generally GEORGE J. STIGLER, *THE THEORY OF PRICE* 21-44 (1966) (delineating factors affecting consumer demand including price fluctuations).

288. See 141 CONG. REC. S5950 (daily ed. May 2, 1995) (statement of Sen. Kyl) (musing that "[t]hese outrageous punitive damages create a tort tax paid by consumers in the form of higher prices, higher insurance premiums, and reduced market choice and quality"); Richard J. Mahoney, *Punishment Without End*, WASH. POST, June 15, 1995, at A21 ("The real damage caused by multiple punitive damage awards is that the American public has been hit with a 'hidden litigation tax.'").

289. Furthermore, if corporations are permitted to insure against punitive damage awards as some states allow, a manufacturer with insurance would pass the costs of premiums on to consumers and the insurance company would spread the loss associated with the punitive damage payment among its customers in the form of higher premiums.

290. See generally STIGLER, *supra* note 287, at 87 (describing type of competitive market in which sellers outnumber buyers).

291. See generally *id.* (describing type of competitive market in which buyers outnumber sellers).

292. See generally *id.* at 21-44 (discussing factors affecting consumer demand including responses to price increases).

293. Such a situation could arise if a corporation had a patent on one of its product and chose not to license it to others.

damage awards. If a choice must be made between the public in general and the specific consumers of a product made by a manufacturer who exhibits a flagrant indifference to human safety, the burden should fall upon the latter.²⁹⁴ The consumer has a choice, unlike the unsuspecting victim, or society in general. The consumer can avoid sharing in the cost of the corporation's misconduct simply by refusing to buy the corporation's product. Those who would have benefitted from the corporate wrongdoing, including consumers, shareholders, and employees, should bear the burden of the costs associated with that conduct.²⁹⁵

c. Limiting punitive damages to a multiple of economic and noneconomic loss discriminates against women and minorities

In addition, the proposed cap on punitive damages discriminates against woman and minorities. Because human life usually is valued in terms of economic loss, which often translates into earning potential,²⁹⁶ disparate awards are granted to victims of different genders, even though they suffer the same injuries.²⁹⁷ For example, two individuals, a man and a woman, suffer exactly the same injury rendering both unable to work. The man is an engineer. His economic damages would include his lost wages, say \$200,000, and his potential punitive damage award would be a multiple of these same

294. This is true, even if, as proponents of tort reform argue, punitive damage payments are skyrocketing in magnitude. It should not be forgotten that punitive damage awards undergo judicial review to determine their reasonableness. See *supra* notes 45, 55 and accompanying text (discussing settlement agreements and reductions in awards by appeals courts).

295. As one commentator noted:

Loss spreading is a separate justification for imposing a full measure of damages on business firms that cause the harm. Firms can spread the losses broadly among individuals who benefit from the harm-causing activity. Depending on the economics of the situation, losses are spread either among consumers through increased prices or among owners by virtue of lower profits. Either way, someone who derives a substantial direct benefit from the injury-producing product or activity bears the cost.

Charles R. Temper, *Compensation for Harm from Charitable Activity*, 76 CORNELL L. REV. 401, 430-31 (1991) (footnote omitted).

296. See Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1, 78-79 (1995) (explaining that women generally receive smaller economic awards for similar injuries because women generally have lower earnings and spend fewer years in workforce).

297. See *Punitive Damages Hearing*, *supra* note 24, at 80 (statement of Robert Creamer, Executive Director, Illinois Public Action).

[T]his proposal would have the result of basing punishment meted out to a wrongdoer on the income of the victim. It would punish those who injure wealthy executives more than those who injure women who are homemakers. It would punish those who injure sports stars more than those who injure children. The proposal is particularly discriminatory against women, who generally suffer less economic loss from injury than men since they typically earn less income.

Id. (statement of Robert Creamer, Executive Director, Illinois Public Action).

lost wages. Under the proposed federal bill, his punitive damages award would be two times \$200,000, or \$400,000. The woman is a homemaker and has suffered little economic loss, so the compensation she receives for the same injury would be substantially less as would any possible punitive award she may receive, capped at \$250,000. As this example demonstrates, capping punitive damages in product liability cases will have a disproportionately negative impact on women.²⁹⁸

The same rationale applies to minorities. "Women and minorities' wages are between three-quarter and one-half of the salaries of average white men . . . [with] white women earn[ing] only 69 cents, African-American women earned only 62 cents, and Hispanic women earned only 54 cents for every dollar earned by white men."²⁹⁹ Like women, minorities generally occupy lower-paying jobs and therefore have less economic loss.³⁰⁰

This disparity results in unequal punishment of similarly situated wrongdoers. Corporations who manufacture products marketed exclusively or predominantly toward women and minorities would not be punished as severely as corporations who manufacture products marketed toward men, where there is generally higher economic loss and therefore the potential for higher punitive damages. Not only would women and minorities not receive as large a punitive damage award when they are injured, but they would have to contend with more unsafe products. This system of economic valuation is the functional equivalent of a directive that companies will not be punished as severely if they hurt a woman or minority as they will be if they hurt a Caucasian man. Therefore, manufacturers of products targeting women and minorities would take fewer safety precautions and would engage in more risky behavior because they have less to lose. This directive is magnified by the fact that women and minorities have less access to the legal system and are less likely to

298. See Koenig & Rustad, *supra* note 296, at 87.

When damages awards are based primarily on out-of-pocket costs and loss of earnings, women are placed at a significant disadvantage. Without the prospect of non-economic and punitive damages, many grievously injured women will be unable to convince an attorney to take their case. The proposed limitations on punitive damages are gender injustice in disguise.

Id.

299. 138 CONG. REC. S6521 (daily ed. May 12, 1992) (statement of Sen. Cranston).

300. See Kathleen Morris, *Through the Looking Glass: Recent Developments in Affirmative Action*, 11 BERKELEY WOMEN'S L.J. 182, 188 (1996) (charging that "minorities and women tend to be 'ghettoized' into lower-paying, lower-skilled jobs").

bring suit.³⁰¹ Moreover, in light of the lower compensatory damages and accordingly lower punitive damages, women and minorities would be less likely to find counsel willing to take their case. Therefore, capping punitive damages as some multiple of economic loss has a discriminatory impact on women and minorities.

d. The Model Act proposes a better solution

The unbridled discretion of juries to award any punishment amount they see fit without any guidance is an unnecessary evil. For the reasons discussed above, however, capping punitive damages also is too extreme.³⁰² The Model Act proposes a better alternative. Instead of imposing an arbitrary cap on punitive awards, the Model Act requires the jury to consider several factors to determine what constitutes a "fair and reasonable amount of punitive damages," including:

- (1) the nature of defendant's wrongful conduct and its effect on the claimant and others;
- (2) the amount of compensatory damages;
- (3) any profit or gain, obtained by the defendant through the wrongful conduct, in excess of that likely to be divested by this or other actions against the defendant for compensatory damages or restitution;
- (4) the defendant's present and future financial condition and the effect of an award on each condition;
- (5) any fines, penalties, damages, or restitution paid or to be paid by the defendant arising from the wrongful conduct;
- (6) any adverse effect of the award on innocent persons;
- (7) any remedial measures taken or not taken by the defendant since the wrongful conduct;
- (8) compliance or noncompliance with any applicable standard promulgated by a governmental or other generally recognized agency or organization whose function it is to establish standards; and
- (9) any other aggravating or mitigating factors relevant to the amount of the award.³⁰³

The factors offered in the Model Act track those endorsed by the Supreme Court in *Haslip*, *TXO*, and *BMW*.³⁰⁴ Requiring the jury to

301. See Jenny Rivera, *The Violence Against Women Act and the Construction of Multiple Consciousness in the Civil Rights and Feminist Movements*, 4 J.L. & POL'Y 463, 498 (1996) (finding access to the legal system a significant obstacle for minority women).

302. See *supra* notes 23-31 and accompanying text.

303. Model Act, *supra* note 9, § 7.

304. See *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1598-1602 (1996); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 468 n.28 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*,

consider certain well-defined factors in determining the amount of punitive damages awarded would result in easier and more limited review by both the district and appellate courts. Such guidance regarding the criteria for assessing the amount of awards would add greater certainty to the award process and would reduce the instances of excessive awards, without sacrificing the goals behind the imposition of such awards: punishment and deterrence. In those instances when excessive awards are proffered, judicial remittitur or reversal would be made easier by consideration of the mandated factors.

If the burden of proof is raised and the liability standard is changed to require a degree of intent, as proposed in this Article, then punitive damage awards would be available only when the plaintiff proves by clear and convincing evidence that the defendant acted with conscious indifference towards the plaintiff's safety. Why should the potential liability of an individual who acts intentionally to harm society be limited? Senator Orrin Hatch (R-Utah) once said: "Punitive damages reform is not about shielding wrongdoers from liability, . . . Safeguards are needed to protect against abuse in the award of punitive damages."³⁰⁵ If punitive damages were capped for those corporations who are proven, by clear and convincing evidence, to have acted intentionally to harm society with no regard for anything but corporate profits, wrongdoers would be shielded from liability. Raising the evidentiary burden and liability standards are the only necessary safeguards. Moreover, judicial review and the tool of remittitur still will be available.

The better route is the one proposed in the Model Act, where the legislature dictates the factors that a jury must consider when assessing a punitive damage award and requires detailed findings justifying the award. The Model Act, unlike the vetoed federal bill, also addresses the problem posed by multiple punitive damages awards that are unfairly duplicative.³⁰⁶

It provides: "If the court determines that an award of punitive damages in the pending case is unfairly duplicative, it shall reduce the award accordingly."³⁰⁷ It requires that courts consider the following:

[T]he bases of liability for the punitive damages awarded, the purposes for which the awards were made, how the awards were determined or calculated, whether the defendant has already

499 U.S. 1, 21-22 (1991).

305. *Punitive Damages Hearing*, *supra* note 24, at 1 (statement of Sen. Hatch).

306. See Model Act, *supra* note 9, § 10(a).

307. Model Act, *supra* note 9, § 10(a). The Model Act also requires that the reviewing court make and enter its findings and the basis for its decision. See *id.* § 10(c).

disgorged any unwarranted economic gain for which it was held liable under Section 6(b), and any other evidence offered by the parties relevant to the issue of whether the petitioner is being subjected to unfair duplicative awards of punitive damages.³⁰⁸

Federal legislation should incorporate this concept from the Model Act rather than a "first comer" rule, and should regulate the imposition of multiple punitive damage awards for the same conduct. Proponents of national tort reform designed to curb the imposition of multiple damage awards have advocated a "first comer" rule accompanied by a limited number of exceptions.³⁰⁹ For example, if the plaintiff in a later suit is able to offer new evidence not present at the first trial, or if the judge determines that the amount of punitive damages awarded in the first case was insufficient to punish or deter the defendant, a second award may be justified. Federal legislation either should incorporate the consideration of past punitive damage awards into the assessment process or should allow the defendant, on post-verdict motion, to bring to the court's attention other punitive awards paid, so that the court can reduce the jury verdict accordingly.³¹⁰

If corporate manufacturers still need saving from profit-threatening punitive damage awards, the legislature could then revisit the cap issue.³¹¹ At present, why destroy the goals of punitive awards, rendering them ineffective for their anticipated purpose, by capping them?³¹²

308. *Id.* § 10.

309. See *Punitive Damages Hearing*, *supra* note 24, at 105 (testimony of Victor E. Schwartz, Esq., General Counsel, American Tort Reform Association) (calling on Congress to remedy unfairness caused by imposition of multiple punitive damage awards).

310. See *id.* § 10.

311. On a purely practical note, Congress would be more likely to pass tort reform legislation if the controversial cap were omitted. As Congress has tried to pass such reform every year since 1982, it would seem preferable to pass some reform—like the elevated burden of proof and uniform standard requiring intentional conduct—rather than no reform. Given President Clinton's re-election, perhaps it is time that Congress consider a more limited reform for the time being.

312. The effectiveness of punitive damage awards already are undermined by permitting their insurability and the tax deductibility. See *Pace*, *supra* note 6, at 828 (insisting that tax deductibility of punitive damages frustrates deterrence and punishment goals of product liability laws). Permitting corporations to insure against their own intentional misconduct or to deduct the payment of these fines from their taxes costs the public twice, first when it is subjected to unsafe products and second when it must bear the burden of the corporation's intentional misconduct through higher taxes and insurance premiums. See *id.* Ideally, federal reform would address both of these concerns by prohibiting their insurability and removing the tax incentive, that is, deductibility, for the misconduct. See *id.*

5. *Regulatory compliance as a bar to punitive damages*

A regulatory compliance defense has appeared in many of the recent congressional bills on tort reform as well as in a number of state tort reform measures.³¹³ This defense provides that compliance with existing regulations either presumptively or conclusively, depending upon the legislation, immunizes the defendant from the imposition of punitive damages. In effect, this means that the federal regulatory standards become the tort standards as well. The arguments in favor of such a defense are agency expertise, predictability, and reduction in the scope of liability. The agencies that promulgate regulations are experts in their field and they know, better than judges or juries, what standards of safety are reasonable in a particular industry.³¹⁴ The agency has obtained the necessary data to make risk comparisons and to set properly a safe standard that protects the public.³¹⁵ The judiciary, therefore, should defer to agency expertise.³¹⁶ A regulatory compliance defense would mandate such deference.

Moreover, such a defense would help to control what many characterize as escalating and unjustified punitive damage awards by reducing the scope of liability and by giving defendants more notice as to the prohibited conduct. Finally, penalizing defendants by awarding punitive damages when the defendant has complied with existing federal regulations can be viewed as fundamentally unfair and inefficient.

There are problems, however, which plague the regulatory compliance defense. One significant problem is that agency regulations often are vague, inadequate, outdated, and obsolete.³¹⁷

313. See *supra* note 68 and accompanying text (listing state statutes that include regulatory compliance defense). The most recent federal tort reform attempt, H.R. 956, originally contained a regulatory compliance defense for companies that act in compliance with FDA regulations. See H.R. 956, 104th Cong. § 7 (1996); see also Victor E. Schwartz & Mark A. Behrens, *Punitive Damages Reform—State Legislatures Can and Should Meet the Challenge Issued by the Supreme Court of the United States in Haslip*, 42 AM. U. L. REV. 1365, 1383 (1993) (arguing in favor of regulatory compliance defense against punitive damages).

314. See Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277, 333-35 (1985) (asserting that courts should defer to expert opinions of agencies); see also James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1555-56 (1973) (challenging suitability of courts to implement tort reform).

315. See Huber, *supra* note 314, at 335 (indicating that licensing agencies such as Nuclear Regulatory Commission compare public risks among industry competitors).

316. See *id.* (expressing view that courts are not qualified to second-guess agencies).

317. See Don Phillips, *As Upstart ValuJet Grew, So Did FAA's Anxieties*, WASH. POST, June 10, 1996, at A1, A12 ("I've been concerned for some time that the airline picture is changing faster that our methods of checking up on the changing picture." (quoting John L. McLucas, a former

Regulations generally set minimal, not optimal safety standards, which is a concern voiced by many courts and noted in the American Law Institute's *Restatement (Third) of Torts* which rejects a regulatory compliance defense.³¹⁸ Pursuant to the *Restatement*, non-compliance with federal regulations renders a product defective.³¹⁹ Compliance, on the other hand, is mere evidence of non-defectiveness and does not preclude a finding that the product is defective.³²⁰

Agencies lack the resources and the ability to keep pace with technological advancement. Moreover, delays inherent in the regulatory process make it impossible to keep regulations up-to-date, especially in this high-tech era when science is changing so quickly.³²¹ In addition, government prosecution for violations of agency regulations occur infrequently.³²² The government simply does not have the resources to police corporate misconduct.

FAA administrator)).

318. See *RESTATEMENT (THIRD) OF TORTS*, *supra* note 7, § 7 & cmt. e (adopting common law approach that regulatory standards set minimal not optimal standards and therefore, rejecting per se regulatory compliance defense); see also *Plummer v. Lederle Labs.*, 819 F.2d 349, 356 (2d Cir. 1987) (concluding that compliance with federal consumer notification regulations precludes application of strict liability but may be used to establish negligence); *Silkwood v. Kerr-McGee Corp.*, 769 F.2d 1451, 1458 (10th Cir. 1985) (upholding on remand punitive damages award despite defendant's compliance with federal nuclear safety regulations); *Toner v. Lederle Labs.*, 732 P.2d 297, 311 n.12 (Idaho 1987) (arguing that FDA certification should constitute non-negligence per se); *Gonzales v. Surgidev Corp.*, 899 P.2d 576, 590-91 (N.M. 1995) (stating that compliance with regulations will not preclude award of punitive damages); *Mulhern v. Outboard Marine Corp.*, 432 N.W.2d 130, 135 (Wis. Ct. App. 1988) ("[C]ompliance with the federal regulation would not have preempted the state strict liability action because the Act and the regulation are only minimum safety standards which do not provide private tort remedies."). But see *Grundberg v. Upjohn Co.*, 813 P.2d 89 (Utah 1991) (giving judicial deference to regulatory compliance); *Stone Man, Inc. v. Green*, 435 S.E.2d 205, 206 (Ga. 1993) (stating that punitive damages generally are not available when defendant has complied with applicable regulations governing conduct at issue); *McDaniel v. McNeil Lab. Inc.*, 241 N.W.2d 822, 828 (Neb. 1976) (refusing to submit to strict liability theory in case where defendant adhered to FDA regulations).

319. See *RESTATEMENT (THIRD) OF TORTS*, *supra* note 7, § 7(a).

320. See *id.* § 7(b).

321. See Schwartz, *Products Liability*, *supra* note 163, at 1152 (finding that in cases where punitive damage are awarded regulatory agencies generally have failed to protect public adequately); see also Rustad, *supra* note 50, at 73 ("The government is a slow starter and a slow finisher in uncovering corporate misconduct in product liability cases.").

322. See Rustad, *supra* note 50, at 73-75 (speculating that government reluctance to investigate and prosecute product liability cases is due to expense and expertise required). Professor Rustad found 355 punitive damage awards in products liability actions from 1965 to 1990. See *id.* at 30; see also Rustad & Koenig, *supra* note 284, at 89 (stating that punitive damage awards are rare, although actual number of awards is unknown because no national reporting system exists). Examining each of these cases, Professor Rustad found that government regulators were ineffective at uncovering corporate misconduct.

Despite these serious threats to the public safety, corporate defendants rarely received official sanctions. Only one defendant [of 355] in our sample was criminally sanctioned for its failure to protect the consuming public. A total of only eleven defendants received some form of civil penalty from a local, state, or federal agency. Rustad, *supra* note 50, at 73.

In addition to inadequate and antiquated regulations, there is also the threat of agency capture.³²³ "Agency capture" refers to domination of an agency by the entities that the agency was created to control."³²⁴ Because agencies depend upon industry for data and expertise when they promulgate regulations, agency choices predictably reflect industry perspectives.³²⁵ Moreover, because many agency staff members have worked in the regulated industry, they share the industry's perspective or expect to work for some regulated entity in the future, and thus hesitate to criticize industry proposals.³²⁶ Moreover, industry has vast resources to devote to agency lobbying, compared to public interest groups. Corporations have all the information and the resources.

For these reasons, although evidence of regulatory compliance might be relevant in a determination of whether to award punitive damages, it should not be conclusively or presumptively determinative.³²⁷ Although regulatory compliance should not be a defense to claims of misconduct, federal legislation could include regulatory compliance among the factors to be considered in assessing punitive damages, as the Model Act proposes.³²⁸

CONCLUSION

Punitive damage awards can be an effective legal tool for controlling corporate misconduct. However, the increase in the magnitude and frequency of such awards warrants closer scrutiny of the doctrine and the introduction of safeguards to protect American industry from abusive penalties. When punitive damage sanctions are awarded in excessive amounts or are imposed erratically against undeserving defendants, the tort system as a whole is undermined. Federal tort

323. See Schwartz, *Products Liability*, *supra* note 163, at 1147 (discussing extent of influence enjoyed by business on agencies because agencies rely on industry-generated data in developing regulations).

324. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 677 n.308 (1996); see also Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1280-81 (1989) (describing how members of industry and agency policy-makers control decision-making process); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1565-66 (1992) (suggesting that top level of agency policy-makers, because they are fewer in number, are easier to influence than the hundreds of legislators needed to pass new laws).

325. See Schwartz, *Products Liability*, *supra* note 163, at 1147.

326. See Seidenfeld, *supra* note 324, at 1565.

327. See Schwartz, *Punitive Damages*, *supra* note 163, at 1363 (arguing against regulatory compliance defenses); see also Schwartz, *Products Liability*, *supra* note 163, at 1147 (voicing concerns that industry has too much influence on regulatory process as compared to the relatively weak influence of public interest groups).

328. See Model Act, *supra* note 9, § 7.

reform legislation is the most appropriate vehicle for achieving the optimum balance in the application of the punitive damage doctrine.

Despite the *BMW* decision, the Supreme Court has provided little actual guidance regarding the imposition of punitive damage awards. Similarly, state courts and legislatures, although trying to assist in preventing what they have observed as manifest injustice in the imposition of these awards, have been equally ineffective in curbing abuse of the punitive damages system, largely because their power to regulate stops at their geographic borders. Legislative, not judicial, action is needed, and to be effective the legislation must be national.

In an effort to reflect the quasi-criminal nature of punitive damage sanctions, federal tort reform should raise the burden of proof and create a uniform liability standard predicated on the defendant's intent. Bifurcation of trials also should be adopted to insure against jury irrationality and bias. Most importantly, federal reform should articulate a uniform set of factors for mandatory consideration in calculating punitive damage awards. Such reforms would effectuate the necessary safeguards against abuse of the punitive penalties while simultaneously ensuring that intentional misconduct does not go unpunished. While safeguards are needed to protect against abuse in the award of punitive damages, reform should not shield wrongdoers who have been found, by clear and convincing evidence, to have intentionally sacrificed public safety for corporate profits. Reforms that would cap punitive damages by limiting them to a multiple of the economic and noneconomic loss or to some arbitrary amount should be avoided because they will undermine the efficacy of the punitive damage system. Capping punitive damages would shield wrongdoers, and thereby encourage misconduct, with women and minorities suffering most.

Federal reform is the only solution to the national crisis in the tort system. Only through national reform can the uniformity and the certainty necessary to yield predictable results be achieved. Federal tort reform will benefit both the consumer and the manufacturer with consumers knowing their rights and manufacturers knowing their responsibilities. This will reduce litigation, increase settlement, and foster respect for, and compliance with, the law.