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ARTICLE: A Proposal for Federal Product Liability Reform in the New Millennium

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SUMMARY:

... The federal product liability reform effort has a long and checkered history. ... A manufacturer of protective sporting goods equipment has said that raw material suppliers are reluctant to sell to her company because of concerns about "deep pocket" liability. ... B. Federal Product Liability Reform Legislation ... A new trend at the state level reinforces the need for federal product liability reform legislation. ... Supporters of federal product liability reform legislation, however, have never called for a complete federal "takeover" of product liability law. ... Federal product liability reform is also consistent with the trend since the mid-1960s toward increased federal involvement in consumer product safety, an inherent part of interstate commerce. ... For example, until 1976, there were only three reported appellate court decisions upholding awards of **punitive damages** in product liability cases, and the **punitive damages** award in each case was modest in proportion to the compensatory damages awarded. ... Plaintiffs' lawyers argue to juries that large, wealthy corporations will only "get the message" if **punitive damage** awards are substantial. ... Federal legislation also should put reasonable parameters on **punitive damages** to make the punishment fit the offense. ... Some opponents of joint liability reform have argued that the "California approach" somehow discriminates because women or other groups may have fewer economic losses than others. ...

TEXT:
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I. Introduction

The federal product liability reform effort has a long and checkered history. Over the past two decades, attempts at reform have spanned Republican and Democratic congresses and administrations. In 1996, legislation passed out of both the House and Senate, ¹ but was vetoed by President Clinton. ² If political circumstances change in Washington and a president is elected who would support legal reform, supporters of federal product liability law may finally be able to claim victory.

Federal product liability reform legislation is needed because the current state-by-state product liability system is unnecessarily costly, inequitable, and unpredictable. ³ The patchwork state system has stifled innovation, kept beneficial products off the market, and handicapped American firms as they compete in the global economy. ⁴ Here are some specifics.

Pregnant women no longer have access to a drug once widely prescribed to treat "morning sickness," in part, because of the manufacturer's legitimate concern about overkill in our liability system. ⁵ A chief executive officer of a biotechnology company has stated that his company decided not to pursue research into the development of an AIDS vaccine because of the current product liability system. ⁶ A manufacturer of protective sporting goods equipment has said that raw material suppliers are reluctant to sell to her company because of concerns about "deep pocket" liability. ⁷ As a result, the company was unable to obtain the raw materials needed to produce and market a new baseball safety helmet that functioned well in prototype testing. ⁸ **[*264]** The company later chose not to produce hockey helmets, even though interest in the sport has grown substantially in the United States. ⁹ "In the final analysis," the company's chief executive officer told Congress, "we felt we could not pursue this market because of the additional, uncontrollable liability exposure it would create." ¹⁰

Federal product liability reform can right the scales of justice, preserving the tort "punch" while eliminating overkill caused by excessive and uncertain liability. After twenty years of exhaustive study, the time for meaningful reform is now.

This article will briefly describe the extensive history of the federal product liability effort. It will then discuss the need for federal product liability reform and provide factual and public policy reasons to support legislation on the subject. ¹¹ The article will then recommend several reforms that merit congressional action. Finally, the article provides constitutional support for the proposals and illustrates the hollowness of arguments that reform opponents have raised to try to cloud what is clear constitutional law.

II. Historical Background

A. The Federal Interagency Task Force on Product Liability and the Model Uniform Product Liability Act

The federal product liability reform effort has its roots in an in-depth research and analysis conducted by the Federal Interagency Task Force on Product Liability from 1976 to 1980 under Presidents Ford and Carter. ¹² The Task Force made two principal recommendations.

First, to give small businesses a fairer opportunity in the liability insurance market, the Task Force recommended federal legislation to allow businesses to form self-insurance pools and purchasing groups. ¹³ The resulting legislation, the Product **[*265]** Liability Risk Retention Act, became law in 1981. ¹⁴ It was extended to all liability coverage (with the exception of

workers' compensation) in 1986. ¹⁵ The legislation helped to ensure not only competitive markets, but also that any savings from the stabilization of the tort system would be passed along to insureds and the American public.

Second, the Task Force found that easier self-insurance options alone would not address the product liability problem facing American consumers and businesses. ¹⁶ Self-insurers and commercial insurers would still confront growing uncertainties caused by individual, ever-changing, state product liability laws. The Task Force, therefore, recommended and then drafted a model law for use by the states. ¹⁷ The Task Force intimated that federal legislation might be needed if the states did not enact the model law in a uniform manner. ¹⁸

The Task Force's Model Uniform Product Liability Act served as the basis of legislation in several states, but was not adopted nationwide. ¹⁹ Furthermore, those states that did enact the "Uniform Act" did so in a piecemeal fashion, rather than "uniformly." ²⁰ This led to calls for reform at the federal level.

B. Federal Product Liability Reform Legislation

Serious interest in enacting federal product liability reform legislation began in the early 1980s and continues to this day. While the effort's long history has been documented elsewhere, ²¹ a brief summary of that history is relevant to illustrate just how carefully and extensively the issue has been studied.

Comprehensive product liability reform bills have been reported out of the House Commerce Committee twice (1988 [*266] and 1995), ²² the House Judiciary Committee once (1995), ²³ and the Senate Commerce Committee eight times (1982, 1984, 1986, 1990, 1991, 1993, 1995, 1997). ²⁴ In the 104th Congress, legislation finally reached both the Senate and House floors, where it passed both chambers - twice (each chamber passed its own bill in 1995 and then a conference report bill in 1996). ²⁵ President Clinton vetoed that legislation in May of 1996. ²⁶

In addition to comprehensive efforts, several individual product liability reform bills have been reported out of congressional committees in recent years. ²⁷ Two became law. ²⁸

The General Aviation Revitalization Act of 1994 (GARA) ²⁹ established an eighteen-year statute of repose for general aviation aircraft used for noncommercial purposes. It reversed the general aviation industry's path toward extinction. As a result of GARA, the general aviation industry is now booming. ³⁰ The other law, the Biomaterials Access Assurance Act of 1998, ³¹ helped avoid a serious public health crisis by ensuring the availability of lifesaving and life-enhancing implantable medical devices, such as pacemakers, heart valves, and hip and knee joints. ³² The supply of those devices had been critically threatened after suppliers made a business judgment to exit the medical device market in order to avoid further legal costs, such as those that accompanied their successful defense of meritless [*267] product liability claims. ³³ The Biomaterials law encourages those suppliers to reenter the market by allowing them to obtain early dismissal, without extensive discovery or other legal costs, in certain tort suits involving finished medical implants. ³⁴

III. The Need for Federal Product Liability Reform

A. Problems with a State-by-State Approach

Congress is uniquely suited to enact a national solution to provide predictability in the product liability system. ³⁵ Predictability reduces unnecessary legal costs and enables consumers to know their rights; it also allows manufacturers to understand their obligations. State product liability legislation, though useful, cannot solve the national product liability problem because a state cannot regulate product liability problems outside its borders.

United States Department of Commerce data indicate that, on average, over seventy percent of the goods that are manufactured in a particular state are shipped and sold out of that state. ³⁶ Insurers recognized this fact [*268] years ago and set insurance rates based on country-wide, not individual state, data.

In that regard, one can contrast product liability with workers' compensation. When a worker is injured because of employer fault or neglect, all the relevant facts usually occur in the same state. For that reason, workers' compensation rates vary from state to state and are based on intrastate data. Putting all this in practical form, if a company moves from State A to State B, its workers' compensation insurance costs will change, but its product liability insurance costs will not.

B. States' Rights Groups and the Need for Federal Reform

Because of the interstate nature of products liability law, the National Governors' Association (NGA) has called upon Congress to enact federal product liability legislation. ³⁷ The NGA's most recent resolution reads, in part, as follows:

The National Governors' Association recognizes that the current patchwork of U.S. product liability laws is too costly, time-consuming, unpredictable, and counterproductive, resulting in a severely adverse effect on American consumers, workers, competitiveness, innovation and commerce Clearly, a national product liability code would greatly enhance the effectiveness of interstate commerce. The Governors urge Congress to adopt a federal uniform product liability code. ³⁸

The American Legislative Exchange Council (ALEC), a bipartisan organization of over three thousand state legislators from all fifty states, formed in principal part to protect states' rights, also supports enactment of federal product liability legislation. ³⁹

C. Judicial Nullification of State Tort Law

A new trend at the state level reinforces the need for federal product liability reform legislation. In response to tort reform legislation that has been enacted in the states, the Association of Trial Lawyers of America ("ATLA"), the primary advocacy organization of the plaintiffs' personal injury bar, has launched [*269] a nationwide effort to persuade state courts to nullify state tort reform legislation. ⁴⁰ While clearly a minority position, a large number of state courts have embraced the trial bar's arguments. ⁴¹ There are now over ninety state court decisions striking down state tort reform laws over the past fifteen years. ⁴² For that reason, it can no longer be suggested that the job of fixing our nation's serious liability problems should be left completely to the states.

Trial lawyer attempts to overturn state legislative tort policy decisions generally rely on obscure provisions of state constitutions, such as "right to remedy" and "open courts" provisions, that have little historical explanation and no "companion" in the United States Constitution. ⁴³ This allows trial lawyers to offer their own explanations to "fill in the gaps" in the historical record. Indeed, former ATLA President Mark Mandell has bragged that a brief written by ATLA and argued by Harvard law professor Laurence Tribe resulted in an Indiana health care liability statute being overturned based on a state constitutional provision "that was previously regarded as toothless." ⁴⁴

By relying solely on state constitutions, contingency fee lawyers are able to preclude any appeal of an adverse decision to the United States Supreme Court - there is no federal issue.

Contingency fee lawyers utilize this strategy, because they know that the United States Supreme Court, in constitutional challenges under the Fourteenth Amendment, has made clear distinctions between situations in which a legislature violated a person's fundamental rights and situations in which a legislature made an economic policy decision. Except in a highly discredited period in the Supreme Court's history known as "the Lochner era," ⁴⁵ which began shortly after the turn of the twentieth [*270] century and ended around the mid-1930's, the Supreme Court has shown appropriate deference to legislative policy judgments, even where the justices might not have personally agreed with a legislature's action. ⁴⁶ Most of the decisions nullifying state tort reforms have not given state legislative policy judgments the same level of respect. ⁴⁷

Federal legislation may be the most direct way of responding to the problem of judicial nullification of state tort law. A federal product liability law could not be nullified under a state constitution. That would be prevented by the Supremacy Clause of the United States Constitution. ⁴⁸ A federal law would have to be examined against the federal constitution. As we explain in this article, we have well-founded reason to believe that a federal product liability reform bill would pass constitutional muster. ⁴⁹

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D. Legislatures v. Courts

Some consumer advocacy groups and plaintiffs lawyers have argued that Congress and state legislatures should not enact liability reform legislation. They contend that the subject should be left to the courts to develop on a case-by-case basis. ⁵⁰ These same arguments are used to support judicial nullification of state tort reform legislation. ⁵¹

Supporters of federal product liability reform legislation, however, have never called for a complete federal "takeover" of product liability law. Instead, the legislation has been premised on the belief that, in a few core areas, Congress is better suited to formulate sound national policy than courts operating in fifty states and the District of Columbia.

In part, this is because of the interstate nature of products liability. It is also because the impacts of liability law go far beyond who should win a particular case. Congress is in the best position to weigh and balance the many competing societal, economic, and policy considerations involved. Through the hearing process, Congress has access to broad information, including the ability to receive comments from persons representing a multiplicity of perspectives and to use the legislative process to obtain new information. This process allows Congress to engage in broad policy deliberations and to formulate public policy carefully. ⁵²

Furthermore, legislative development of tort law gives the public advance notice of significant changes affecting rights and duties, and the time to comport behavior accordingly. As the United States Supreme Court noted in a landmark decision regarding **punitive damages**, "elementary notions of fairness [*272] enshrined in our constitutional jurisprudence dictate that a person receive fair notice ... of the conduct that will subject him to [liability]...." ⁵³

Courts, on the other hand, are uniquely and best suited to adjudicate individual disputes concerning discrete issues and parties. ⁵⁴ This is an essential part of the tripartite structure of our system of government. The Founding Fathers recognized this when they drafted the United States Constitution to give the judiciary jurisdiction to decide "cases and controversies." ⁵⁵ This advantage also has its limitations: the focus on individual cases does not provide comprehensive access to broad scale information, and judicial changes in tort law apply retroactively rather than prospectively, denying "fair notice" to everyone potentially affected. ⁵⁶

In addition to the sound public policy reasons that support congressional enactment of product liability reform legislation, there is a very practical reason for congressional involvement: some reforms cannot be achieved through judicial decision. GARA provides an excellent example. That law has worked well, but it could not have been accomplished by a court. First, it is doubtful that a court could draw a bright-line rule cutting off "long-tail" liability for general aviation manufacturers after eighteen years. Second, even if a court issued such a ruling, courts in other jurisdictions could simply choose to ignore it.

IV. The Constitutionality of Federal Product Liability Reform

Congress has the power under the Commerce Clause of the United States Constitution to enact a federal product liability statute that preempts state law.⁵⁷ In fact, Congress has long exercised its authority in matters of interstate commerce by [*273] enacting statutes that preempt state tort law.⁵⁸ Federal product liability reform is also consistent with the trend since the mid-1960s toward increased federal involvement in consumer product safety, an inherent part of interstate commerce.⁵⁹

Despite the long history of congressional involvement in matters affecting interstate commerce and consumer safety, and nearly a century of decisions declaring these laws to be constitutional,⁶⁰ we would not be surprised to hear opponents of federal product liability reform raise constitutional questions.⁶¹

A basic explanation is political. Opponents of federal liability reform initiatives enjoy pointing out an apparent inconsistency in conservative philosophy.⁶² For example, Presidents Reagan and Bush both supported federal product liability reform legislation, notwithstanding their strong preference for an expanding role for state governments.⁶³ Federal civil justice and product liability reform legislation is an exception to the conservative pattern of giving more policymaking authority to the states.⁶⁴

We believe, however, that federal civil justice and liability reform is justified because there are certain rational goals of civil justice reform that, as a practical matter, can only be [*274] accomplished at the federal level. The fact that tort law has long been the province of the states does not mean that it should be off-limits to any reform at the federal level. Federal legislation can provide an effective means of addressing liability problems that are rooted in interstate commerce and national in scope.

A second explanation for the prominence of "federalism" in arguments against federal liability reform is more pragmatic. Opponents of reform know that if their political arguments fail to carry the day and federal legislation is enacted, the United States Constitution may provide the only mechanism to nullify the law.⁶⁵

Nevertheless, we have well-founded reason to believe that a federal product liability law would pass constitutional muster and would be upheld if challenged on constitutional grounds.⁶⁶ For almost a century, Congress has enacted legislation altering state tort law, and those laws have been upheld time after time.⁶⁷ A court would have to break with long and well-established precedent to strike down a federal product liability reform law.⁶⁸

A. The Commerce Clause and United States v. Lopez

Congress has the power under the Commerce Clause of the United States Constitution to enact federal civil justice reform legislation, and state courts are bound to enforce that law under the Supremacy Clause. The law is clear.⁶⁹

It is nevertheless worth "clearing the fog" about a case that is frequently raised by opponents of federal civil justice reform initiatives to try to cloud the Supreme Court's Commerce Clause decisions and cast doubt on the constitutionality of federal liability reform legislation.⁷⁰ The

case is the United States Supreme Court's 1995 decision in *United States v. Lopez*.⁷¹

[*275] In *Lopez*, the Court considered whether Congress's enactment of the Gun-Free School Zones Act of 1990, which made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone,"⁷² was a proper exercise of Congress's Commerce Clause power. The Court held that it was not, because "the Act neither regulated a commercial activity nor contained a requirement that the possession be connected in any way to interstate commerce."⁷³

Conceptually, *Lopez* was not even a true Commerce Clause case. Congress was not regulating the firearms market or any other economic activity. As the Court explained, the Gun-Free School Zones Act was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly defined."⁷⁴ Moreover, "Respondent was a local student at a school; there [was] no indication that he had recently moved in interstate commerce, and there [was] no requirement that his possession of the firearm had any concrete tie to interstate commerce."⁷⁵

The *Lopez* decision is distinguishable both legally and factually from those cases upholding regulation of activities that arise out of or are connected with commercial transactions, which viewed in the aggregate, substantially effect interstate commerce - cases that directly support Congress's Commerce Clause authority over liability law.⁷⁶ In fact, rather than limiting Congress's Commerce Clause authority, the decision can be read to support legislation that would, for example, either limit liability for gun manufacturers in order to promote the development of the firearms industry or impose new firearms safety requirements.⁷⁷

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B. The Supreme Court's Recent Tenth Amendment Cases

Some opponents of federal civil justice reform also have questioned whether federal liability reform legislation would violate the Tenth Amendment.⁷⁸ It would not.

We recently published an article which provides an in-depth and detailed analysis of the Supreme Court's recent Tenth Amendment decisions, including *New York v. United States*⁷⁹ (the Low-Level Radioactive Waste Policy case) decided in 1992, and *Printz v. United States*⁸⁰ (the Brady Handgun Violence Prevention Act case) decided in 1997.⁸¹ Though these cases provide limits on the federal government's power over the states, they do not preclude the enactment of civil justice reform at the federal level, such as a product liability reform law.⁸² In fact, the Court's opinions make very clear that state court enforcement of federal liability reform legislation would not encroach upon any powers specifically reserved for the states.⁸³ The cases expressly distinguish state court enforcement of federal laws from federal laws commanding state legislatures to legislate or requiring state executive officials to administer a federal regulatory scheme.⁸⁴ While the former is clearly constitutional and, indeed, mandated by the Supremacy Clause, the latter are not.⁸⁵

V. Product Liability Reform Proposals

Over the past two decades, Congress has explored various ways to bring about greater predictability in product liability law. Some of the "nuts and bolts" issues have largely been resolved. For example, when is a product defective in design, or when is a warning adequate? Certain fundamental rules have emerged over the years on those key issues. They are contained in the **[*277]** Restatement (Third) of Torts: Products Liability,⁸⁶ which was approved unanimously by the diverse membership of the American Law Institute on May 20, 1997.⁸⁷

Accordingly, we do not believe it is critical to address those issues at the federal level. Instead, we believe that federal legislation should focus on areas of product liability law that lack predictability. Those are the areas where federal action would do the most good. A few key proposals that have generated bipartisan support in recent congresses and have a strong foundation in both law and sound public policy are discussed below.

A. Barring Claims Because of a Person's Abuse of Alcohol or Drugs or Criminal Acts

In about eleven states, a person who is inebriated or under the influence of illegal drugs can recover in a product liability action even if that illegal condition was a substantial cause of the harm.⁸⁸ Some states even permit a felon to recover in a product liability action if he or she is injured while fleeing the scene of a violent crime.

Federal law should put an end to these types of situations. It should provide that if the principal cause of an accident was the claimant's abuse of alcohol or drugs, he or she should no longer be able to recover in a product liability action.⁸⁹ It also should prohibit a plaintiff from recovering in a product liability action if he or she was harmed while engaged in, fleeing from, or being apprehended for the commission or attempted commission of a felony.

Federal legislation barring product liability claims because of a plaintiff's abuse of alcohol or drugs or felonious behavior **[*278]** would implement sound public policy. It would tell persons that if they are drunk or on illegal drugs and choose to get behind the wheel of a car or operate some other product, they will not be rewarded through the product liability system if they injure themselves.⁹⁰ The same would be true for dangerous criminals who consciously decide to commit a serious crime and are injured in the process. At the same time, law-abiding citizens would be relieved from paying more for the products they purchase in order to subsidize the illegal and irresponsible misconduct of others.

B. Fair Treatment for Product Sellers, Lessors, and Renters

1. Product Seller Fair Treatment Reform

Currently, under the law in about thirty states, product sellers, such as wholesalers, distributors, and retailers, are potentially liable for defects that they are neither aware of nor able to discover. They rarely pay the judgment, however, because in over ninety-five percent of the cases where any liability is present, the product's manufacturer is held responsible for the harm.⁹¹ Based on this showing, the seller gets contribution or indemnity from the manufacturer, and the manufacturer ultimately pays the damages.⁹² This approach generates substantial, unnecessary legal costs, which are passed on to consumers in the form of a "tort tax."

Federal legislation is needed to address "the unfairness and illogic of imposing 'strict' liability upon small business product sellers who neither participate in the design process for products they sell, nor create warnings or instructions for a product."⁹³ Product sellers should be subject to liability only if they are directly at fault for a harm (e.g., they misassembled the product or failed to convey appropriate warnings to customers), unless the manufacturer of the product is out of business or otherwise not available to respond in a lawsuit.⁹⁴ This would encourage product sellers to select the safest products for sale and to deal **[*279]** with responsible manufacturers who would be available and have assets in the United States in case a lawsuit arises because a product was defective.⁹⁵ It also would ensure that injured consumers would be able to pursue a recovery from the product seller if recovery could not be obtained from the manufacturer.⁹⁶

There is strong support for product seller fair treatment legislation at the state level. Twenty-one states have enacted product seller fair treatment laws.⁹⁷ Some of these laws have existed for almost two decades and none have been repealed. A federal law would work well

too.

2. Fairness for Lessors and Renters

Federal legislation should also provide relief for companies, such as car and truck rental firms, that rent or lease products. ⁹⁸ In a small minority of states, these companies are subject to liability for the tortious acts of their lessees and renters, even if the rental company is not negligent and there is no defect in the product. ⁹⁹ The rental company can be held vicariously liable for **[*280]** the negligence of its customer simply because the company owns the product and has given permission for its use. ¹⁰⁰ Vicarious liability - liability without regard to fault - increases costs for renters nationwide and imposes an undue burden on interstate commerce. ¹⁰¹

C. Statute of Repose for All Products

Statutes of repose place an outer time limit on liability involving old products. Like a statute of limitations, a statute of repose specifies the time within which a claimant must file his or her action. The difference is that, in product liability cases, a statute of repose starts to run when the product is sold, not when there has been an injury. The purpose of a statute of repose is to eliminate the heavy burdens presented by claims that can arise many years - even decades - after a product has been sold.

Common sense experience indicates that if a product has performed as intended, day in and day out, year after year, for many years, and a harm occurs, the most likely explanation is that the product wore out, was not properly maintained, or was misused. It would be highly unusual for the harm to be the result of a product defect after many years of reliable use.

Not surprisingly, manufacturers almost always win cases involving old products when they go to trial. ¹⁰² The cost of defending such claims, however, can be substantial, both in terms of money spent and "person power" lost while company employees respond to discovery, have their depositions taken, and are forced to sit through lengthy trials. ¹⁰³ The result is a "great incentive for manufacturers to settle even the flimsiest cases, so long as the settlement is less than or approximately equal to defense costs." ¹⁰⁴

Bills containing a national statute of repose have been considered by every congress for almost two decades. Several have been approved by the House and Senate. ¹⁰⁵ One that **[*281]** became law, the General Aviation Revitalization Act of 1994 (GARA), ¹⁰⁶ has existed for several years and has worked well. ¹⁰⁷

The General Aviation Manufacturers Association, a national trade association of over fifty manufacturers of fixed-wing aircraft, engines, avionics, and components, submitted its five-year report to the President and Congress on GARA in September of 1999. ¹⁰⁸ The report describes the industry's progress in creating over 25,000 new jobs, doubling general aviation aircraft production, doubling export revenues, increasing general aviation research and development by 150%, and establishing new pilot training programs. ¹⁰⁹

The conclusions of the five-year report are consistent with testimony received at a March 1997 hearing by the Consumer Affairs Subcommittee of the Senate Commerce Committee that explored GARA's effects. ¹¹⁰ John Moore, Senior Vice President of Human Resources for Cessna Aircraft Company, testified that Cessna withdrew from the single engine aircraft market in 1986. As a result of GARA, Cessna is back in the single engine aircraft business. ¹¹¹ Paul Newman, Chief Financial Officer of the New Piper Aircraft Corporation, testified that GARA permitted New Piper to emerge from a Chapter 11 bankruptcy that had idled one thousand workers. ¹¹² John S. Yodice, General Counsel of the Aircraft Owners and Pilots Association (AOPA), testified that his members supported GARA, even though it limited their rights to sue. ¹¹³ AOPA members realized that they were paying an extraordinary amount for

new aircraft because of manufacturers' long-tail liability exposure for planes that had **[*282]** flown safely for many years. ¹¹⁴ John Peterson of the Montgomery County Action Council of Coffeyville, Kansas, the home of Cessna's new small aircraft plant, testified that, prior to 1995, Montgomery County ranked 98th out of 105 Kansas counties in economic indicators. ¹¹⁵ The county's population was dropping, employment was on the decline, per capita income was down, and property values were depressed. ¹¹⁶ After GARA, new housing starts were up 260%, the value of new homes doubled, retail sales were up 5%, per capita income nearly doubled, and nearly 500 people per year were moving into the county. ¹¹⁷

Our nation's principal international competitors, the European Community, Australia, and Japan, have adopted ten-year statutes of repose for all products. ¹¹⁸ These laws reinforce a significant competitive disadvantage that American manufacturers face in the global marketplace. Foreign manufacturers are not subject to liability claims based on old products in their home markets, where most of their sales occur, and many do not face claims in the United States involving very old products because they have not been in the American market that long. ¹¹⁹ With a lower-cost home market as their base and fewer transaction costs here in the United States, foreign manufacturers have greater resources available to pursue new technology and are able to offer goods in the United States for less than their American competitors. ¹²⁰ While the passage of decades may eventually even out the situation in the United States, foreign manufacturers will always have the advantage that comes from more favorable treatment in their home markets. ¹²¹ Enactment of a federal statute of repose would help level the playing field between American businesses and their foreign competitors.

[*283] At the state level, twenty states have enacted legislation to deal with the drain on resources and competitive threat to American jobs caused by long-tail product liability. ¹²² State product liability statutes of repose with fixed time periods range from six years to a maximum of fifteen years; the typical repose period is between ten and twelve years.

Federal product liability legislation should contain a statute of repose applicable to all products. ¹²³ Congress has several options to consider in setting a fixed time period for a federal statute of repose. For example, it could choose the ten-year standard that is law in Europe, Australia, and Japan, or something less. Congress also could choose the twelve-year standard that is typical of many state laws, the eighteen-year standard in GARA, ¹²⁴ or something in between, such as fifteen years. ¹²⁵ Federal statute of repose proposals over the years have not covered cases involving "toxic harms" (i.e., latent physical injuries). ¹²⁶ Congress did this to provide a balanced solution that would address the problem of "long-tail" liability while protecting a claimant's right to bring suit for a latent injury that occurred during the repose period but could not have been discovered in time to bring a claim. ¹²⁷

D. Basic Rules for **Punitive Damages**

1. In General

Punitive damages are not normal civil or tort law damages. They are not intended to compensate people to "make them whole" for something they have lost; that purpose is accomplished by compensatory damages, which provide **[*284]** compensation for both economic losses (e.g., lost wages, medical expenses, substitute domestic services) and noneconomic losses (e.g., "pain and suffering"). Rather, **punitive damages** are awarded to punish a defendant and to deter that defendant and others from engaging in the same or similar wrongful behavior in the future. ¹²⁸ They provide a "windfall recovery" for plaintiffs. ¹²⁹

Punitive damages, like many forms of punishment, are by their nature designed to "engender adverse social consequences," including, in many instances, debilitating stigma. ¹³⁰ Courts and commentators alike have emphasized the "potentially devastating"

ramifications of a **punitive damages** award on a civil defendant's character, reputation, business, and good will. ¹³¹

2. A Brief History

Punitive, or exemplary, damages first received explicit recognition by the English common law in 1763 in two cases involving illegal searches and seizures by officers of the Crown. ¹³² In *Huckle v. Money*, ¹³³ the first case to use the term "exemplary damages," and its companion case, *Wilkes v. Wood*, ¹³⁴ English courts for the first time expressed that "the punitive and [*285] deterrent purposes of damages awards could be separated from their compensatory function." ¹³⁵

Huckle and *Wilkes* were followed by cases approving **punitive damages** awards in a narrow category of torts involving conscious and intentional harm inflicted by one person on another. These "intentional torts" included assault and battery, ¹³⁶ malicious prosecution, ¹³⁷ false imprisonment, ¹³⁸ and trespass. ¹³⁹ **Punitive damages** were allowed in these cases as an auxiliary, or "helper," to the criminal law system, which in eighteenth century England "punished more severely for infractions involving property damage than for invasions of personal rights." ¹⁴⁰

As in England, **punitive damages** in colonial America (and through the nineteenth and into the twentieth centuries) were available only in a comparatively small class of torts - "the traditional intentional torts." ¹⁴¹ These included: assault and battery, ¹⁴² libel and slander, ¹⁴³ malicious prosecution, ¹⁴⁴ false [*286] imprisonment, ¹⁴⁵ and intentional interference with property such as trespass and conversion, malicious attachment, or destruction of property, ¹⁴⁶ private nuisance, ¹⁴⁷ and similar wrongful conduct. ¹⁴⁸ In general, **punitive damages** "merited scant attention," because they "were rarely assessed and likely to be small in amount." ¹⁴⁹ Typically, **punitive damages** awards only slightly exceeded compensatory damages awards, if at all. ¹⁵⁰

Beginning in the late 1960s, however, American courts began to depart radically from the historical "intentional tort" moorings of **punitive damages** law. ¹⁵¹ The advent of "mass tort" litigation resulted in an increase of **punitive damages** claims against manufacturers, ¹⁵² including the possibility of repeated imposition of **punitive damages** for an alleged risk in a single product line. ¹⁵³

For example, until 1976, there were only three reported appellate court decisions upholding awards of **punitive damages** [*287] in product liability cases, and the **punitive damages** award in each case was modest in proportion to the compensatory damages awarded. ¹⁵⁴ Then, in the late 1970s and early 1980s, the size of **punitive damages** awards "increased dramatically," ¹⁵⁵ and "unprecedented numbers of punitive awards in product liability and other mass tort situations began to surface." ¹⁵⁶ "Today," as one respected commentator in the field has noted, "hardly a month goes by without a multi-million dollar **punitive damages** verdict in a product liability case." ¹⁵⁷

This phenomenon is fueled in part by evidentiary rules that permit a contingency fee personal injury lawyer to tell the jury not only about the profit the defendant made on a product, but also the general wealth of the corporation as a whole. ¹⁵⁸ Plaintiffs' lawyers argue to juries that large, wealthy corporations will only "get the message" if **punitive damage** awards are substantial. As the United States Supreme Court noted in *Honda Motor Co., Ltd. v. Oberg*, ¹⁵⁹ a product liability **punitive damages** case, "The 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." ¹⁶⁰

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3. The Need for Federal **Punitive Damages** Reform

The United States Supreme Court has observed that **punitive damages** have "run wild" in the United States, jeopardizing fundamental constitutional rights. ¹⁶¹ The Court has held that the Due Process Clause of the Fourteenth Amendment imposes a substantive limit on the size of **punitive damages** awards. ¹⁶² The Court also has held that the Constitution provides procedural limits on when and how **punitive damages** may be awarded. ¹⁶³

As a practical matter, however, the Supreme Court cannot fashion highly specific rules in the area of **punitive damages**. Legislation is needed to protect fundamental constitutional rights, remove barriers to interstate commerce, and promote economic growth and innovation, while at the same time providing incentives for responsible business practices. ¹⁶⁴

4. Strong Support for Federal **Punitive Damages** Reform

Consistent with the United States Supreme Court's recognition that **punitive damages** are a form of punishment, federal legislation should establish the burden of proof necessary for punishment and make the punishment proportional to the "offense." At present, **punitive damages** laws in many states fail these basic requirements, as evidenced by the [*289] United States Supreme Court's observation that **punitive damages** awards in this country have "run wild." ¹⁶⁵

a. "Clear and Convincing Evidence" Burden of Proof

Federal legislation should provide that a claimant must establish proof of **punitive damages** liability by "clear and convincing evidence." ¹⁶⁶ This burden of proof standard reflects the quasi-criminal nature of **punitive damages**; it takes a middle ground between the burden of proof standard ordinarily used in civil cases (i.e., proof by a "preponderance of the evidence") and the criminal law standard (i.e., proof "beyond a reasonable doubt"). ¹⁶⁷

The "clear and convincing evidence" burden of proof standard is now law in twenty-nine states and the District of Columbia ¹⁶⁸ and has been recommended by each of the principal academic groups to analyze the law of **punitive damages** over the past decade, including the American Bar Association, the American College of Trial Lawyers, and the National Conference of Commissioners on Uniform State Laws. ¹⁶⁹ The Supreme Court has specifically endorsed the "clear [*290] and convincing evidence" burden of proof standard in **punitive damages** cases. ¹⁷⁰

There is support for the "clear and convincing evidence" burden of proof standard at the federal level. The Volunteer Protection Act of 1997, ¹⁷¹ which was enacted with strong bipartisan support, requires "clear and convincing evidence" of **punitive damages** liability before **punitive damages** can be imposed against volunteers of nonprofit organizations.

b. Proportionality: Making the Punishment Fit the "Offense"

Federal legislation also should put reasonable parameters on **punitive damages** to make the punishment fit the offense. ¹⁷² Proportionality has been an important part of the United States Supreme Court's consideration of the validity of criminal punishment. ¹⁷³ Even serious crimes such as larceny, robbery, and arson have sentences defined with a maximum set forth in a statute. ¹⁷⁴ As former Supreme Court Justice Lewis Powell wrote: "It is long past time to bring the law of **punitive damages** into conformity with our notions of just punishment." ¹⁷⁵

[*291] For example, Congress could provide that **punitive damages** may be awarded against larger businesses in an amount up to twice the claimant's economic and noneconomic losses, or \$ 250,000, whichever is greater. ¹⁷⁶ Furthermore, Congress could provide that the

maximum single punishment against an individual or small business could not exceed two times the amount awarded to the claimant for economic and noneconomic losses, or \$ 250,000, whichever is less (i.e., \$ 250,000 is the maximum). ¹⁷⁷ This lower limit would reflect the practical reality that a **punitive damages** award exceeding \$ 250,000 would bankrupt most individuals and small businesses. ¹⁷⁸

Academic groups have recommended limiting **punitive damages** to prevent excessive **punitive damages** awards. ¹⁷⁹ At the state level, limits on **punitive damages** awards exist in a number of states. ¹⁸⁰

c. Bifurcation

Federal legislation also should contain a procedural reform called "bifurcation." ¹⁸¹ At either party's request, the trial would be divided so that the proceedings on **punitive damages** would be separate from and subsequent to the proceedings on compensatory damages. Judicial economy would be achieved by [*292] having the same jury determine both compensatory damages and **punitive damages** issues.

Bifurcated trials are equitable because they prevent evidence that is highly prejudicial and relevant only to the issue of punishment from being heard by jurors and improperly considered when they are determining basic liability. For example, as stated, plaintiffs' lawyers like to introduce evidence of a company's net worth. Although a jury is often instructed to ignore such evidence unless it decides to punish the defendant, this is difficult, as a practical matter, for jurors to do. The net result may be that jurors overlook key issues regarding whether a defendant is liable for compensatory damages; they may make an award simply because they believe that the defendant "can afford it." Bifurcation would help prevent that unfair result, because evidence of the defendant's net worth would be inadmissible in the first part (i.e., compensatory damages phase) of the case.

Bifurcation also helps jurors "compartmentalize" a trial, allowing them to more easily separate the burden of proof that is required for compensatory damage awards (i.e., proof by a preponderance of the evidence) from a higher burden of proof for **punitive damages** (i.e., proof by clear and convincing evidence).

Recognizing the benefit of bifurcation, some courts have adopted the procedure as a matter of common law reform. ¹⁸² Other states have made changes through court rules or legislation. ¹⁸³ Bifurcation of **punitive damages** trials is supported by the American Bar Association, the American College of Trial Lawyers, and the National Conference of Commissioners on Uniform State Laws, among other well-known organizations. ¹⁸⁴

5.

"Data Wars" and the In Terrorem Effect of **Punitive Damages**

Opponents of **punitive damages** reform argue that changes in the law are not needed, because headline-grabbing **punitive** [*293] **damages** awards are often reduced on appeal. ¹⁸⁵ One study funded by plaintiffs' lawyers has suggested that there were only 355 **punitive damages** awards in products liability cases from 1965 to 1990. ¹⁸⁶ While the author of this study has conceded that this number was only a "guesstimate," ¹⁸⁷ the study also overlooked the practical reality that actual punitive awards represent just the tip of the iceberg in regard to their impact. They are dwarfed by the amounts paid out in settlements because of the in terrorem effect of **punitive damages**.

On average, over ninety percent of product liability cases are settled out of court or otherwise disposed of without trial. ¹⁸⁸ In many of these cases, the threat of **punitive damages** may be abused as a "wild card" to force higher settlements. ¹⁸⁹ As Yale law

professor **George Priest** has observed:

The availability of unlimited **punitive damages** affects the 95% to 98% of cases that settle out of court prior to trial. It is obvious and indisputable that a **punitive damages** claim increases the magnitude of the ultimate settlement and, indeed, affects the entire settlement process, increasing the likelihood of litigation. ¹⁹⁰

[*294] Professor Priest's observation is supported by the findings of a February 1996 Pacific Research Institute for Public Policy study. ¹⁹¹ The Institute's study concluded the following:

1. The unpredictability of a prospective **punitive damage** award contributes significantly to the uncertainty (and therefore the risk) of a court trial outcome.
2. Both the uncertainty posed by the prospect of unlimited **punitive damages**, combined with the relative probability of a **punitive damage** award if a case goes to jury trial, provide litigants who demand **punitive damages** with potent leverage against risk-averse defendants, and tip the balance in settlement bargains in favor of litigants with weak or frivolous cases. ¹⁹²

6. Unsupported Arguments Challenging Proportionality

It has been argued that proportionality may result in inadequate deterrence. ¹⁹³ As Thomas Jefferson noted, however, "if the punishment were only proportional to the injury, men would feel that their inclination as well as their duty to see the laws observed." ¹⁹⁴ Indeed, federal antitrust laws have worked well for decades with punishment set in proportion to actual losses.

Furthermore, it should be remembered that there is no limit on the number of times a business can be punished and that when a business engages in wrongful conduct it does not know how many people will be hurt and how much harm might occur. There is simply no way for a company to predetermine the actual damages of all persons who may be injured by its conduct. One also must remember that compensatory damages themselves can run very high; they can definitely have a deterrent effect on wrongful behavior as well. ¹⁹⁵

[*295] The argument that proportionality may somehow result in inadequate deterrence has been rebutted by empirical fact. A study by two Cornell University Law School professors and the National Center for State Courts found that awards in product liability **punitive damages** cases, after all appeals were exhausted, have almost always been within two times compensatory damages. ¹⁹⁶

We have been asked, in light of this report, why a so-called "cap" on **punitive damages** is needed? The answer is that the present system is time-consuming and wasteful. It may take months or years until the final "appeal" is determined. It is our judgment that having a firm outer limit on **punitive damages** will reduce appeals and legal costs without sacrificing deterrence. This should benefit both plaintiffs and defendants.

In addition, it has been argued that unlimited **punitive damages** are needed to police corporate wrongdoing. ¹⁹⁷ This assertion is not supported by fact. There is no credible evidence that the behavior of businesses is less safe in either those states that have set limits on **punitive damages** or in the six states (Louisiana, Nebraska, Washington, New Hampshire, Massachusetts, and Michigan) that do not permit **punitive damages** at all. ¹⁹⁸ Furthermore, plaintiffs in these states have no more difficulty obtaining legal representation than in those states where the "sky is the limit."

Finally, it has been suggested that a proportionality requirement for **punitive damages** could be unfair to women and minority groups that tend to recover less in compensatory damages than other groups because it may reduce the amount such individuals could recover in **punitive damages**. ¹⁹⁹ First, this argument misapprehends the basic premise that **punitive damages** have absolutely nothing to do with compensating an individual for a loss - they are purely a "windfall" to the claimant.

[*296] Second, the argument ignores the needs of women and minority groups in business, particularly small businesses, who face threats to their enterprises as a result of unlimited **punitive damages**. The U.S. Small Business Administration's Office of Women's Business Ownership has reported that there are eight million women-owned businesses in the United States. ²⁰⁰ In addition, the U.S. Small Business Administration's Office of Advocacy has reported that, by 1997, there were an estimated 3.25million minority-owned businesses in the United States, generating \$ 495billion in revenues and employing nearly 4million workers. ²⁰¹ From 1987 to 1997, the number of minority-owned businesses increased 168% while revenues grew twice as fast - 343%. ²⁰² **Punitive damages** reform would benefit these businesses greatly.

E. Several Liability for Noneconomic Loss

1. Joint Liability Reform Finds Strong Legal and Public Policy Support

For many years, committees in both the House and Senate have received numerous testimonies about the extreme and unwanted consequences of joint liability. ²⁰³ The rule of joint liability, commonly called joint and several liability, provides that when two or more persons engage in conduct that might subject them to individual liability and their conduct produces a single, indivisible injury, each defendant will be liable for the total amount of damages. ²⁰⁴ Joint liability is unfair and blunts incentives for safety because it allows negligent actors to [*297] under-insure and puts full responsibility on those who may have been only marginally at fault. ²⁰⁵

Joint liability has caused manufacturers of protective sporting goods equipment, such as safety helmets, to withdraw products from the market or be chilled from introducing new products. ²⁰⁶ Joint liability also brought about a serious public health crisis that critically threatened the availability of implantable medical devices, such as pacemakers, heart valves, artificial blood vessels, and hip and knee joints. ²⁰⁷ Companies had ceased supplying raw materials and component parts to medical implant manufacturers because they found that the costs of responding to litigation far exceeded potential sales revenues, even though courts were not finding the suppliers liable. ²⁰⁸ Congress had to enact legislation, the Biomaterials Access Assurance Act of 1998, ²⁰⁹ so that people who might find themselves in need of a lifesaving medical device would be able to obtain it in this country.

Recognizing the need for reform, over thirty states have abolished or modified the principle of joint liability. ²¹⁰ They have done so, however, in a great variety of ways and, thereby, have contributed to the already serious problem of inconsistency among our nation's tort laws. That is why federal legislation is needed.

2. The "California Approach" is a Good Model

Past federal bills proposed holding defendants liable only for their "fair share" of responsibility for a claimant's noneconomic damages (e.g., damages for pain and suffering or emotional [*298] distress). ²¹¹ States could permit the rule of joint liability to apply to economic damages (e.g., medical expenses and lost wages and the cost of substitute domestic services in the case of injury to a homemaker), so that claimants could recover full compensation for those losses. This fair approach provides a good model for future legislation.

The approach finds direct support in a California law that was adopted by voter referendum in 1986. ²¹² The "California rule" was later adopted in Nebraska after that legislature carefully studied all the arguments for and against joint liability, as well as other approaches. ²¹³ The Nebraska legislature chose the "California rule," because of its basic fairness and ease of application.

The "California rule" regarding fair share liability for noneconomic loss also finds direct support at the federal level. The Volunteer Protection Act of 1997 ²¹⁴ abolished joint liability for noneconomic damages for volunteers of nonprofit organizations. That law was overwhelmingly supported by a bipartisan majority of Congress. ²¹⁵

3. The "California Approach" is Fair and Does Not Discriminate

Some opponents of joint liability reform have argued that the "California approach" somehow discriminates because women or other groups may have fewer economic losses than others. ²¹⁶ The California approach does not discriminate. In fact, the California Supreme Court has ruled that the California law meets equal protection guarantees found in both the California and United States Constitutions. ²¹⁷

Moreover, Suzelle Smith, a highly respected attorney from California who practices both for plaintiffs and defendants, [*299] testified before the Consumer Affairs Subcommittee of the Senate Commerce Committee in September 1993 and before the Senate Judiciary Committee in March 1994 that the California approach works, is fair to all groups, and is pro-consumer. ²¹⁸ She testified that, prior to the California initiative, her experience was that juries often rendered defense verdicts in cases in which a finding to the contrary could mean that a minimally at-fault defendant would be saddled with the entire damage award. ²¹⁹

Finally, the argument that holding defendants liable only for their fair share of a claimant's noneconomic loss is somehow unfair to women ignores the needs of women in business. A study by the American Women's Economic Development Corporation showed that the number of people hired by women-owned businesses grew faster than the national average in nearly every major industry and that women-owned firms generated sales of nearly \$ 2.38 trillion in 1997. ²²⁰ Federal joint liability reform would help these women-owned businesses prosper and continue to grow.

VI. Conclusion

The product liability system is an example of what is wrong with our civil justice system. It is costly, inequitable, and unpredictable. Justice has been exchanged for a lottery. As a result, innovation is chilled, beneficial products are kept off the market, and American firms are basically forced to wear lead boots in their race against international competitors for a piece of the global economy.

Federal product liability legislation can encourage appropriate conduct and sanction bad behavior. The "real" consumers of America, those who purchase and use products on a daily basis, would benefit by getting the products they need and by no longer having to pay unfair and unreasonable "product liability taxes."

While the federal effort has dragged on, the problems created by our patchwork product liability system have grown worse. [*300] Congress should close the book on this problem by passing meaningful product liability reform legislation now.

FOOTNOTES:

†n1. See H.R. Conf. Rep. No. 104-481 (1996).

†n2. See John F. Harris, Clinton Vetoes Product Liability Measure, Wash. Post, May3, 1996, at A14.

†n3. See Richard Thornburgh, America's Civil Justice Dilemma: The Prospects For Reform, 55 Md. L. Rev. 1074 (1996) (former Attorney General of the United States calling for federal product liability reform).

†n4. See Peter W. Huber, The Legal Revolution and its Consequences (1988); Walter K. Olson, The Litigation Explosion (1991).

†n5. See S. Rep. No. 105-32, at 7, 46 (1997).

†n6. See id. at 10.

†n7. Hearings Before the Consumer Subcomm., Senate Comm. on Commerce, Science and Transp., 103rd Cong. 20 (1993) (statement of Julie Nimmons, CEO, Shutt Sports Group).

†n8. See id.

†n9. Product Liability Law Revision: Hearing Before the Senate Comm. on Commerce, Science and Transp., 105th Cong. 2 (1997) (statement of Julie Nimmons).

†n10. See id.

†n11. See H.R. Conf. Rep. No. 104-481 (1996).

†n12. See Interagency Task Force On Prod. Liab., U.S. Dep't Of Commerce, Final Report V-19 to V-21 (1976).

†n13. See id.

†n14. Product Liability Risk Retention Act of 1981, Pub. L. No. 97-45, 95 Stat. 949 (codified as amended at 15 U.S.C. 3901-3906 (1994)).

†n15. See 15 U.S.C.3901-3906 (1994).

†n16. See Interagency Task Force On Prod. Liab., supra note 12.

†n17. See Model Uniform Products Liability Act, 44 Fed. Reg. 62,714 (1979).

†n18. See 43 Fed. Reg. 14,612 (1978).

†n19. See Victor E. Schwartz & Mark A. Behrens, The Road To Federal Product Liability Reform, 55 Md. L. Rev. 1363, 1366 (1996).

†n20. See id.

†n21. See *id.*; Victor E. Schwartz & Mark A. Behrens, Federal Product Liability Reform in 1997: History And Public Policy Support Its Enactment Now, 64 *Tenn. L. Rev.* 595, 599 (1997).

†n22. See H.R. Rep. No. 104-63 (1995); H.R. Rep. No. 100-748 (1988).

†n23. See H.R. Rep. No. 104-64 (1995).

†n24. See S. Rep. No. 105-32 (1997); S. Rep. No. 104-69 (1995); S. Rep. No. 103-203 (1993); S. Rep. No. 102-215 (1991); S. Rep. No. 101-356 (1990); S. Rep. No. 99-422 (1986); S. Rep. No. 98-476 (1984); S. Rep. No. 97-670 (1982).

†n25. See 142 Cong. Rec. H3204 (daily ed. Mar. 29, 1996) (House vote on Product Liability Conference Report); 142 Cong. Rec. S2590 (daily ed. Mar. 21, 1996) (Senate vote on Product Liability Conference Report); 141 Cong. Rec. S6407 (daily ed. May 10, 1995) (vote on Senate bill); 141 Cong. Rec. H3027 (daily ed. Mar. 10, 1995) (vote on House bill).

†n26. See *The Lawyers' Veto*, *WallSt.J.*, May3, 1996, at A12.

†n27. See, e.g., H.R. Rep. No. 106-494 (2000) (limits on liability for small businesses in most civil actions and for wholesalers, distributors, and retailers in products liability cases); H.R. Rep. No. 106-410 (1999) (workplace goods statute of repose bill). Both of these bills were passed by the House of Representatives.

†n28. Congress also enacted broad legislation covering virtually all civil actions (including product liability claims) involving Year 2000 date-related device or computer system failures. See Y2K Act, Pub. L. 106-37, 113 Stat. 135 (1999).

†n29. 49 U.S.C. 40.101 (1994).

†n30. See Geoffrey A. Campbell, Study: Business Booms After Tort Reform Enacted, *ABA J.* 28 (1996).

†n31. 21 U.S.C. 1601-1606 (1998).

†n32. See S. Rep. No. 105-32, at 58-60 (1997).

†n33. See H.R. Rep. No. 105-549, pt.1 (1998).

†n34. See *id.*

†n35. In two separate opinions, the West Virginia Supreme Court of Appeals reflected on this issue. In *Garnes v. Fleming Landfill, Inc.*, 413S.E.2d 897 (W.Va. 1991), the court stated:

State courts have adopted standards that are, for the most part, not predictable, not consistent and not uniform. Such fuzzy standards inevitably are most likely to be applied arbitrarily against out-of-state defendants. Moreover, this is a problem that state courts are by themselves incapable of correcting regardless of surpassing integrity and boundless goodwill. State courts cannot weigh the appropriate trade-offs in cases concerning the national economy and national welfare when these trade-offs involve benefits that accrue outside the jurisdiction of the forum and detriments that accrue inside the jurisdiction of the forum.

Id. at 905. Earlier, in *Blankenship v. General Motors Corp.*, 406 S.E.2d 781 (W.Va. 1991), the court opined:

Indeed, in some world other than the one in which we live, where this Court were called upon to make national policy, we might very well take a meat ax to some current product liability rules. Therefore, we do not claim that our adoption of rules liberal to plaintiffs comports, necessarily, with some Platonic ideal of perfect justice. Rather, for a tiny state incapable of controlling the direction of national law in terms of appropriate trade-offs among employment, research, development, and compensation for the injured users of products, the adoption of rules liberal to plaintiffs is simple self-defense.

Id. at 786.

†n36. See *Commodity Transportation Survey*, U.S. Dept. of Commerce, Bureau of the Census, Table 1, at 1-7 (1977).

†n37. See S. Rep. No. 105-32, at 14 (1997).

†n38. Id. (quoting NGA policy EDC-15 (Feb. 7, 1997)).

†n39. See id. at 15.

†n40. See *Constitutional Challenges: An Antidote to Tort "Reform,"* ATLA Advoc., Nov. 1999, at 1.

†n41. See Victor E. Schwartz, Mark A. Behrens & Mark D. Taylor, *Who Should Make America's Tort Law: Courts Or Legislators?* (Wash. Legal Found. Feb. 1997).

†n42. See William Glaberson, *State Courts Sweeping Away Laws Curbing Suits for Injury*, N.Y. Times, July 16, 1999, at A1.

†n43. See Victor E. Schwartz, Mark A. Behrens & Mark D. Taylor, *Stamping Out Tort Reform: State Courts Lack Proper Respect for Legislative Judgments*, Legal Times, Feb. 10, 1997, at S34.

†n44. *Two More State Supreme Courts Strike Down Tort Reforms*, Liability Wk., July 19, 1999, at 7.

†n45. In *Lochner v. New York*, 198 U.S. 45 (1905), the Court invalidated a New York law that limited the number of hours bakers could work. Justice Holmes argued in his dissent that courts should respect economic legislation that is rationally related to a legitimate policy goal. He wrote:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of the majority to embody their opinions in law.

Id. at 75 (emphasis added).

✚n46. See Victor E. Schwartz, Mark A. Behrens & Leavy Mathews III, Federalism and Federal Liability Reform: The United States Constitution Supports Reform, 36 Harv. J. on Legis. 269 (1999) (discussing a century of congressional enactments changing state liability law and the cases holding the statutes constitutional) [hereinafter Schwartz, Behrens & Mathews].

✚n47. See, e.g., *Williams v. Wilson*, 972 S.W.2d 260, 261 (Ky. 1998) (overturning law that simply required plaintiffs to show that the defendant acted with "flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct [would] result in human death or bodily harm" before **punitive damages** could be imposed and instead holding that the statute violated an obscure constitutional "right" known as the "jural rights" doctrine); *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999) (overturning civil justice reform statute based on "single subject" provision of the Ohio Constitution, even though there was no case or controversy before the court). See also *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1113 (Ill. 1997) (Miller, J., dissenting) ("Today's decision represents a substantial departure from our precedent on the respective roles of the legislative and judicial branches in shaping the law of this state. Stripped to its essence, the majority's mode of analysis simply constitutes an attempt to overrule, by judicial fiat, the considered judgment of the legislature."). See generally Recent Cases, State Tort Reform - Ohio Supreme Court Strikes Down State General Assembly's Tort Reform Initiative. - *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 113 Harv. L. Rev. 804 (2000).

✚n48. See U.S. Const. art. VI.

✚n49. See Schwartz, Behrens & Mathews, *supra* note 46.

✚n50. See Product Liability: Hearing on H.R. 10 Before the House Comm. on the Judiciary, 104th Cong. 3-4 (1995) (testimony of Larry Stewart, President, Association of Trial Lawyers of America); Product Liability: Hearing on H.R. 10 Before the House Subcomm. on Commerce, Trade, and Hazardous Material, 104th Cong. 3-6 (1995) (testimony of Larry Stewart); The Product Liability Fairness Act of 1995: Hearing on S. 565, Before the Subcomm. on Consumer Affairs, Foreign Commerce, and Tourism of the Senate Comm. on Commerce, Science, and Transp., 104th Cong. 2-5 (1995) (testimony of Larry Stewart).

✚n51. See Mark S. Mandell, Preserving Judicial Independence, *Trial*, Jan. 1999, at 9.

✚n52. See generally *Smith v. Cutter Biological, Inc.*, 823 P.2d 717, 736 (Haw. 1991) (Moon, J., concurring in part and dissenting in part) (disagreeing with the majority's application of "market share liability" to a blood products case, because "there are too many unanswered questions of social, economic, and legal import which only the legislature, with its investigative powers and procedures can determine").

✚n53. *BMW v. Gore*, 517 U.S. 559, 574 (1996) (emphasis added).

✚n54. See *Berger v. Supreme Court of Ohio*, 598 F. Supp. 69 (S.D. Ohio 1984) (upholding a judicial canon restricting a judicial candidate's campaign activities), *aff'd*, 861 F.2d 719 (6th Cir. 1988), *cert. denied*, 490 U.S. 1108 (1989). The trial court noted that "the very purpose of the judicial function makes inappropriate the same kind of particularized pledges and predetermined commitments that mark campaigns for legislative and executive office. A judge acts on individual cases, not broad programs." *Id.* at 76 (emphasis added).

✚n55. U.S. Const. art. III, 2, cl. 1.

†n56. *BMW*, 517 U.S. at 574.

†n57. See U.S. Const. art. I, 8, cl. 3. See also Schwartz, Behrens & Mathews, *supra* note 46.

†n58. See Schwartz, Behrens & Mathews, *supra* note 46.

†n59. See, e.g., Consumer Product Safety Act, 15 U.S.C. 2051-2084 (1972); National Traffic and Motor Vehicle Safety Act, 15 U.S.C. 1381 (1966) (repealed 1994); Magnuson-Moss Warranty--Federal Trade Commission Improvement Act, 15 U.S.C. 2301-2312 (1982); Federal Hazardous Substances Act, 15 U.S.C. 1261-1278 (1960); Poison Prevention Packaging Act, 15 U.S.C. 1471-1476 (1970); Flammable Fabrics Act, 15 U.S.C. 1191-1204 (1972); and the Medical Device Amendments of 1976, 21 U.S.C. 360c-360ss (1988 & Supp. 1993), to the Federal Food, Drug and Cosmetic Act of 1938, 21 U.S.C. 301-395 (1988 & Supp. 1993); Occupational Safety and Health (OSHA) Act, 29 U.S.C. 651-678 (1970).

†n60. See Schwartz, Behrens & Mathews, *supra* note 46.

†n61. See, e.g., H.R. Rep. No. 106-494, at 47-49 (2000) (minority views); H.R. Rep. No. 106-410, at 16-18 (1999) (minority views).

†n62. Conservatives also enjoy pointing out an apparent inconsistency in liberal philosophy. The same Members who have expressed a resounding "no" to federal civil justice and liability reform legislation strongly support the Consumer Products Safety Commission, in part because products flow in interstate commerce.

†n63. See C. Boyden Gray, Regulation and Federalism, 1 *Yale J. On Reg.* 93, 96-98 (1983) (explaining the Reagan Administration's reasons for supporting national product liability legislation); Joe Davidson, Bill to Limit Product Liability Lawsuits by Consumers Fails in Senate, but Barely, *Wall St. J.*, Sept. 11, 1992, at A4 (stating that "President Bush strongly supported [federal product liability reform legislation] and made it a hot campaign topic with a comment at the Republican convention").

†n64. See Robert L. Rabin, Federalism And The Tort System, 50 *Rutgers L. Rev.* 1 (1997); Symposium, Constructing a New Federalism: Testing Two Assumptions About Federalism and Tort Reform, 14 *Yale J. On Reg.* 371 (1996); Symposium, Tort Law and Federalism: Whatever Happened to Devolution?, 14 *Yale J. On Reg.* 329 (1996).

†n65. See generally Howard F. Twigg & Robert S. Peck, Keeping The Common Law: State Courts Have Fundamental Authority to Limit Tort Reform, *Legal Times*, Mar. 3, 1997, at 30 (arguing in support of judicial nullification of state tort reform legislation).

†n66. See Schwartz, Behrens & Mathews, *supra* note 46.

†n67. See *id.*

†n68. See *id.*

†n69. See Sherman Joyce, Federal Product Liability Litigation Reform: Product Liability Law In The Federal Arena, 19 *Seattle U.L. Rev.* 421 (1996); Schwartz & Behrens, *supra* note 21 at 604-07; Victor E. Schwartz & Liberty Mahshigian, A Permanent Solution For Product Liability Crises: Uniform Federal Tort Law Standards, 64 *Den. U.L. Rev.* 685 (1988).

†n70. See, e.g., Jerry J. Phillips, Hoist By One's Own Petard: When A Conservative Commerce Clause Interpretation Meets Conservative Tort Reform, 64 *Tenn. L. Rev.* 647

(1997).

†n71. 514 U.S. 549 (1995).

†n72. 18 U.S.C. 922(q)(1)(A).

†n73. 514 U.S. at 551. See also U.S. Const. art. I, 8, cl. 3. See generally Herbert Hovenkamp, *Judicial Restraint And Constitutional Federalism: The Supreme Court's Lopez And Seminole Tribe Decisions*, 96 Colum. L. Rev. 2213 (1996); Symposium, *The New Federalism After United States v. Lopez*, 46 Case W. Res. L. Rev. 633 (1996); Symposium, *Reflections on United States v. Lopez*, 94 Mich. L. Rev. 533 (1995).

†n74. *Lopez*, 514 U.S. at 561.

†n75. *Id.* at 567.

†n76. See Patrick Hoopes, *Tort Reform In The Wake of United States v. Lopez*, 24 Hastings Const. L.Q. 785 (1997).

†n77. See *Lopez*, 514 U.S. at 562.

†n78. See Cynthia C. Lebow, *Federalism And Federal Product Liability Reform: A Warning Not Heeded*, 64 Tenn. L. Rev. 665 (1997); Beth Rogers, Note, *Legal Reform - At The Expense of Federalism? House Bill 956, Common Sense Civil Justice Reform Act and Senate Bill 565, Product Liability Reform Act*, 21 U. Dayton L. Rev. 513 (1996); Jeffrey White, *Does products bill collide with Tenth Amendment?*, 33-Nov. TRIAL 30 (1997).

†n79. 505 U.S. 144 (1992).

†n80. 521 U.S. 898 (1997).

†n81. See Schwartz, Behrens & Mathews, *supra* note 46.

†n82. See *id.*

†n83. See *id.*

†n84. See *id.*

†n85. See *id.*

†n86. Restatement (Third) of Torts: Products Liability (1998).

†n87. See generally James A. Henderson, Jr. & Aaron D. Twerski, *The Politics of the Products Liability Restatement*, 26 Hofstra L. Rev. 667 (1998); Victor E. Schwartz, *The Restatement (Third) of Torts: Products Liability - The American Law Institute's Process of Democracy and Deliberation*, 26 Hofstra L. Rev. 743 (1998); Victor E. Schwartz, *The Restatement (Third) of Torts: Products Liability - A Guide to Its Highlights*, 34 Tort & Ins. L.J. 85 (1998).

†n88. The majority of states have laws which do not permit recovery in this situation. Four states (**Alabama**, Maryland, North Carolina, and Virginia) and the District of Columbia continue to recognize contributory negligence as an absolute defense. Most other states have adopted some form of modified comparative fault standard, which would bar a plaintiff's claim if the plaintiff exceeded a certain percentage of fault (e.g., 50%). See Victor E. Schwartz, *Comparative Negligence app. a* (3d ed. 1994 & Supp. 1999).

†n89. See, e.g., Wash. Rev. Code 5.40.060 (West 1999).

†n90. See S. Rep. No. 105-32, at 36 (1997).

†n91. See id. at 33.

†n92. See id.

†n93. M. Stuart Madden, The Vital Common Law: Its Role in a Statutory Age, 18 U. Ark. Little Rock L.J. 555, 570 (1996).

†n94. See S. Rep. No. 105-32, at 33-34 (1997).

†n95. See id. at 34.

†n96. See id.

†n97. See Colo. Rev. Stat. 13-21-402 (1998); Del. Code Ann. tit. 18 7001 (1998); Ga. Code Ann. 51-1-11.1 (Supp. 1999); Idaho Code 6-1407 (1999); 735 ILCS 5/2-621 (1999); Iowa Code 613.18 (Supp. 1997); Kan. Stat. Ann. 60-3306 (1998); Ky. Rev. Stat. Ann. 411.340 (Michie/Bobbs-Merrill 1998); La. Rev. Stat. Ann. 9:2800.53 (West 1999); Md. Cts. & Jud. Pro. Code Ann. 5-405 (1999); Mich. Comp. Laws 600.2947(6) (1999); Minn. Stat. 544.41 (West 1998); Mo. Rev. Stat. 537.762 (1999); Neb. Rev. Stat. 25-21,181 (1998); N.C. Gen. Stat. 99B-2 (1999); N.D. Cent. Code 28-01.3-04 (Supp. 1999); N.J. Stat. Ann. 2A:58C-9 (1999); Ohio Rev. Code Ann. 2307.78 (Anderson 1999); S.D. Codified Laws 20-9-9 (1999); Tenn. Code Ann. 29-28-106 (Supp. 1999); Wash. Rev. Code 7.72.040 (West 1999).

†n98. See S. Rep. No. 105-32, at 34 (1997).

†n99. To provide appropriate levels of protection for people injured by motor vehicles, all states have minimum financial responsibility laws which establish a minimum level of insurance coverage that must be maintained on every vehicle. In most states the financial responsibility laws operate to cover the liability of any driver. Some states do not require liability on the part of the driver to trigger coverage; these states allow unlimited vicarious liability. See Conn. Gen. Stat. Ann. 14-154a (West 1999); D.C. Code Ann. 40-408 (1999); Iowa Code 321.493 (1997); Me. Rev. Stat. Ann. tit. 29-A, 1652-53 (West Supp. 1998); N.Y. Veh. & Traf. 388 (McKinney 1999); R.I. Gen. Laws 31-33-6, 31-33-7 (1998). A few states have restricted the application of their vicarious liability laws to those cases where the rental or leasing company failed to maintain the required insurance coverage under the state's financial responsibility law. See Ariz. Rev. Stat. 28-324 (1999); Neb. Rev. Stat. 25-21,239 (1999) (applying only to trucks); Nev. Rev. Stat. 482.305 (1999). A few states have capped the liability of rental companies at the level of the state's financial responsibility law. See Cal. Veh. Code 17150-51 (West 1999); Idaho Code 49-2417 (1999); Mich. Comp. Laws Ann. 257.401 (West Supp. 1999). Two states have recently enacted laws which limit vicarious liability, but with liability exposures set at a higher level than the preexisting financial responsibility requirements. See Fla. Stat. Ann. 324.021 (West 1999); Minn. Stat. 170.54 (1998).

†n100. See S. Rep. No. 105-32, at 34 (1997).

†n101. See id.

†n102. See H.R. Rep. No. 106-410, at 3 (1999).

†n103. See id. at 3.

↗n104. Id. at 3-4.

↗n105. Most recently, the House passed the "Workplace Goods Job Growth and Competitiveness Act of 1999," which would create an 18-year statute of repose for durable goods used in the workplace where the claimant has received or is eligible to receive workers' compensation. See Cong. Rec. H183-84 (daily ed. Feb. 2, 2000); see also 142 Cong. Rec. H3204 (daily ed. Mar. 29, 1996) (House vote on Product Liability Conference Report); 142 Cong. Rec. S2590 (daily ed. Mar. 21, 1996) (Senate vote on Product Liability Conference Report); 141 Cong. Rec. S6407 (daily ed. May 10, 1995) (vote on Senate product liability bill); 141 Cong. Rec. H3027 (daily ed. Mar. 10, 1995) (vote on House product liability bill).

↗n106. Pub. L. No. 103-298, 108 Stat. 1552 (codified at 49 U.S.C. 40101). See generally Note, David Moffitt, The Implications of Tort Reform For General Aviation: The General Aviation Revitalization Act of 1994, 1 Syracuse J. Legis. & Pol'y 215 (1995).

↗n107. See General Aviation Manufacturers Association, A Report to the President and Congress on The General Aviation Revitalization Act, Sept. 1999.

↗n108. See id.

↗n109. See id.

↗n110. See S. Rep. No. 105-32, at 41-42 (1997).

↗n111. See id. at 41.

↗n112. See id.

↗n113. See id. at 42.

↗n114. See id.

↗n115. See id.

↗n116. See id.

↗n117. See id.

↗n118. See Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability For Defective Products, 28 O.J. Eur. Comm. (No. L210) 29, art. 11 (July 25, 1985); Product Liability Law, Law No. 85 of 1994, art. 5(1) (Japan). See generally Mark A. Behrens & Daniel H. Raddock, Japan's New Product Liability Law: The Citadel of Strict Liability Falls, But Access To Recovery Is Limited By Formidable Barriers, 16 U. Pa. J. Int'l Bus. L. 669 (1996). Australia has adopted the EC Product Liability Directive.

↗n119. See H.R. Rep. No. 106-410, at 5 (1999).

↗n120. See id.

↗n121. See id.

↗n122. See Ark. Code Ann. 16-116-105(c) (Michie 1997); Colo. Rev. Stat. 13-21-403 (1998); Colo. Rev. Stat. 13-80-107(1)(b) (1998); Conn. Gen. Stat. 52-577a (1999); Fla. Stat. Ann. 95.031(b) (1999); Ga. Code Ann. 51-1-11(b)(2) (1999); Idaho Code 6-1403(2) (1999); 735 Ill. Comp. Stat. 5/13-213(b) (West 1997); Ind. Code Ann. 34-20-3-1(b) (1999);

Iowa Code 614.1(2A) (1997); Kan. Stat. Ann. 60-3303 (1997) Ky. Rev. Stat. Ann. 411.310 (1) (Banks-Baldwin 1998); Mich. Stat. Ann. 27A.5805(9) (1999); Minn. Stat. Ann. 604.03 (1998); Neb. Rev. Stat. 25-224 (1998); N.C. Gen. Stat. 1-50(a)(6) (1999); N.D. Cent. Code 28-01.3-08(1) (1999); Or. Rev. Stat. 30.905(1) (1997); Tenn. Code Ann. 29-28-103(a) (1999); Tex. Civ. Prac. & Rem. Code Ann. 16.012 (West 1999); Wash. Rev. Code 7.72.060 (1) (1999).

†n123. See H.R. Rep. No. 104-64, at 15-16 (1995).

†n124. Pub. L. No. 103-298, 108 Stat. 1552 (codified at 49 U.S.C. 40101).

†n125. See H.R. Rep. No. 104-64, at 15-16 (1995).

†n126. See H.R. Rep. No. 106-410, at 2 (1999); S. Rep. 105-32, at 19 (1997).

†n127. See H.R. Rep. No. 106-410, at 7 (1999).

†n128. All jurisdictions, except Louisiana, Nebraska, Massachusetts, Michigan and Washington, permit the award of **punitive damages** in products liability cases. Michigan permits "exemplary" damages as compensation for mental suffering consisting of a sense of insult, indignity, humiliation, or injury to feelings, but does not permit **punitive damages** for purposes of punishment. See Product Liability Desk Reference - A Fifty State Compendium (Morton Daller ed., 1999).

†n129. See *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981) (Brennan, J., dissenting).

†n130. See *Addington v. Texas*, 441 U.S. 418, 426 (1979).

†n131. *Browning-Ferris v. Kelco Disposal*, 492 U.S. 257, 281 (Brennan & Marshall, JJ., concurring). See also *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 50 (1979) ("the impact of [a **punitive damages** award] is unpredictable and potentially substantial"); Comment, Criminal Safeguards and the **Punitive Damages** Defendant, 34 U. Chi. L. Rev. 408, 417 (1967) (**punitive damages** awards have "'momentous and serious' ... consequences" for civil defendants) (citation omitted).

†n132. See James B. Sales & Kenneth B. Cole, Jr., **Punitive Damages: A Relic That Has Outlived Its Origins**, 37 Vand. L. Rev. 1117, 1120 (1984); see also *Sharpe v. Brice*, 96 Eng. Rep. 557 (C.P. 1774) (illegal search and seizure); *Bruce v. Rawlins*, 95 Eng. Rep. 934 (C.P. 1770) (illegal search and seizure); *Beardmore v. Carrington*, 95 Eng. Rep. 790 (C.P. 1764) (illegal search and seizure).

†n133. 95 Eng. Rep. 768 (C.P. 1763).

†n134. 98 Eng. Rep. 489 (C.P. 1763).

†n135. Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of **Punitive Damages**, 56 S. Cal. Rev. 1, 14 (1982). In *Wilkes*, Lord Chief Justice Pratt announced: "[A] jury shall have it in their power to give damages for more than the injury received as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." *Wilkes*, 98 Eng. Rep. at 498-99. See also Calvin R. Massey, The Excessive Fines Clause and **Punitive Damages: Some Lessons From History**, 40 Vand. L. Rev. 1233 (1987).

†n136. See, e.g., *Benson v. Frederick*, 97 Eng. Rep. 1130 (K.B. 1766); *Grey v. Grant*, 95 Eng. Rep. 794 (C.P. 1764).

†n137. See, e.g., *Hewlett v. Cruchley*, 128 Eng. Rep. 696 (C.P. 1813); *Leith v. Pope*, 96 Eng. Rep. 777 (C.P. 1779).

†n138. See, e.g., *Fabrigas v. Mostyn*, 96 Eng. Rep. 549 (C.P. 1774).

†n139. See, e.g., *Merest v. Harvey*, 128 Eng. Rep. 761 (C.P. 1814); *Sears v. Lyons*, 171 Eng. Rep. 658 (K.B. 1818). **Punitive damages** also were allowed for seduction. See, e.g., *Tullidge v. Wade*, 95 Eng. Rep. 909 (C.P. 1769). In addition, for a period, English courts permitted an award of **punitive damages** for criminal conversation (i.e., adultery). See, e.g., *Duberly v. Gunning*, 100 Eng. Rep. 1226 (K.B. 1792).

†n140. 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, 355 (1983).

†n141. The use of "private attorneys general" to sanction antisocial conduct unregulated by the criminal law reached America in 1784. See *Genay v. Norris*, 1S.C.L. 6 (1784). See also David G. Owen, **Punitive Damages** in Products Liability Litigation, 74 Mich. L. Rev. 1257, 1263, 1287-88 (1976).

†n142. See, e.g., *Ward v. Blackwood*, 41Ark. 295 (1883); *Lyon v. Hancock*, 35Cal. 372 (1868); *Corwin v. Walton*, 18Mo. 71 (1853); *Trogden v. Terry*, 172N.C. 540 (1916); *Porter v. Seiler*, 23Pa. 424 (1854).

†n143. See, e.g., *Sheik v. Hobson*, 19 N.W. 875 (Iowa 1884); *Louisville & Nashville R.R. Co. v. Ballard*, 3 S.W. 530 (Ky. 1887); *Vanch v. Hall*, 3N.J.L. 578 (1809); *Gilreath v. Allen*, 32N.C. (10Ired.) 67 (1849); *Benaway v. Coyne*, 3Pin. 196 (Wis. 1851).

†n144. See, e.g., *Brown v. McBride*, 24Misc. 235, 52N.Y.S. 620 (Sup. Ct. Queens County 1898).

†n145. See, e.g., *Lake Shore & Mich. S. Ry. v. Prentice*, 147 U.S. 101 (1893); *Green v. Southern Express Co.*, 41Ga. 515 (1871); *Schlencker v. Risley*, 4Ill. 483 (1842); *Taber v. Hutson*, 5Ind. 322 (1854); *Parsons v. Harper*, 57Va. 64 (1860); *Hamlin v. Spaulding*, 27Wis. 360 (1870).

†n146. See, e.g., *Dorsey v. Manlove*, 14Cal. 553 (1860); *Treat v. Barber*, 7Conn. 274 (1828); *Singer Mfg. Co. v. Holdfodt*, 86Ill. 455 (1877); *Taylor v. Giger*, 3Ky. 586 (1808); *Schindel v. Schindel*, 12Md. 108 (1858); *Huling v. Henderson*, 161Pa. 553 (1894); *Bradshaw v. Buchanan*, 50Tex. 492 (1878).

†n147. See, e.g., *Yazoo v. M.V.R. Co.*, 40 So. 163 (Miss. 1905); *Schumacher v. Shawhan Distillery Co.*, 165 S.W. 1142 (Mo. 1914).

†n148. See, e.g., *Linsley v. Bushnell*, 15Conn. 225 (1842); *Whipple v. Walpole*, 10N.H. 130 (1839); *Meibus v. Dodge*, 38Wis. 300 (1875). As in England, **punitive damages** were also awarded in cases involving seduction. See, e.g., *Reutkemeier v. Nolte*, 161 N.W. 290 (Iowa 1917); *Coryell v. Colbaugh*, 1N.J. 77 (1791).

†n149. Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 2 (1982).

†n150. See, e.g., *Southern Kan. Ry. v. Rice*, 16 P. 817 (Kan. 1888) (\$ 35 costs and fees, \$ 10 injury to feelings, \$ 71.75 punitive); *Fay v. Parker*, 53N.H. 342 (1872) (\$ 150 actual, \$ 331.67 exemplary); *Taylor v. Grand Trunk Ry. Co.*, 48N.H. 304 (1869) (\$ 500 actual damages, \$ 858.50 exemplary); *Woodman v. Nottingham*, 49N.H. 387 (1870) (\$ 578 actual,

\$ 100 exemplary).

†n151. In 1967, a California court of appeals held for the first time that **punitive damages** were recoverable in a strict product liability action. See Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967).

†n152. "Mass tort" litigation began in the late 1960s with cases involving the sale of the anti-cholesterol drug MER/29. See Roginsky v. Richardson-Merrell, Inc., 378F.2d 832 (2dCir. 1967); Paul D. Rheingold, The MER/29 Story - An Instance of Successful Mass Disaster Litigation, 56Cal. L. Rev. 116 (1968). See generally Richard A. Seltzer, **Punitive Damages** In Mass Tort Litigation: Addressing The Problems of Fairness, Efficiency And Control, 52Fordham L.Rev. 37 (1983).

†n153. See Victor E. Schwartz, Mark A. Behrens & Lori Bean, **Multiple Imposition Of Punitive Damages: The Case For Reform**, Critical Legal Issues: Working Paper Series (Wash. Legal Found. Mar. 1995).

†n154. See Gillham v. Admiral Corp., 523F.2d 102 (6thCir. 1975) (\$ 125,000 compensatory damages, \$ 50,000 attorneys' fees, \$ 100,000 **punitive damages**); Toole v. Richardson-Merrell, Inc., 60Cal. Rptr. 398 (Cal. Ct. App. 1967) (\$ 175,000 compensatory, \$ 250,000 **punitive damages**); Moore v. Jewel Tea Co., 253N.E.2d 636 (Ill. App. 1969) (affirming \$ 920,000 compensatory damages, \$ 10,000 **punitive damages**), aff'd, 263N.E.2d 103 (Ill. 1970).

†n155. **George L. Priest, Punitive Damages** and Enterprise Liability, 56 S. Cal. L. Rev. 123, 123 (1982).

†n156. John Calvin Jeffries, Jr., A Comment on The Constitutionality of **Punitive Damages**, 72Va. L. Rev. 139, 142 (1986).

†n157. Symposium, **Punitive Damages: A Proposal for Further Common Law Development of the Use of Punitive Damages** in Modern Products Liability Litigation, 40 Ala. L. Rev. 919 (1989).

†n158. See Kenneth S. Abraham & John Calvin Jeffries, Jr., **Punitive Damages** and the Rule of Law: The Role of Defendant's Wealth, 18 J. Legal Stud. 415 (1989); 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, 271 (1993).

†n159. 512 U.S. 415 (1994).

†n160. Id. at 432. Honda Motor involved an all-terrain vehicle that flipped over when an inebriated plaintiff tried to drive it up a hill. The Court struck down a **punitive damages** award on the ground that Oregon law violated due process because it did not provide an opportunity for meaningful appellate review of the size of **punitive damages** awards. A year earlier, in TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993), Justice O'Connor observed:

Corporations are mere abstractions and, as such, are unlikely to be viewed with much sympathy. Moreover, they often represent a large accumulation of productive resources: jurors naturally think little of taking an otherwise large sum of money out of what appears to be an enormously larger pool of wealth. Finally, juries may feel privileged to correct perceived social ills stemming from unequal wealth distribution by transferring money from

"wealthy" corporations to comparatively needier plaintiffs.

509 U.S. at 491 (O'Connor, J., dissenting).

†n161. *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991). See also *Honda Motor*, 512 U.S. at 432 (stating that **punitive damages** "pose an acute danger of arbitrary deprivation of property," raising serious due process concerns).

†n162. See *BMW v. Gore*, 517 U.S. 559, 585-86 (1996). See also *TXO*, 509 U.S. at 458; *Pacific Mutual*, 499 U.S. at 23-24. Cf. *Pulla v. Amoco Oil Co.*, 72F.3d 648, 661 (8th Cir. 1995) (opinion by retired Supreme Court Justice Byron White) (striking down **punitive damages** award as "excessive, unreasonable and violative of due process").

†n163. See *Honda Motor Co.*, 512 U.S. at 432 (1994).

†n164. As eminent Professor Aaron Twerski, reporter for the Restatement (Third) of Torts: Products Liability, wrote years ago:

The risk of crushing liability as a result of **punitive damages** is too great. It threatens the business community with the legal equivalent of an atom bomb. It places the entire product liability system in jeopardy of runaway unregulated verdicts. It deserves a clear-cut federal solution.

Aaron Twerski, National Product Liability Legislation: In Search For The Best Of All Possible Worlds, 18 Idaho L. Rev. 411, 475-76 (1982). See also Dick Thornburgh, No End in Sight as **Punitive Damages** Go Up, Up, Up, Wall St. J., Mar. 13, 2000, at A47.

†n165. *Pacific Mutual*, 499 U.S. at 18.

†n166. See S. Rep. No. 105-32, at 48-49 (1997).

†n167. See Malcolm Wheeler, The Constitutional Case for Reforming **Punitive Damage** Procedures, 69 Va. L. Rev. 269, 298 (1983).

†n168. See Ala. Code 6-11-20 (1999); Alaska Stat. 09.17.020 (1999); Cal. Civ. Code 3294 (a) (1999); Fla. Stat. ch. 768.73 (1998); Ga. Code Ann. 51-12-5.1 (1999); Iowa Code Ann. 668A.1 (1997); Kan. Stat. Ann. 60-3701(c) (1998); Ky. Rev. Stat. Ann. 411.184(2) (Michie/Bobbs-Merrill 1998); Minn. Stat. Ann. 549.20 (West Supp. 1998); Miss. Code Ann. 11-1-65(1)(a) (Supp. 1998); Mont. Code Ann. 27-1-221(5) (1998); N.J. Stat. Ann. 2A:15-5.12 (1999); Nev. Rev. Stat. Ann. 42-005(1) (1998); N.C. Gen. Stat. 10-15(b) (1999); N.D. Cent. Code 32-03.2-11 (Supp. 1999); Ohio Rev. Code Ann. 2307.80(A) (Anderson 1999); Okla. Stat. Ann. tit. 23, 9.1 (West Supp. 1998); Or. Rev. Stat. 18.537 (1997); S.C. Code Ann. 15-33-135 (Law. Co-op. Supp. 1998); S.D. Codified Laws Ann. 21-1-4.1 (1999); Tex. Civ. Prac. & Rem. Code 41.003 (1999); Utah Code Ann. 78-18-1 (1999); *Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d 675 (Ariz. 1986); *Jonathan Woodner, Co. v. Breeden*, 665 A.2d 929 (D.C. 1995); *Masaki v. General Motors Corp.*, 780 P.2d 566 (Haw. 1989); *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349 (Ind. 1982); *Tuttel v. Raymond*, 494 A.2d 1353 (Me. 1985); *Owens-Illinois v. Zenobia*, 601 A.2d 633 (Md. 1992); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437 (Wis. 1980). One state, Colorado,

requires proof "beyond a reasonable doubt" in **punitive damages** cases. See Colo. Rev. Stat. 13-25-127(2) (1987).

✚n169. See American Bar Association, Special Committee on **Punitive Damages** of the American Bar Association, Section on Litigation, **Punitive Damages: A Constructive Examination** 19 (1986) [hereinafter ABA Report]; American College of Trial Lawyers, Report on **Punitive Damages** of the Committee on Special Problems in the Administration of Justice 15-16 (1989) [hereinafter ACTL Report]; National Conference Of Commissioners On Uniform State Laws, Uniform Law Commissioners' Model **Punitive Damages** Act 5 (approved on July 18, 1996) [hereinafter Uniform Law Commissioners' Model **Punitive Damages** Act]; see also American Law Institute, 2 Enterprise Responsibility for Personal Injury - Reporters' Study 248-49 (1991) [hereinafter ALI Reporters' Study].

✚n170. See *Pacific Mutual*, 499 U.S. at 23 n.11 (stating that "there is much to be said in favor of a state's requiring, as many do, ... a standard of "clear and convincing evidence"").

✚n171. Pub. L. No. 105-19, 111 Stat. 218.

✚n172. Congress included a cap on **punitive damages** for individuals and small businesses in the Year 2000 Readiness and Responsibility Act, Pub. L. 106-37, 113 Stat. 135 (1999). The "Y2K Act" established procedures and legal standards for lawsuits stemming from Year 2000 date-related computer failures.

✚n173. See *Solem v. Helm*, 463 U.S. 277, 284 (1983) ("The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence"); *Weems v. United States*, 217 U.S. 349, 366-67 (1910) (it is "a precept of the fundamental law" as well as "a precept of justice that punishment should be graduated and proportioned to the offense").

✚n174. Some examples of federal criminal fines, even for particularly egregious crimes, do not exceed \$ 250,000 and include the following: tampering with consumer products (\$ 250,000 if death results), U.S. Sentencing Guidelines Manual 2N1.1, 5E1.2 (1998); assault on the President (\$ 30,000), U.S. Sentencing Guidelines Manual 2A6.1, 5E1.2 (1998); bank robbery (\$ 75,000), U.S. Sentencing Guidelines Manual 2B3.1, 5E1.2; and sexual exploitation of children (\$ 100,000), U.S. Sentencing Guidelines Manual 2G2, 5E1.2 (1998). See generally Jonathan Kagan, Comment, Toward a Uniform Application of Punishment: Using the Federal Sentencing Guidelines as a Model for **Punitive Damages** Reform, 40 U.C.L.A. L. Rev. 753 (1993).

✚n175. Lewis Powell, The "Bizarre" Results of **Punitive Damages**, Wall St. J., Mar. 8, 1995, at A21.

✚n176. See S. Rep. No. 105-32, at 49 (1997); H.R. Conf. Rep. No. 104-481, at 10 (1996).

✚n177. See S. Rep. No. 105-32, at 49 (1997); H.R. Conf. Rep. No. 104-481, at 10 (1996). A bill to cap **punitive damages** for individuals and small businesses in all civil actions was reported out of the House Judiciary Committee in February of 2000 by voice vote. See H.R. Rep. No. 106-494 (2000). The House passed the bill on February 16, 2000 by a vote of 221 to 193.

✚n178. See H.R. Rep. No. 106-494, at 9 (2000).

✚n179. See ABA Report, *supra* note 169, at 64-66 (recommending that **punitive damages** awards in excess of three-to-one ratio to compensatory damages be considered presumptively "excessive"); ACTL Report, *supra* note 169, at 15 (proposing that **punitive damages** be awarded up to two times a plaintiff's compensatory damages or \$ 250,000,

whichever is greater); ALI Reporters' Study, *supra* note 169, at 258-59 (endorsing concept of ratio coupled with alternative monetary ceiling).

†n180. See **Ala.** Code 6-11-21 (1999); Alaska Admin. Code tit. 58 9.17.020(f)-(h) (1999); Colo. Rev. Stat. 13-21-102(1)(a)(1998); Conn. Gen. Stat. 52-240b (1999); Fla. Stat. Ann. 768.73(1)(b) (West Supp. 1998); Ind. Code Ann. 34-51-3-4 (1999); Kan. Stat. Ann. 60-3701 (1998); N.J. Stat. Ann. 2A:15-5.14 (West 1999); N.C. Gen. Stat. 1D-25 (1999); N.D. Cent. Code 32.03.2-11(4) (1999); Okla. Stat. tit. 23 9.1 (1998); Tex. Civ. Prac. & Rem. Code Ann. 41.008 (West 1999); Va. Code Ann. 8.01-38.1 (1999).

†n181. See S. Rep. No. 105-32, at 52-53 (1997); H.R. Conf. Rep. No. 104-481, at 11-12 (1996).

†n182. See *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992); *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994).

†n183. See, e.g., Cal. Civ. Code 3295(d) (West Supp. 1999); Minn. Stat. Ann. 549.20 (West Supp. 1999); Miss. Code Ann. 11-1-65(1) (a) (Supp. 1999).

†n184. See ABA Report, *supra* note 169, at 19; ACTL Report, *supra* note 169, at 18-19; Uniform Law Commissioners' Model **Punitive Damages** Act, *supra* note 169, at 11; ALI Reporters' Study, *supra* note 169, at 255 n.41.

†n185. See H.R. Rep. No. 106-494, at 41-42 (2000) (minority views); S. Rep. No. 105-32, at 74-75 (1997) (minority views); see also Michael L. Rustad, *Unraveling Punitive Damages: Current Data And Further Inquiry*, 1 Wis. L. Rev. 15 (1998); Marc Galanter, *Real World Torts: An Antidote To Anecdote*, 55 Md. L. Rev. 1093 (1996); Michael L. Rustad, *How The Common Good Is Served By The Remedy of Punitive Damages*, 64 Tenn. L. Rev. 793 (1997).

†n186. See Michael Rustad, *Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts* (Roscoe Pound Found. 1991).

†n187. Professor Rustad said in his report: "The actual number of **punitive damages** awards in product liability litigation is unknown and possibly unknowable because no comprehensive recording system exists." *Id.* at 2 (emphasis added).

†n188. See Brian J. Ostrom & Neal B. Kauder, *State Justice Inst., Examining the Work of State Courts, 1993: A National Perspective from the Court Statistics Project 24* (1993).

†n189. See Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1, 28 (1990) (noting that "jury verdicts in the minority of matters actually adjudicated play an important role in determining the worth, or settlement value, of civil matters filed but not tried"). Furthermore, in some states, **punitive damages** are not insurable. Thus, a business that does not self-insure can be subject to unwarranted pressure to settle a case for compensatory damages, which are insurable; a **punitive damages** award could end the business.

†n190. **George L. Priest, Punitive Damages Reform: The Case of Alabama**, 56 La. L. Rev. 825, 830 (1996).

†n191. Steven Hayward, *Pacific Research Inst. Public Pol'y, The Role of Punitive Damages In Civil Litigation*, New Evidence 8 (1996).

†n192. *Id.*

†n193. See, e.g., S. Rep. 105-32, at 76-77 (1997) (minority views).

†n194. Thomas Jefferson, A Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital, in 2 The Papers of Thomas Jefferson 492, 493 (Julian P. Boyd ed., 1950).

†n195. For example, in a 1999 product liability case arising out of an alcohol-related automobile accident, a California court left untouched a jury award of \$ 107 million in compensatory damages; the court approved **punitive damages** in the case totaling \$ 1.09 billion. See Frederic M. Biddle, GM Verdict Cut \$ 3.8 Billion in Suit Over Explosion, Wall St. J., Aug. 27, 1999, at B5. In a 1996 case, an **Alabama** jury awarded \$ 50 million in compensatory damages and \$ 100 million in **punitive damages**. The automobile's manufacturer argued that the plaintiff had been intoxicated and lost control of his car after falling asleep at the wheel. See Hardy v. General Motors Corp., No. CV-93-56 (**Ala.** Cir. Ct. June 3, 1996).

†n196. See Edward Felsenthal, **Punitive Damage** Awards Found to be Generally Modest and Rare, Wall St. J., June 17, 1996, at B4.

†n197. See, e.g., S. Rep. 105-32, at 76-77 (1997) (minority views).

†n198. See W. Kip Viscusi, **Punitive Damages: The Social Costs of Punitive Damages** Against Corporations In Environmental and Safety Torts, 87 Geo. L.J. 285, 294 (1998).

†n199. See Troy L. Cady, Note, Disadvantaging The Disadvantaged: The Discriminatory Effects of **Punitive Damages** Caps, 25 Hofstra L. Rev. 1005 (1997).

†n200. U.S. Small Business Administration (visited Mar. 4, 2000)
<http://www.onlinewbc.org/docs/about_sba.html>.

†n201. See United States Small Business Administration, Office of Advocacy, Minorities in Business (visited Mar. 4, 2000)
<<http://www/sbaonline.sba.gov/advo/stats/<number>Women & Minorities>>.

†n202. See id.

†n203. See H.R. Rep. No. 106-494 (2000) (civil actions involving individuals and small businesses); S. Rep. No. 105-32 (1997) (product liability); H.R. Rep. 105-101 (1997) (volunteer liability); S. Rep. No. 104-69 (1995) (product liability); H.R. Rep. No. 104-64 (1995) (product liability); H.R. Rep. No. 104-63 (1995) (product liability); S. Rep. No. 103-203 (1993) (product liability); S. Rep. No. 102-215 (1991) (product liability).

†n204. See *Coney v. J.L.G. Indus., Inc.*, 454 N.E.2d 197 (Ill. 1983).

†n205. For example, in *Walt Disney World Co. v. Wood*, 515 So.2d 198 (Fla. 1987), Disney was required to pay an entire damages award, even though it was only 1% at fault for the claimant's harm.

†n206. See Brookings Inst., *The Liability Maze: The Impact of Liability Law on Safety and Innovation* (Peter W. Huber & Robert E. Litan eds., 1991); National Academy of Engineering, *Product Liability And Innovation: Managing Risk in an Uncertain Environment* (Janet R. Hunziker & Trevor O. Jones eds., 1994); Testimony of Ms. Julie Nimmons, *supra* notes 7 & 9.

†n207. See Product Liability Reform and Consumer Access to Life-Saving Products: Hearing Before the Subcomm. on Telecommunications, Trade and Consumer Protection of the House Commerce Comm., 105th Cong. (1997) (testimony of Mark Behrens).

↗n208. See id.

↗n209. Pub. L. No. 105-230.

↗n210. See Victor E. Schwartz, *Comparative Negligence* app. b (3d ed. 1994 & Supp. 1999).

↗n211. See H.R. Rep. No. 106-494 (2000); S. Rep. No. 105-32 (1997); H.R. Rep. 105-101 (1997); S. Rep. No. 104-69 (1995); H.R. Rep. No. 104-64 (1995); H.R. Rep. No. 104-63 (1995); S. Rep. No. 103-203 (1993) ; S. Rep. No. 102-215 (1991).

↗n212. See Cal. Civ. Code Ann. 1431.2 (West Supp. 1999).

↗n213. See Neb. Rev. Stat. 25-21,185.10 (1995).

↗n214. Pub. L. No. 105-19, 111 Stat. 218.

↗n215. See Dan Carney, *Volunteer Liability Limit Heads to President*, Cong. Q., May 24, 1997, at 1199 ("The measure passed the House on May 21 by a vote of 390-35, and the Senate cleared it by voice vote later that day. An earlier Senate version passed May 1 by a vote of 99-1.") (omitting references to bill numbers).

↗n216. See Lucinda M. Finley, *Female Trouble: The Implications of Tort Reform For Women*, 64 Tenn. L. Rev. 847 (1997).

↗n217. See *Evangelatos v. Superior Ct.*, 753 P.2d 585 (Cal. 1988).

↗n218. See S. Rep. No. 105-32, at 57 (1997).

↗n219. See id.

↗n220. U.S. Small Bus. Admin., *Online Women's Business Center: Women and Small Business - Startling New Statistics* (visited Apr. 18, 2000)
<http://www.onlinewbc.org/docs/starting/new_stats.html>.

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BMW OF NORTH AMERICA, INC., Petitioner, v. IRA GORE, JR., Respondent.

No. 94-896

1994 U.S. Briefs 896

October Term, 1994

May 26, 1995

On Writ Of Certiorari To The Alabama Supreme Court

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW
ATTORNEYS (NASCAT) IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment mandates additional procedural or substantive limitations on punitive damage awards by state courts.

View Table of Authorities

INTEREST OF AMICUS CURIAE

The National Association of Securities and Commercial Law Attorneys ("NASCAT") is an association of law firms and attorneys who litigate antitrust, commercial, consumer, environmental and securities fraud cases in federal and state courts. NASCAT's members represent victims of corporate abuse, fraudulent schemes and so-called "white-collar" criminal activity, including victims of the type of consumer fraud at issue in this case. In civil

actions challenging such wrongdoing, NASCAT's members not only seek compensation for victims, but also attempt to deter wrongdoers, modify corporate behavior and improve the access of victims to justice. As part of these efforts, NASCAT advocates the enactment and enforcement of effective state and federal laws to prevent fraudulent, deceptive and manipulative business practices.

Claims for punitive damages are an important weapon used by NASCAT members to enforce laws protecting investors, consumers, small businesses, the environment and the integrity of the securities markets. Accordingly, with the written consent of the parties NASCAT files this amicus curiae brief in support of Respondent and urges this Court to affirm the decision of the court below. n1

n1 Letters of consent have been filed with the Clerk of the Court. The decision of the Alabama Supreme Court is reported as *BMW of North America v. Gore*, 646 So. 2d 619 (Ala. 1994) ("BMW"), cert. granted, ___ U.S. ___, 115 S. Ct. 932 (1995). Citations to the slip opinion reprinted in Appendix A to Petitioner's Brief are cited herein as "A- ."

SUMMARY OF ARGUMENT

In this case, the Alabama Supreme Court affirmed a jury verdict for Respondent, finding that there was substantial and sufficient evidence from which the jury could conclude that Petitioner, BMW of North America, Inc. ("BMW"), a wholly-owned subsidiary of Bayerische Motoren Werke, A.G., had deliberately engaged in a nationwide scheme to conceal from consumers that certain "new" vehicles sold by BMW had, in fact, been refinished before sale to such an extent that the vehicles had suffered a substantial (and undisclosed) decline in market value. A-7a, A-11a. BMW's fraudulent scheme was perpetrated under an official corporate policy of indifference to the consumer. BMW unilaterally elected to disclose damage to its vehicles to consumers only if the cost of repair was more than 3% of the manufacturers' suggested retail price, A-11a, in utter disregard for the impact that such repairs might have on the market value of its customers' substantial investment in the expensive cars sold by BMW. This deliberate consumer fraud, which impacted many consumers in (relatively) small individual amounts but reaped large profits for BMW, is precisely the type of situation in which the individual states should be permitted to fashion punitive damages awards in order to punish and deter corporate wrongdoing. NASCAT supports Respondent's position in this case and believes that the decision of the court below should be upheld for several reasons.

First, in the words of this Court, "[p]unitive damages have long been a part of traditional state tort law." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). n2 As Justice Scalia recently observed in *TXO Prod. Corp. v. Alliance Resources Corp.*, ___ U.S. ___, 113 S. Ct. 2711 (1993) ("TXO"), "[s]tate legislatures and courts have ample authority to eliminate any perceived 'unfairness' in the common-law punitive damages regime, and have frequently exercised that authority in recent years." *Id.* at 2727-28 (Scalia, J., concurring in judgment) (citing NASCAT's Amicus Curiae Brief). In the last decade, the legislatures of many states have overhauled their respective punitive damage laws and have enacted a range of procedural safeguards and substantive limits, including (1) statutory "caps" or proportionality rules on punitive damage awards; (2) requiring a finding of clear and convincing evidence (or even proof beyond a reasonable doubt) before such damages may be awarded; (3) requiring bifurcated trials; and/or (4) some combination of several of these measures. n3 As demonstrated in Part A and Appendices A-F, *infra*, these changes in state law have been enacted to accommodate the public policy concerns raised by Petitioner and its amici. To the extent further modification of state law is needed, this Court should leave reform of punitive damages law and procedure to the political process, as Justices Scalia, O'Connor and Kennedy have acknowledged. n4

n2 See also Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257, 278 (1989) ("In a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law.").

n3 See generally Janie L. Shores, A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls, 44 Ala. L. Rev. 61, 84-89 (1992) (comprehensively outlining limits that many states have placed on punitive damage awards and procedures to be followed in such cases); 2 James D. Ghiardi & John J. Kirchner, Punitive Damages Law and Practice § 21.17 (Supp. 1989) (same).

n4 In Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) ("Haslip"), Justice Scalia stated in his concurring opinion:

State legislatures and courts have the power to restrict or abolish the common-law practice of punitive damages, and in recent years have increasingly done so. See, e.g., Alaska Stat. Ann. § 09.17.020 (Supp. 1990) (punitive damages must be supported by "clear and convincing evidence"); Fla. Stat. § 768.73(1)(a) (1989) (in specified classes of cases, punitive damages are limited to three times the amount of compensatory damages); Va. Code Ann. § 8.01-38.1 (Supp. 1990) (punitive damages limited to \$ 350,000). It is through those means -- State by State, and, at the federal level, by Congress -- that the legal procedures affecting our citizens are improved.

Id. at 39 (Scalia, J., concurring); see also id. at 63-64 (O'Connor, J., dissenting) ("As a number of effective procedural safeguards are available, we need not dictate to the States the precise manner in which they must address the problem. We should permit the States to experiment with different methods and to adjust these methods over time."); id. at 42 ("the usual protections given by the laws of the particular State must suffice until judges or legislators authorized to do so initiate system-wide change") (Kennedy, J., concurring in judgment). See generally Robert W. Pritchard, The Due Process Implications of Ohio's Punitive Damages Law, 19 U. Dayton L. Rev. 1207, 1223 (1994).

When this Court addresses state law its primary concern is the constitutionality, not the wisdom, of the law. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) ("We would not, of course, invalidate state law simply because we doubt its wisdom. . . ."). This Court "should hesitate to overturn long-established law on due process grounds without overwhelming evidence that the law is indeed unreasonable and unfair" and, in the case of state law on punitive damages, "such overwhelming evidence is not to be found" because "the present system satisfies due process." Robert E. Riggs, Constitutionalizing Punitive Damages: The Limits of Due Process, 52 Ohio St. L.J. 859, 915 (1991) ("Riggs, Constitutionalizing Punitive Damages").

Second, federal and state trial and appellate courts have considered dozens of challenges to punitive damage awards since Haslip and TXO were decided by this Court and every empirical measure demonstrates that they are fairly applying the substantive and procedural due process standards established by this Court through careful review (and remittitur where appropriate) of punitive damage awards. As detailed in Part B, *infra*, post-Haslip and TXO cases from many jurisdictions demonstrate that the federal and state trial and appellate courts are following this Court's mandate to ensure that (1) juries are permitted to consider only admissible evidence when determining whether defendants are guilty of fraud, malice, or oppression, the predicates to any punitive damages award; n5 (2) juries are properly instructed as to what factors must be considered before punitive damages may be awarded; n6 (3) trial courts are conducting careful post-verdict reviews of punitive damage awards and setting aside, or reducing by remittitur, those awards that are excessive and/or unsupported by the evidence; and (4) appellate courts are meticulously reviewing such awards to ensure that substantive and procedural due process has been provided.

n5 Most courts have adopted the criteria set forth in the Restatement (Second) of Torts § 908(2) (1979):

Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

See, e.g., *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 740 (3d Cir. 1991) (applying Pennsylvania law), cert. denied, U.S. , 112 S. Ct. 3034 (1992). For a state-by-state summary of types of wrongful conduct giving rise to liability for punitive damages, see R. Schloerb, R. Blatt, R. Hammesfahr & L. Nugent, *Punitive Damages: A Guide to the Insurability of Punitive Damages in the United States and Its Territories* 18-26 (1988).

n6 For examples of state pattern jury instructions specifying when punitive damages may be awarded, see 1 L. Schlueter & K. Redden, *Punitive Damages* 204-39 (2d ed. 1989); see also Appendix D, *infra*.

Indeed, the Alabama Supreme Court's decision in this case presents but one example of the care and thoroughness being exercised by the lower courts in their post-verdict reviews of punitive damage awards. The court below analyzed the verdict under the very same standards held by this Court to comport with due process in *Haslip* and it determined that the jury had apparently improperly considered BMW's non-Alabama conduct in setting the amount of punitive damages. A-16a-17a. Accordingly, the court below reduced the award to reflect only BMW's Alabama conduct, as well as all of the other factors that this Court held in *Haslip* should be considered in a post-verdict review of a punitive damage award. A-17a-21a. Thus, the Alabama Supreme Court complied with the requirements of due process in this case.

Third, although the remitted punitive damages award was arguably large relative to the compensatory damages award in this case, it was not "grossly excessive" in violation of the Due Process Clause of the Fourteenth Amendment. As the court below concluded, BMW engaged in a deliberate scheme of deception that had the potential to cause incalculable damage to future consumers of its automobiles. As the plurality opinion of this Court found in *TXO*, "the shocking disparity between the punitive award and the compensatory award . . . dissipates when one considers the potential loss . . . had petitioner succeeded in its illicit scheme." 113 S. Ct. at 2722. Moreover, a large punitive damages award against BMW was necessary to accomplish the objectives that courts have long recognized are the primary purposes of punitive damages. n7 The jury properly punished a large wealthy company which had engaged in deliberate and wide-spread wrongdoing by imposing a penalty that stung - a significant monetary penalty, not just a nominal cost of doing business. The punitive damages award also deterred future wrongdoing by compelling BMW to change its nondisclosure policy, A-20a, thereby providing all of its future consumers with important information about their investments in BMW cars. n8

n7 The purpose of punitive damages is to punish wrongdoers and deter similar wrongful conduct by other persons or entities. See, e.g., *Wackenhut Applied Technologies Center, Inc. v. Sygnatron Protection Systems, Inc.*, 979 F.2d 980, 985 (4th Cir. 1992) (applying Virginia law) ("The purpose of punitive damages is to punish and deter.") (citation omitted); *Adams v. Murakami*, 54 Cal. 3d 105, 110, 284 Cal. Rptr. 318, 813 P.2d 1348, 1350 (1991) ("The public's goal is to punish wrongdoing and thereby to protect itself from future misconduct, either by the same defendant or other potential wrongdoers.") (citation omitted). See also *Gertz*, 418 U.S. at 350 (characterizing punitive damages as "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence"); Restatement (Second)

of Torts § 908(2), comment a (1979) ("The purposes of awarding punitive damages . . . are to punish the person doing the wrongful act and to discourage him and others from similar conduct in the future."); Note, Tightening the Constitutional Noose Around Punitive Damages Challenges: TXO, What It Means, and Suggestions That Address Remaining Concerns, 68 S. Cal. L. Rev. 203, 223 (1994); Comment, Constitutional Law - Punitive Damages Award Not Violative of the Due Process Clause, 28 Suffolk U. L. Rev. 208, 210 (1994); Michael Rustad & Thomas Koenig, The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers, 42 Am. U. L. Rev. 1269, 1284-1304 (1993) (tracing punitive damages awards from 2000 B.C. to present).

n8 The plurality opinion in TXO made it clear that "[i]t is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred." 113 S. Ct. at 2721-22 (emphasis in original).

Finally, NASCAT believes that the availability of punitive damages is an essential weapon in the continuing struggle that consumers, investors and small businesses must wage against fraudulent schemes and white-collar crime, which constantly threaten to cheat them of their hard-earned savings and opportunities. The continued availability of punitive damages in cases of this kind in the words of the West Virginia Supreme Court of Appeals, "give[s] individual plaintiffs a sword with which to fight well-armored, bureaucratic defendants." TXO Prod. Corp. v. Alliance Resources Corp., 187 W. Va. 457, 419 S.E.2d 870, 888 (1992), aff'd, TXO, U.S. , 113 S. Ct. 2711 (1993). Private citizens, investors and small businesses should not be deprived of one of their most effective weapons to combat fraudulent schemes and unfair business practices. Indisputably, the threat of punitive damages properly and effectively deters individual and corporate wrongdoers from engaging in wrongdoing, especially when such damages are measured by the actual or potential fruits of their schemes. Any rule of law that makes punitive damages less available concomitantly lessens the important social objectives of such awards. n9

n9 Professor Dorsey Ellis, one of the leading academic commentators on the subject of punitive damages, identifies seven objectives for punitive damages that he gleans from judicial opinions and related commentary: (1) punishment of the defendant; (2) specific deterrence (to prevent the defendant from repeating the offense); (3) general deterrence (to prevent others from committing similar offenses); (4) preservation of the peace; (5) inducement for private law enforcement; (6) compensation to victims for otherwise uncompensable losses; and (7) payment of the plaintiff's attorney's fees. Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1, 3 (1982).

ARGUMENT

A. The States Are Responsibly Modifying Their Punitive Damage Laws And This Court Should Not Interfere With That Continuing Political Process

Over the past fifteen years, the elected representatives of the people have taken responsible steps to substantially modify their respective states' laws on punitive damages. Those modifications have taken various forms, including (1) imposing statutory "caps" or proportionality rules on punitive damage awards; (2) requiring a finding of clear and convincing evidence (or even proof beyond a reasonable doubt) before such damages may be awarded; (3) requiring bifurcated trials in which the trier of fact must determine defendant's liability for punitive damages before it assesses such damages; (4) authorizing only trial judges to assess punitive damages if a jury has determined that they are warranted; (5) requiring trial courts to exercise their power of remittitur to reduce excessive punitive

damage awards; and/or (6) requiring successful plaintiffs to share punitive damage awards with the state. See Appendices A-F, *infra*. These legislative reforms demonstrate that some of the arguments raised against the common-law system of awarding punitive damages have been persuasive, at least in some quarters; however, "it does not make a case that change is constitutionally required and may indeed be better evidence that the issue of punitive damages is a policy matter appropriately left to legislatures and, perhaps, to courts exercising their common law powers." Riggs, *Constitutionalizing Punitive Damages*, 52 *Ohio St. L. J.* at 876. n10 The states' legislative response to the so-called punitive damages "crisis" n11 may be categorized as follows:

Bifurcation: At least 11 states -- California, Connecticut, Georgia, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, North Dakota and Ohio -- require by statute bifurcation of the liability and damages phases of trials in which punitive damages may be assessed, n12 while the Supreme Court of Tennessee has imposed the same requirement. n13

n10 These legislative reforms include every solution to the punitive damages "problem" ever suggested by any Justice of this Court, see Haslip, 499 U.S. at 41 (O'Connor, J., dissenting), as well as those advocated by commentators sympathetic to Petitioner and its amici. See David G. Owen, *The Moral Foundations of Punitive Damages*, 40 *Ala. L. Rev.* 705, 735-38 (1982); Malcolm Wheeler, *A Proposal For Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 *Ala. L. Rev.* 919, 947-60 (1982).

n11 A number of commentators have challenged the popular notion that awards of punitive damages are "skyrocketing." TXO, 113 S. Ct. at 2742 (O'Connor, J., dissenting); Haslip, 499 U.S. at 60 (O'Connor, J., dissenting); *Browning-Ferris Indus.*, 492 U.S. at 282 (O'Connor, J., dissenting). The author of a comprehensive empirical study of punitive damages awards in products liability cases concluded that both the frequency and size of punitive damages awards is "much less" than is generally believed. Michael Rustad, *Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts* 28 (Papers of the Roscoe Pound Found. 1991); see also Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System -- And Why Not?*, 140 *U. Pa. L. Rev.* 1147, 1256 (1992) (noting that while the mean (i.e., average) size of jury verdicts has increased due to a "very few cases with exceptionally large awards," median awards have risen only moderately); Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 *Minn. L. Rev.* 1, 13 (1990) (observing that "the punitive damages debate has become a matter of public relations, propaganda, and the mobilization of prejudice and fear, rather than a matter of rational discourse"). In his comprehensive study, Professor Rustad found only 355 punitive damages awards in products liability cases between 1965 and 1990. See Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 *Iowa L. Rev.* 1, 30, 38 *tbl. 3* (1992). Further, only 22% of the punitive damages awards in his study were completely affirmed on appeal. *Id.* at 57 *tbl. 14*. In addition, he found that the median punitive damages award of \$ 625,000 was not significantly higher than the median compensatory damages award of \$ 500,000. *Id.* at 46. See also Stephen Daniels & Joanne Martin, *Jury Verdicts and the "Crisis" in Civil Justice*, 11 *Just. Sys. J.* 321, 328-29, 340-42 *tbl. 4*, 347-48 (1986) (study of jury awards in 43 counties of ten states between 1981 and 1985 in cases involving automobile accidents, products liability, medical malpractice, street hazards and premises liability leads to conclusion that juries' punitive damages awards have not caused a "crisis" in the insurance industry).

n12 See Cal. Civ. Code § 3295(d) (1995); Conn. Gen. Stat. Ann. § 52-240(b) (1992); Ga. Code Ann. § 51-12-5.1(d)(1), (2) (1994); Kan. Code Civ. Proc. § 60-3701(a)-(b) (1994); Minn. Stat. Ann. § 549.20(4) (1994); Rev. Stat. Mo. § 510.263(1)-(3) (1994); Mont. Code Ann. § 27-1-221(7) (1994); Nev. Rev. Stat. § 42.005(3) (1993); N.J. Stat. Ann. § 2A:58C-5 (b), (d) (1993); N.D. Cent. Code Ann. § 32.03.02-11(2) (1993); Ohio Rev. Code Ann. § 2315.21(C)(2) (Anderson 1994). These statutory provisions are summarized and/or quoted

in Appendix A, *infra*.

n13 See *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992) ("In a trial where punitive damages are sought, the court, upon motion of defendant, shall bifurcate the trial. During the first phase, the factfinder shall determine (1) liability for, and the amount of, compensatory damages and (2) liability for punitive damages. . . . During this phase, evidence of a defendant's financial affairs, financial condition, or net worth is not admissible. If the factfinder finds a defendant liable for punitive damages, the amount of such damages shall then be determined in an immediate, separate proceeding.").

Burdens of Proof: The legislatures of at least 21 states -- Alabama, Alaska, Arizona, California, Colorado, Georgia, Indiana, Iowa, Kansas, Kentucky, Minnesota, Mississippi, Montana, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota and Utah -- have enacted statutes imposing higher standards of proof n14 than a mere preponderance of the evidence, n15 while the courts of five additional states -- Arizona, n16 Hawaii, n17 Maine, n18 Maryland n19 and Wisconsin n20 -- have adopted the same rule, even though in *Haslip* this Court rejected the argument that due process requires a heightened standard of proof before punitive damages may be awarded:

We have considered the arguments raised by [some of the parties] as to the constitutional necessity of imposing a standard of proof of punitive damages higher than "preponderance of the evidence." There is much to be said in favor of a State's requiring, as many do, a standard of "clear and convincing evidence" or, even, "beyond a reasonable doubt," as in the criminal context. We are not persuaded, however, that the Due Process Clause requires that much.

n14 The function of the standard of proof is to "allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington v. Texas*, 441 U.S. 418, 423 (1979). The "clear and convincing" standard of proof "is an important check against unwarranted imposition of punitive damages." *Honda Motor Co. v. Oberg*, U.S. , 114 S. Ct. 2331, 2341 (1994). The standard has been used "in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant" because "[t]he interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof." *Addington*, 441 U.S. at 424 (holding due process requires clear and convincing standard of proof in civil commitment proceedings); see also *In re Winship*, 397 U.S. 358, 361-64 (1970) (due process requires higher standard of proof for criminal convictions because of important liberty interests and stigmatization at stake). According to one view, this rationale encompasses actions in which punitive damages may be awarded. See *Haslip*, 499 U.S. at 54 (O'Connor, J., dissenting) ("[T]here is a stigma attached to an award of punitive damages that does not accompany a purely compensatory award. The punitive character of punitive damages means that there is more than just money at stake."); see also Dorsey D. Ellis, Jr., *Punitive Damages, Due Process, and the Jury*, 40 Ala. L. Rev. 975, 994-95 (1989); Malcolm E. Wheeler, *The Constitutional Case For Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 298 (1983).

n15 See Ala. Code § 6-11-20(a) (1994); Alaska Stat. Ann. § 09.17.020 (1992); Ariz. Rev. Stat. § 12-701A, B (1994); Cal. Civ. Code § 3294(a) (1995); Colo. Rev. Stat. § 13-25-127(2) (1994); Ga. Code Ann. § 51-12-5.1(b) (1994); Ind. Stat. Ann. § 34-4-34-2 (Burns 1994); Iowa Code Ann. § 668A.1(1) and (2) (1993); Kan. Civ. Proc. Code Ann. § 60-3701(c) (1994); Ky. Rev. Stat. § 411.184(2) (Michie 1994); Minn. Rev. Stat. Ann. § 549.20(1)(a) (1994); Miss. Code Ann. § 11-1-65(a) (1993); Mont. Code Ann. § 27-1-221(5) (1994); Nev. Rev. Stat. § 42.005(1) (1993); N.D. Cent. Code § 32-03.2-11(1), (5) (1993); Ohio Rev. Code Ann. § 2315.21(C)(3) (Anderson 1994); Okla. Stat. Ann. Tit. 23 § 9 (1995); Or. Rev. Stat. § 41.315, 30.925(1) (1994); S.C. Code Ann. § 15-33-135 (1993); S.D. Codified Laws

Ann. § 21-1-4.1 (1994); Utah Code Ann. § 78-18-1(1)(a) (1994). These statutory provisions are summarized and/or quoted in Appendix B, *infra*. But see Idaho Code § 6-1604 (1994) (codifying "preponderance of the evidence standard" for punitive damage claims).

n16 See *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675, 681 (1986) ("As this remedy is only to be awarded in the most egregious of cases, where there is reprehensible conduct combined with an evil mind over and above that required for commission of a tort, we believe it appropriate to impose a more stringent standard of proof.").

n17 See *Masaki v. General Motors Corp.*, 71 Haw. 1, 780 P.2d 566, 571 (1989) ("[P]unitive damages are a form of punishment and can stigmatize the defendant in much the same way as a criminal conviction. It is because of the penal character of punitive damages that a standard of proof more akin to that required in criminal trials is appropriate. . . . A more stringent standard of proof will assure that punitive damages are properly awarded.").

n18 See *Tuttle v. Raymond*, 494 A.2d 1353, 1363, 58 A.L.R. 4th 859 (Me. 1985) ("The potential consequences of a punitive damages claim warrant a requirement that the plaintiff present proof greater than a mere preponderance of the evidence. Therefore, we hold that a plaintiff may recover exemplary damages based upon tortious conduct only if he can prove by clear and convincing evidence that the defendant acted with malice.").

n19 In *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 601 A.2d 633 (1992), the Supreme Court of Maryland conducted a survey of other states' statutes and judicial decisions before adopting the clear and convincing evidence standard: "Use of a clear and convincing standard of proof will help to insure that punitive damages are properly awarded. We hold that this heightened standard is appropriate in the assessment of punitive damages because of their penal nature and potential for debilitating harm. Consequently, in any tort case a plaintiff must establish by clear and convincing evidence the basis for an award of punitive damages." 601 A.2d at 657.

n20 See *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437, 443 (1980).

499 U.S. at 23 n.11 (citations omitted). See also *TXO*, 113 S. Ct. at 2719. Thus, as to punitive damages claims, nearly half of the states have already imposed proof requirements beyond what this Court requires to satisfy due process. n21

n21 See also *Campbell v. Bartlett*, 975 F.2d 1569, 1577 (10th Cir. 1992) (refusing to set aside punitive damages verdict because the trial court "correctly applied New Mexico law requiring proof of punitive damages by a preponderance of the evidence" and "the United States Supreme Court has not held that due process requires a heightened standard of proof of punitive damages") (citations omitted); *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1099 (5th Cir. 1991) ("Texas law authorizes recovery of punitive damages upon proof that a preponderance of the evidence justifies the award. Celotex cannot establish that constitutional due process requires a higher standard of proof based only upon a policy preference expressed by the United States Supreme Court.") (citation omitted), cert. denied, 503 U.S. 1011 (1992); *Galjour v. General Am. Tank Car Corp.*, 764 F. Supp. 1093, 1101 (E.D. La. 1991) (interpreting footnote 11 in *Haslip* decision as a holding that the "preponderance of the evidence" standard satisfies due process).

Evidentiary Limitations: At least nine states -- California, Colorado, Maryland, Missouri, Montana, Nevada, North Dakota, Oregon and Utah -- have enacted statutes precluding the introduction of evidence regarding a defendant's financial condition or net worth until the jury has determined that the defendant is liable for punitive damages. n22

n22 See Cal. Civ. Code § 3295(d) (1995); Colo. Rev. Stat. § 13-21-102(6) (1994); Md. Code

Ann. § 10-913(a) (1994); Rev. Stat. Mo. § 510.263(2), (3) (1994); Mont. Code Ann. § 27-1-221(7) (1994); Nev. Rev. Stat. § 42.005(4) (1993); N.D. Cent. Code Ann. § 32-03.2-11(2)-(3) (1993); Or. Rev. Stat. Ann. § 30.925(2) (1994); Utah Code Ann. § 78-18-1(2) (1994). These statutory provisions are summarized and/or quoted in Appendix C, *infra*. In addition, as noted above, in *Hodges*, 833 S.W. 2d at 901, the Supreme Court of Tennessee expressly stated that during the first (liability) phase of the required bifurcated trial, "evidence of a defendant's financial affairs, financial condition, or net worth is not admissible."

Jury Instructions: At least eight states -- Alabama, Colorado, Kentucky, Minnesota, Montana, New Jersey, North Dakota and Oregon -- have codified jury instructions governing awards of punitive damages. n23

n23 See Ala. Code § 6-11-20(b)(1)-(3), (5) (1994); Colo. Rev. Stat. § 13-21-102(1)(b) (1994); Ky. Rev. Stat. Ann. § 411.184(1)(a)-(c) (Michie 1994); Minn. Stat. Ann. § 549.20(3) (1994); Mont. Code Ann. § 27-1-221(2)-(4) (1994); N.J. Stat. Ann. § 2A:58C-5(b) (1993); N.D. Cent. Code Ann. § 32-03.2-11(5) (1993); Or. Rev. Stat. Ann. § 30.925(3) (1994). These statutory provisions are summarized and/or quoted in Appendix D, *infra*.

Allocation of Damages to the State: Because punitive damages are not compensatory in nature and their primary purpose is to advance the public good through specific and general deterrence, at least 11 states -- Colorado, Florida, Georgia, Illinois, Iowa, Kansas, Missouri, New York, Oregon, Tennessee and Utah -- allocate a portion of every punitive damages award to a state agency. n24

n24 See Colo. Rev. Stat. § 13-21-102(4) (1994); Fla. Stat. Ann. § 768.73(2)(a)(b) (1994); Ga. Code Ann. § 51-12-5.1(e)(2) (1994); Ill. Rev. Stat. Ch. 735, 5/2-1207 (1995); Iowa Code Ann. § 668A.1(2)(b) (1993); Kan. Civ. Proc. Code Ann. § 60-3402(e) (1994); Rev. Stat. Mo. § 537.675 (1994); N.Y. Civ. Proc. L. & R. § 8701(1) (1994); Or. Rev. Stat. § 18.540(1) (1992 Cum. Supp.); Tenn. Code Ann. § 39-13-216(e) (1994); Utah Code Ann. § 78-18-1(3) (1992). These statutory provisions are summarized and/or quoted in Appendix E, *infra*. See generally Comment, Split-Recovery: A Constitutional Answer to the Punitive Damage Dilemma, 21 Pepp. L. Rev. 857 (1994); Comment, The Feasibility of Full State Extraction of Punitive Damage Awards, 32 Duq. L. Rev. 301 (1994); Note, Split-Recovery Statutes: The Interplay of the Takings and Excessive Fines Clauses, 80 Cornell L. Rev. 104 (1995).

Cap Statutes: At least 12 states -- Alabama, Colorado, Connecticut, Florida, Georgia, Kansas, Nevada, North Dakota, Oklahoma, Tennessee, Texas and Virginia -- have enacted so-called statutory "caps" which set maximum limits on the size of punitive damages awards. n25

n25 See Ala. Code § 6-11-21(1)-(3) (1994); Colo. Rev. Stat. § 13-21-102(1)(a) (1994); Conn. Gen. Stat. § 52-240b (1992); Fla. Stat. Ann. § 768.73(1)(a)-(b) (1994); Ga. Code Ann. § 51-12-5.1(g) (1994); Kan. Civ. Proc. Code Ann. § 60-3701(e)(1)-(2), (f) (1994); Nev. Rev. Stat. Ann. § 42.005.1(a)-(b) (1993); N.D. Cent. Code Ann. § 32-03.2-11(4) (1993); Okla. Stat. Ann. Tit. 23, § 9 (1995); Tex. Civ. Prac. & Rem. Code Ann. § 41.007 (1995); Va. Code Ann. § 8.01-38.1 (1994). These statutory provisions are summarized and/or quoted in Appendix F, *infra*. See generally Comment, Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective, 40 Emory L.J. 303 (1991).

Remittitur: In *Honda Motor*, 114 S. Ct. at 2339-41, this Court held that due process requires the states to provide post-verdict judicial review of the amount of punitive damages awards. As this Court noted in that case, remittitur is available in every state except Oregon and the Court's decision in that case made that procedure applicable in that state as well. Several states have codified the trial court's authority and/or responsibility to carefully review punitive damages awards to determine whether remittitur is necessary. n26

n26 See Ala. Code § 6-11-23 (1994); Ark. Code Ann. § 16-64-124 (1994); Colo. Rev. Stat. § 13-21-102(1) (1994); Fla. Stat. Ann. § 768.74, 768.73(1) (1994); Ill. Rev. Stat. Ann. Ch. 735, 5/2 2-1207 (1995); Mont. Code Ann. § 27-1-221(7)(c) (1994). See generally 2 James D. Ghiardi & John J. Kircher, *Punitive Damages: Law and Practice* § 18.02 n.6 (Supp. 1989).

Altogether, these numerous legislative enactments demonstrate that the states are responsive to arguments concerning the incidence and amount of punitive damages awards and have taken appropriate steps, as part of the democratic process, to insure that defendants receive every applicable measure of procedural due process. The effectiveness of these procedures is demonstrated in the case at bar. See Section C, *infra*. Given this impressive record of achievement, this Court should feel no need to dictate to the states the precise manner in which they must address the procedural and substantive issues presented by punitive damages claims.

B. The Federal And State Courts Are Undertaking Meaningful Post-Verdict Review And Are Making Appropriate Reductions Of Punitive Damage Awards

The Due Process Clause of the Fourteenth Amendment requires state courts to use procedures that adequately ensure that punitive damage awards are not imposed arbitrarily. In *Haslip*, 499 U.S. at 20, this Court stressed that the availability of "meaningful and adequate review by the trial court," followed by review by an appellate court, satisfied the requirements of the Due Process Clause. In *TXO*, 113 S. Ct. at 2720, the plurality opinion held that because the "award was reviewed and upheld by the trial judge" and then affirmed on appeal by West Virginia's highest court, it was "entitled to a strong presumption of validity." This Court further observed that "there are persuasive reasons for suggesting that the presumption should be irrebuttable, see *Haslip*, 499 U.S. at 24-40 (Scalia, J., concurring in judgment), or virtually so, *id.* at 40-42 (Kennedy, J., concurring in judgment)." *TXO*, 113 S. Ct. at 2720. Most recently, in *Honda Motor*, 114 S. Ct. at 2339, this Court reaffirmed the constitutional necessity for post-verdict review to check the danger of "arbitrary deprivations of property."

After *Honda Motor*, every state now "affords post-verdict judicial review of the amount of a punitive damages award." *Id.* at 2338. One study reported that in the relatively rare cases in which punitive damages are awarded, the jury awards are frequently reduced in the post-verdict review conducted by the courts. See Michael Rustad, *Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts* 28 (Papers of Roscoe Pound Found. 1991). Post-*Haslip* decisions from many jurisdictions demonstrate the vigor with which the courts are providing meaningful post-verdict and appellate review, whether under applicable state law or Fed. R. Civ. P. 59. n27 The courts have carefully reviewed the punitive damages awards in tort cases of every stripe, n28 including actions for fraud, n29 tortious interference, n30 false endorsement, n31 personal injury n32 and wrongful death, n33 products liability, n34 and bad faith actions against insurers. n35

n27 In the words of this Court, "[i]n reviewing an award of punitive damages, the role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. The court of appeals should then review the district court's determination under an abuse-of-discretion standard." *Browning-Ferris Indus.*, 492 U.S. at 279.

n28 The Fourth Circuit has stated that "[i]t would appear that the *Haslip* decision has, at least, compelled most state courts which have subsequently faced the due process issue to reconsider the constitutionality of their schemes for assessing punitive damages." *Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1417 (4th Cir. 1992) (applying Virginia law). In that case, the Fourth Circuit reversed a \$ 175,000 punitive damages award because the jury had not been properly instructed. See also *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350, 354

(1991) (establishing eight-factor post-trial review of punitive damages awards in wake of Haslip); Alexander & Alexander v. B. Dixon Evander & Assocs., 88 Md. App. 672, 596 A.2d 687, 711-12 (Spec. App.) (establishing "proper guidance" for jury's consideration of punitive damages claims in wake of Haslip); cert. denied, 323 Md. 1, 590 A.2d 158, cert. denied, 323 Md. 2, 590 A.2d 159 (1991), cert. denied, 326 Md. 435, 605 A.2d 137 (1992); Garnes v. Fleming Landfill, Inc., 186 W. Va. 656, 413 S.E.2d 897, 908 (1991) (establishing "a new system for the review of punitive damages" as a result of Haslip).

n29 See Jacobs Mfg. Co. v. Sam Brown Co., 19 F.3d 1259 (8th Cir.) (affirming jury's award of \$ 2.5 million in actual damages and \$ 2.7 million in punitive damages for defendant distributor's fraud counterclaim against manufacturer), cert. denied, U.S., 115 S. Ct. 487 (1994), cert. denied, U.S., 115 S. Ct. 1251 (1995); Robertson Oil Co. v. Phillips Petroleum Co., 14 F.3d 373 (8th Cir. 1993) (applying Arkansas law) (affirming two punitive damages awards -- one for \$ 4 million for fraud and one for \$ 4 million for tortious interference with business relationship -- in distributor's lawsuit against oil company because state law "shock the conscience" standard and ten-part inquiry satisfied Haslip standards) cert. denied, U.S., 114 S. Ct. 2120 (1994); Latham Seed Co. v. Nickerson Am. Plant Breeders, Inc., 978 F.2d 1493, 1500-01 (8th Cir. 1992) (\$ 1 million punitive damages award in favor of each of ten of seed stock company's distributors for company's breach of contract and fraud did not violate due process requirements where trial court carefully instructed jury on applicable law of four states -- Indiana, Iowa, Michigan and Ohio -- concerning nature and purpose of punitive damages and trial court also thoroughly reviewed damage awards under relevant state law standards), cert. denied, U.S., 113 S. Ct. 3037 (1993); Stephens, Inc. v. Geldermann, Inc., 962 F.2d 808, 814-15 (8th Cir. 1992) (applying Illinois law) (affirming \$ 1 million punitive damages award in fraud action brought by corporate customer against commodity futures merchant); Braswell v. Conagra, Inc., 936 F.2d 1169, 1175-76 (11th Cir. 1991) (applying Alabama law) (affirming \$ 9.1 million punitive damages award to 268 chicken growers in class action fraud claims against corporate buyer of broilers).

n30 See Benny M. Estes & Assoc., Inc. v. Time Ins. Co., 980 F.2d 1228, 1234-36 (8th Cir. 1992) (affirming punitive damages award of \$ 1.7 million based upon insurance company's tortious interference with contracts between Arkansas agents and sub-agents); Lightning Lube v. Witco Corp., 802 F. Supp. 1180, 1199-1201 (D.N.J. 1992) (setting aside jury's \$ 50 million punitive damages award for franchisees in fraud and tortious interference with contracts action against franchisor), aff'd, 4 F.3d 1153 (3d Cir. 1993); Fraidin v. Weitzman, 93 Md. App. 168, 611 A.2d 1046, 1063-71 (1992) (reversing \$ 2 million punitive damages award in action for tortious interference with contract brought by discharged attorneys against former client's opponent), cert. denied, 329 Md. 109, 617 A.2d 1055 (1993).

n31 See Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1104-06 (9th Cir. 1992) (affirming \$ 2 million punitive damages award in false endorsement action because it was supported by clear and convincing evidence, as required under California law), cert. denied, U.S., 113 S. Ct. 1047 (1993).

n32 See Campbell v. Bartlett, 975 F.2d at 1575-77 (applying New Mexico law) (affirming \$ 200,000 punitive damages award in drunk driving case); Mattison v. Dallas Carrier Corp., 947 F.2d 95, 98-110 (4th Cir. 1991) (applying South Carolina law) (reversing \$ 100,000 punitive damages award in auto accident case when state law denied defendant due process because lack of meaningful standards allowed jury to exercise unconstrained discretion in making its award); Rodebush by & Through Rodebush v. Oklahoma Nursing Homes, 867 P.2d 1241 (Okla. 1993) (in affirming award of \$ 50,000 in actual damages and \$ 1.2 million in punitive damages against nursing home whose employee intentionally struck a patient, court extensively analyzed Oklahoma's punitive damage procedures in light of Haslip and held that award of punitive damages under those procedures did not violate Due Process Clause); Wollersheim v. Church of Scientology, 4 Cal. App. 4th 1074, 6 Cal. Rptr. 2d 532, 536-47 (finding \$ 24 million punitive damages award for intentional infliction of emotional injury in

former adherent's action against religious organization excessive and reversing judgment unless plaintiff accepted remittitur to \$ 2 million), review granted, 10 Cal. Rptr. 2d 182, 832 P.2d 898 (1992).

n33 See Missouri Pac. R.R. Co. v. Lemon, 861 S.W.2d 501 (Tex. App. 1993) (affirming \$ 2.2 million in actual damages but reducing exemplary damages from \$ 10 to \$ 8.9 million awarded against railroad for grossly negligent operation of a train that collided with a plaintiff's car), writ granted, 38 Tex. Sup. Ct. J. 274 (1995); General Motors Corp. v. Johnston, 592 So. 2d 1054, 1060-64 (Ala. 1992) (\$ 15 million punitive damages award in wrongful death action held excessive and remittitur to \$ 7.5 million ordered).

n34 See Hopkins v. Dow Corning Corp., 33 F.3d 1116 (9th Cir. 1994) (applying standards set forth in Haslip and TXO in affirming award of \$ 840,000 in compensatory damages and \$ 6.5 million in punitive damages against maker of defective breast implants), cert. denied, U.S., 115 S. Ct. 734 (1995); Burke v. Deere & Co., 6 F.3d 497, 511 (8th Cir. 1993) (applying Iowa law) (in farm worker's product liability action against combine manufacturer, jury awarded compensatory damages of \$ 650,000 and punitive damages of \$ 50 million; trial court remitted the compensatory award to \$ 390,000 and the punitive award to \$ 28 million; appellate court reversed punitive award holding that defendant's conduct was not sufficiently egregious), cert. denied, U.S., 114 S. Ct. 1063 (1994); Dunn v. Hovic, 1 F.3d 1371 (3d Cir.) (after trial court had remitted a punitive damages award in asbestos product liability case from \$ 25 million to \$ 2 million, Court of Appeals further reduced punitive award to \$ 1 million to take into consideration effect of successive punitive awards in asbestos litigation), cert. denied, U.S., 114 S. Ct. 650 (1993); Mason v. Texaco, Inc., 948 F.2d 1546, 1559-61 (10th Cir. 1991) (applying Kansas law) (finding excessive a \$ 25 million punitive damages award in benzene poisoning case and ordering a remittitur of award to \$ 12.5 million), cert. denied, U.S., 112 S. Ct. 1941 (1992).

n35 See Eichenseer v. Reserve Life Ins. Co., 934 F.2d 1377, 1380-86 (5th Cir. 1991) (applying Mississippi law) (affirming \$ 500,000 punitive damages award, in addition to compensatory damages of \$ 1,000, following bench trial in insured's action against insurer for wrongful denial of claim); Pacific Group v. First State Ins. Co., 841 F. Supp. 922 (N.D. Cal. 1993) (granting a post-trial motion to vacate a \$ 21 million punitive damages award in action for breach of an insurance contract and breach of the covenant of good faith and fair dealing by an insurance company's failure to defend or indemnify its insureds, where compensatory damages were \$ 4.8 million); Transportation Ins. Co. v. Moriel, 879 S.W.2d 10 (Tex. 1994) (reversing award of \$ 1 million in punitive damages in bad faith insurance litigation where actual damages were \$ 101,000 because there was an inadequate showing of gross negligence, and articulating the standards that Texas courts must follow in awarding punitive damages in light of Haslip and TXO); Intercontinental Life Ins. Co. v. Lindblom, 598 So. 2d 886, 890-91 (Ala.) (reaffirming \$ 1 million punitive damages award in bad faith case after reconsideration in light of Haslip), cert. denied, U.S., 113 S. Ct. 200 (1992); Republic Ins. Co. v. Hires, 107 Nev. 317, 810 P.2d 790, 792-93 (1991) (reducing \$ 22.5 million punitive damages award in insured's bad faith action against insurer to \$ 5 million).

These cases unequivocally demonstrate that the federal and state courts are carefully scrutinizing all punitive damage awards in the wake of this Court's decisions in Haslip and TXO and, when appropriate, have substantially reduced excessive verdicts. Thus, the present system already weeds out insupportable punitive damages awards and there is simply no reason for this Court to impose additional standards in a field that has traditionally been the province of the states.

C. This Case Demonstrates That There Is No Need For Additional Procedural Or Substantive Limitations On Punitive Damage Awards

1. The Trial And Appellate Courts Adhered To The Procedural Standards Previously Upheld By

This Court

In *Haslip*, this Court conducted an in-depth analysis of the same procedures followed by the Alabama trial and appellate courts in this case and concluded that due process had not been violated in *Haslip* because the award was subject to the full panoply of procedural protection under Alabama law. 499 U.S. at 18-23. Accordingly, this Court held that a punitive damage award that was more than four times the amount of compensatory damages and more than 200 times the amount of plaintiff's out-of-pocket damages did not violate due process. *Id.* at 23. Judged by those same standards, the decision of the Alabama Supreme Court in this case clearly passes constitutional muster. n36

n36 After *Haslip*, the TXO Court approved procedures that were "far less detailed and restrictive than those upheld in *Haslip*." TXO, 113 S. Ct. at 2727 (Scalia, J. concurring in judgment). For example, in TXO the trial court judge did not articulate his reasons for upholding the verdict, *id.* at 2724, as the trial court in this case did.

Significantly, BMW concedes that the jury was properly instructed n37 and, after considering all of the evidence, the jury found that BMW's fraudulent nondisclosure had reduced the value of Respondent's car by \$ 4,000 (or approximately 10% of its value). It awarded him \$ 4,000 in compensatory damages and \$ 4 million in punitive damages "based on a finding that the BMW defendants had been guilty of gross, malicious, intentional, and wanton fraud." A-4a.

n37 Alabama is one of the states that requires a plaintiff seeking punitive damages to prove by "clear and convincing evidence" that the defendant "consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff." A-5a-6a (citing Ala. Code § 6-11-20 (1975)). The jury, trial court and appellate court each determined that Respondent had met this heightened burden.

After the jury verdict, the trial court utilized the same post-trial procedures for scrutinizing the punitive damage award upheld by this Court in *Haslip*. It conducted an excessiveness hearing and analyzed the verdict under the standards enunciated by the Alabama Supreme Court in *Hammond v. Gadson*, 493 So. 2d 1374 (Ala. 1986), and *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989). A-4a. In its written statement of the reasons for denying BMW's motion for remittitur, the trial court noted that "the Court's conscience is not shocked by the amount of the verdict in this case." B-28a at P4. n38 Indeed, the trial court agreed with the jury's finding of liability: "The Court is of the opinion, from the evidence at trial and the post-judgment hearing, that these defendants were deliberately engaging in a scheme of fraud from which they derived monetary benefits." B-29a, at P5.

n38 Order on Motion for Judgment Notwithstanding the Verdict, New Trial or in the Alternative, Motion for Remittitur, October 8, 1992, attached as Appendix B to Petitioner's Brief (cited as "B- ").

The Alabama Supreme Court reviewed the verdict, again applying the *Green Oil* factors held by this Court to pass constitutional muster in *Haslip*. In its thorough opinion, the court below held that the jury's finding was amply supported by evidence that BMW had intentionally and wilfully suppressed the fact that the automobile had been repaired. A-7a. It noted that in view of the substantial diminution in value found by the jury, the 3% disclosure rule adopted by BMW "may not have been the proper yardstick by which to measure whether a disclosure should be made." A-7a, n.2. The court also observed that "this jury and another jury thought that the 'cost of repair' policy did not correspond with actual diminution in value." *Id.* at 11. The court further found that Respondent had demonstrated at trial that BMW's conduct was "reprehensible" because he had "satisfactorily proved that [BMW] engaged in a pattern and practice of knowingly failing to disclose damage to new cars, even though the damage affected their value, and that BMW NA followed this policy for several years." A-11a. The

Alabama Supreme Court also considered the punitive damage award in relation to BMW's financial position (*id.* at 12a), the costs of the litigation (*id.*), criminal sanctions (*id.* at 12a-13a), other civil actions (*id.* at 13a-18a), and whether the damages bore a reasonable relationship to the harm that was likely to occur from the defendant's conduct (*id.* at 15a-21a).

In a clear fulfillment of its duty under *Haslip* to make a meaningful review of the punitive damage award, the Alabama Supreme Court reduced the verdict by one-half. The court concluded that the jury had likely considered BMW's non-Alabama conduct in setting the amount of the punitive award, which the court believed would improperly punish extraterritorial conduct that had not been shown to be unlawful. A-16a-17a. The court then determined the appropriate amount of the punitive award without considering BMW's sales outside of Alabama.

The argument of BMW and its amici that BMW has been unconstitutionally punished for its extraterritorial conduct is expressly belied by the Alabama Supreme Court's decision: "when applying the reasonable relationship test to the amount of punitive damages to be awarded in this case, we do not consider those acts that occurred in other jurisdictions." A-19a (emphasis added). Instead, the court reached its conclusion that a \$ 2 million punitive award was appropriate based on its analysis of: (1) whether BMW had acted in good faith (*id.*, 17a-18a); (2) the fact that BMW had refused to change its policy of nondisclosure, even after lawsuits were filed and its dealers had requested a change in policy (*id.*, 18a); (3) that BMW changed its policy only after the punitive damage award in this case (*id.*); (4) the potential gain to BMW from its illicit scheme (*id.*); (5) the number of times BMW had engaged in the wrongful conduct, without considering BMW's acts outside of Alabama (*id.* at 19a); and (6) a comparative analysis with punitive damages awards in Alabama and other jurisdictions (*id.*).

BMW argues that the court should have reversed the judgment with instructions either to grant a new trial or to apply the jury's (presumed) \$ 4,000 per car formula to BMW's Alabama sales. Petitioner's Brief at 26. But BMW's request for a simple formula for calculating punitive damages is not mandated by the Due Process Clause and would not serve the objectives of punishment and deterrence, as explained below. Moreover, courts conducting post-verdict reviews of excessive punitive awards have traditionally given the plaintiff the option of accepting either a remittitur or a new trial, as the Alabama Supreme Court did here. It is appropriate for a court reviewing an excessive punitive damage award to "remit the portion of the verdict in excess of the maximum amount supportable by the evidence." *Dunn v. Hovic*, 1 F.3d at 1381 (quoting *Kazan v. Wolinski*, 721 F.2d 911, 914 (3d Cir. 1983)).

Thus, the Supreme Court of Alabama's review of the jury verdict and the trial court's discretion, "imposes a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages." *Haslip*, 499 U.S. at 22. In the words of the Fifth Circuit, *Haslip* "stand[s] for the general proposition that a punitive damage award by a properly instructed jury, where there is adequate post-verdict review, will not violate due process." *Watson v. Shell Oil Co.*, 979 F.2d 1014, 1020 (5th Cir. 1992) (citing *Haslip*, 111 S. Ct. at 1044-45). As the plurality opinion in *TXO* noted, such an award is entitled to a "strong presumption of validity." 113 S. Ct. at 2720. Here, the jury was properly instructed and the appellate court conducted an adequate post-verdict review. The Due Process Clause requires nothing more.

2. The \$ 2 Million Punitive Damage Award In This Case Is Not "Grossly Excessive"

BMW's claim that the punitive award is "grossly excessive" in violation of the Due Process Clause rests on the erroneous premise that the Alabama Supreme Court was obligated to provide a precise mathematical formula for calculating the award. n39 This Court, however, has steadfastly refused to proscribe any rigid mathematical formula governing punitive damage awards. In *TXO*, the plurality stated:

"We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concer[n] of reasonableness . . . properly enter[s] into the constitutional calculus."

n39 This assumes, of course, that there is a substantive component of the Due Process Clause that prohibits grossly excessive awards. But see *TXO*, 113 S. Ct. at 2727 (Scalia, J., concurring in judgment) ("To say (as I do) that 'procedural due process' requires judicial review of punitive damages awards for reasonableness is not to say that there is a federal constitutional right to a substantively correct 'reasonableness' determination. . . ."). 113 S. Ct. at 2720 (quoting *Haslip*, 499 U.S. at 18).

The Alabama Supreme Court's decision in this case demonstrates once again why this Court should not, and indeed cannot, enunciate a "mathematical bright line." The decision below was the product of the full range of factors presented by this case. As the plurality observed in *TXO*, punitive damage awards "are the product of numerous, and sometimes intangible factors; a jury imposing a punitive damages award must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it." 113 S. Ct. at 2720. We highlight below some of the factors warranting the punitive damages award that are most significant to consumers, who NASCAT's members often represent in cases challenging deceptive practices.

First, the punitive award is reasonable in relation to BMW's "reprehensible" conduct. A-11. BMW was found to have intentionally defrauded consumers by adopting a disclosure policy that disregarded the effect of its paint repairs on the value of cars it sold. Despite BMW's protestations that it is "a model of good corporate citizenship" who adopted the nondisclosure policy in good faith (Petitioner's Brief at 12), the fact-finders who heard the evidence obviously found that BMW had not acted in good faith. Indeed, in his post-verdict order the trial court judge expressed the opinion that BMW was "deliberately engaging in a scheme of fraud from which [it] derived monetary benefits." B-29a, at P5. Likewise, the Alabama Supreme Court determined that Respondent had proven by clear and convincing evidence that BMW "engaged in a pattern and practice of knowingly failing to disclose damage to new cars, even though the damage affected their value." A-11a. BMW plainly should be punished for this intentional wrongdoing.

BMW attempts to portray itself as a responsible corporate citizen who, when faced with conflicting state consumer protection laws governing the threshold level at which repairs to new vehicles must be disclosed, adopted the most restrictive standard (3%) as its official disclosure policy. But the jury and the trial court which heard the evidence found that BMW chose a policy in conscious disregard of the fact that certain repairs could significantly diminish the market value of its cars. Moreover, BMW's supposed survey of state law has not turned up a single state consumer protection statute that expressly immunizes a car manufacturer from common-law fraud liability for a deliberate failure to disclose facts having a material impact on the market value of their cars. The only state court to address this issue, the Alabama Supreme Court (after its decision in *BMW*), has held that such consumer protection laws do not abrogate common-law fraud. See *Hines v. Riverside Chevrolet-Olds*, 1994 Ala. LEXIS 438, at *10 n.2 (Sept. 2, 1994). n40

n40 It is noteworthy that BMW concedes that some states do require disclosure of repairs costing less than 3% of the manufacturer's suggested retail price (Petitioner's Brief at 39, n.25). This suggests that BMW's supposed survey of state law was either less than thorough or, at least, not periodically updated.

Second, the punitive damages award is reasonable in relation to the harm inflicted by BMW on consumers, even if one considers only the consumers in Alabama. BMW concealed repairs

that had a significant impact on the sizeable investments made by consumers in BMW cars. Although the monetary loss to each individual consumer was relatively small in actual dollars (about \$ 4,000), it was relatively large as a percentage of the total value of each car (about 10%). If the punitive award were made strictly proportional to a single consumer's out-of-pocket loss, as BMW urges, it would frustrate two of the fundamental objectives of punitive damages: it would not meaningfully punish a large profitable company and it would nullify the deterrent effect of the award by showing that widespread consumer fraud will simply be slapped on the wrist. n41 Furthermore, as the court below observed, "[m]athematical formulas simply cannot fit the requirement of case-by-case justice that is the cornerstone of our jury system." A-20a. NASCAT submits that punitive damages are particularly appropriate where, as here, a defendant's wrongdoing has the potential to produce large profits for itself while inflicting relatively small losses on many consumers.

n41 As the Tenth Circuit recently noted, "high ratios [between punitive and actual damages] have been upheld where the record shows that the jury properly based its verdict on the purposes underlying punitive damages." *Orjias v. Stevenson*, 31 F.3d 995, 1014 (10th Cir.), cert. denied, U.S. , 115 S.Ct. 511 (1994).

It is also important to note that Respondent and other consumers have been genuinely injured by BMW's conduct. BMW derides the 10% diminution in value suffered by Dr. Gore as "metaphysical harm" (Petitioner's Brief at 35, n.21) and "his (absurdly inflated) loss" (id. at 31, n.17). It is precisely this type of cavalier attitude toward the consumer that undoubtedly led the jury to award punitive damages in this case. There is nothing metaphysical about a consumer who pays 10% more for an expensive product than it is worth; nor is there anything metaphysical about a product that suffers a 10% depreciation in value due to undisclosed repairs made before it was purchased. The average consumer views a car, particularly the expensive luxury models sold by BMW, as a major investment and frequently finances the purchase with debt secured by the vehicle's value. The vehicle's market value after purchase and the rate of depreciation are thus important facts to every consumer. As the Alabama Supreme Court recently held, "the fact that [a new vehicle] was repainted to remedy a defect in the paint finish is a material fact, which significantly affects the fair market value of a car and whose importance is fairly commonly known among the public." *Hines v. Riverside Chevrolet-Olds*, 1994 Ala. LEXIS 438 at *24. It should come as no surprise that two juries concluded that BMW's paint repairs caused a tangible and measurable decline in the market value of its cars. n42 To this day, BMW continues to look at the damage issue with its own self-interested blinders: it narrowly focuses on the cost to it of the paint repairs as a percentage of the car's cost of sale, rather than the cost to the consumer caused by the resulting diminution in value.

n42 As the Alabama Supreme Court observed, a separate jury in a previous case against BMW also concluded that the paint repairs had caused an approximate 10% decline in value. A-7, n.2, A-11. The fact that two independent juries resolved this disputed factual issue in essentially the same manner refutes BMW's claim that Respondent's loss was "absurdly inflated."

Finally, the punitive damages award is reasonable in relation to the "magnitude of the potential harm that the defendant's conduct would have caused . . . to other victims that might have resulted if similar future behavior were not deterred." *TXO*, 113 S. Ct. at 2722. BMW's official nondisclosure policy, had it continued, would have defrauded numerous future consumers in Alabama. BMW changed that policy only after the punitive damages award in this case, in spite of previous lawsuits and, indeed, despite numerous requests from its own dealers. A-18a. The cost to the future potential consumers, who would have been deceived by the nondisclosure policy, is incalculable. As in *TXO*, the "shocking disparity between the punitive award and the compensatory award . . . dissipates when one considers the potential loss . . . had petitioner succeeded in its illicit scheme." *Id.*

BMW also argues that if the 1,000 other consumers who purchased BMW automobiles that had undergone undisclosed refinishing were able to recover punitive damages in the amount awarded to Dr. Gore, it would be excessive repetitive punishment. Petitioner's Brief at 46-47. The Court should not reach this issue because there have not yet been any punitive awards in other cases. If in the future BMW is subjected to excessive repetitive punitive awards, it can then raise a constitutional objection. But that hypothetical possibility does not justify a reduction in the only punitive award that has been made in this case. This Court has recognized that evidence of similar acts of misconduct have traditionally been considered in awarding punitive damages. *TXO*, 113 S. Ct. at 2722 n.28; see also *Haslip*, 499 U.S. at 21-22. Evidence of similar wrongdoing is particularly appropriate in consumer fraud cases, which typically involve widespread wrongdoing and small individual losses. If consumer fraud is going to be effectively punished and deterred, punitive damage awards must reflect not just the harm to the individual plaintiff, but the actual harm to all past consumers and the potential harm to future consumers.

In sum, when viewed from the perspective of both past and future potential consumers, the remitted punitive award in this case plainly does not "jar one's constitutional sensibilities." *Haslip*, 499 U.S. at 18. In *TXO*, this Court upheld a judgment of \$ 19,000 in actual damages and \$ 10 million in punitive damages. It found that the punitive award, which was over 526 times as large as actual damages, was not "grossly excessive." 113 S. Ct. at 2721-22. Here, BMW engaged in a deliberate nationwide pattern of deception affecting many past and potential future consumers and with a potential for inflicting incalculable loss. The due process challenge to the punitive award in this case can thus be disposed of with the simple observation suggested by Justice Scalia: "this is no worse than *TXO*." *Id.* at 2727 (Scalia, J. concurring in judgment).

CONCLUSION

For the reasons stated above, NASCAT respectfully submits that the decision of the court below should be affirmed.

May 26, 1995

Respectfully submitted,

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APPENDIX A

No. 94-896

Statutes Requiring Bifurcation of Liability and Damages Determinations In Punitive Damages Actions

California: Cal. Civ. Code § 3295(d) (1995) provides that the trial court "shall, on application

of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud." Evidence of profit and financial condition "shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud" and such evidence "shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."

Connecticut: Conn. Gen. Stat. Ann. § 52-240(b) (1992) states that "[i]f the trier of fact determines that punitive damages should be awarded" in a products liability action, "the court shall determine the amount of such damages not to exceed the amount equal to twice the damages awarded to the plaintiff."

Georgia: Ga. Code Ann. § 51-12-5.1(d)(1)-(2) (1994) provides that "[i]n any case in which punitive damages are claimed, the trier of fact shall first resolve from the evidence produced at trial whether an award of punitive damages shall be made." If it is found that punitive damages are to be awarded, "the trial shall immediately be recommended in order to receive such evidence as is relevant to a decision regarding what amount of damages will be sufficient to deter, penalize, or punish the defendant in light of the circumstances. It shall then be the duty of the trier of fact to set the amount to be awarded. . . ."

Kansas: Kan. Code Civ. Proc. § 60-3701(a)-(b) (1994) ("In any civil action in which exemplary or punitive damages are recoverable, the trier of fact shall determine, concurrent with all other issues presented, whether such damages shall be allowed. If such damages are allowed, a separate proceeding shall be conducted by the court to determine the amount of such damages to be awarded. . . . At the conclusion of the proceeding, the court shall determine the amount of exemplary or punitive damages to be awarded. . . .").

Minnesota: Minn. Stat. Ann. § 549.20(4) (1994) ("In a civil action in which punitive damages are sought, the trier of fact shall, if requested by any of the parties, first determine whether compensatory damages are to be awarded. Evidence of the financial condition of the defendant and other evidence relevant only to punitive damages is not admissible in that proceeding. After a determination has been made, the trier of fact shall, in a separate proceeding, determine whether and in what amount punitive damages will be awarded.").

Missouri: Rev. Stat. Mo. § 510.263(1)-(3) (1994) ("All actions tried before a jury involving punitive damages shall be conducted in a bifurcated trial before the same jury if requested by any party. . . . If during the first stage of a bifurcated trial the jury determines that a defendant is liable for punitive damages, that jury shall determine, in a second stage of trial, the amount of punitive damages to be awarded against such defendant.").

Montana: Mont. Code Ann. § 27-1-221(7) (1994) ("When the jury returns a verdict finding a defendant liable for punitive damages, the amount of damages must then be determined by the jury in an immediate, separate proceeding and be submitted to the judge for review. . . .").

Nevada: Nev. Rev. Stat. § 42.005(3) (1993) ("If punitive damages are claimed . . . the trier of fact shall make a finding of whether such damages will be assessed. If such damages are to be assessed, a subsequent proceeding must be conducted before the same trier of fact to determine the amount of such damages to be assessed.").

New Jersey: N.J. Stat. Ann. § 2A:58C-5(b), (d) (1993) ("The trier of fact shall first determine whether compensatory damages are to be awarded. Evidence relevant only to punitive damages shall not be admissible in that proceeding. After such determination has been made, the trier of fact shall, in a separate proceeding, determine whether punitive damages are to be awarded. . . . If the trier of fact determines that punitive damages should be

awarded, the trier of fact shall then determine the amount of those damages. . . .").

North Dakota: N.D. Cent. Code Ann. § 32.03.2-11(2) (1993) provides that "[i]f any party so elects, the trier of fact shall first determine whether compensatory damages are to be awarded before addressing any issues relating to exemplary damages."

Ohio: Ohio Rev. Code Ann. § 2315.21(C)(2) (Anderson 1994) provides that "[i]n a tort action, whether the trier of fact is a jury or the court, if the trier of fact determines that any defendant is liable for punitive or exemplary damages, the amount of those damages shall be determined by the court."

APPENDIX B

No. 94-896

Statutes Imposing Heightened Burdens of Proof in Punitive Damages Actions

Alabama: Ala. Code § 6-11-20(a) (1994) (punitive damages may not be awarded "other than 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"); see also id., § 6-11-20(b)(4) (defining "clear and convincing evidence").

Alaska: Alaska Stat. Ann. § 09.17.020 (1992) ("Punitive damages may not be awarded in any action, whether in tort, contract, or otherwise, unless supported by clear and convincing evidence.").

Arizona: Ariz. Rev. Stat. § 12-701A and B (1994) provides that punitive damages are not available in product liability actions involving drug products unless "the plaintiff proves, by clear and convincing evidence, that the defendant, either before or after making the drug available for public use, knowingly, in violation of applicable [FDA] regulations, withheld from or misrepresented to the [FDA] information known to be material and relevant to the harm which plaintiff allegedly suffered."

California: Cal. Civ. Code § 3294(a) (1995) provides that "[i]n an action for breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

Colorado: Colo. Rev. Stat. § 13-25-127(2) (1994) requires proof beyond a reasonable doubt to support a punitive damages award.

Georgia: Ga. Code Ann. § 51-12-5.1(b) (1994) (plaintiff must show by "clear and convincing evidence that the 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").

Indiana: Ind. Stat. Ann. § 34-4-34-2 (Burns 1994) ("Before a person may recover punitive damages in any civil action, that person must establish, by clear and convincing evidence, all of the facts that are relied upon by that person to support his recovery of punitive damages.").

Iowa: Iowa Code Ann. § 668A.1(1)-(2) (1993) provides that punitive damages may not be awarded unless the fact finder determines "by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights and safety of another."

Kansas: Kan. Civ. Proc. Code Ann. § 60-3701(c) (1994) ("plaintiff shall have the burden of proving, by clear and convincing evidence in the initial phase of the [bifurcated] trial, that the defendant acted toward the plaintiff with willful conduct, wanton conduct, fraud or malice").

Kentucky: Ky. Rev. Stat. § 411.184(2) (Michie 1994) ("A plaintiff shall recover punitive damages only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice.").

Minnesota: Minn. Rev. Stat. Ann. § 549.20(1)(a) (1994) ("Punitive damages shall be allowed in civil action only upon clear and convincing evidence that the acts of the defendant show **deliberate disregard** for the rights or safety of others.").

Mississippi: Miss. Code Ann. § 11-1-65(a) (1993) ("Punitive damages may not be awarded if the claimant does not prove by clear and convincing evidence 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.").

Montana: Mont. Code Ann. § 27-1-221(5) (1994) (specifying that "[a]ll elements of the claim for punitive damages must be proved by clear and convincing evidence" and defining "clear and convincing evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence").

Nevada: Nev. Rev. Stat. § 42.005(1) (1993) (it must be "proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied").

North Dakota: N.D. Cent. Code Ann. § 32-03.2-11(1) & (5) (1993) (plaintiff must prove that "the defendant has been guilty by clear and convincing evidence of oppression, fraud, or malice, actual or presumed").

Ohio: Ohio Rev. Code Ann. § 2315.21(C)(3) (Anderson 1994) ("In a tort action, the burden of proof shall be upon a plaintiff in question, by clear and convincing evidence, to establish that he is entitled to recover punitive or exemplary damages.").

Oklahoma: 23 Okla. Stat. § 9 (1995) (punitive damages may be awarded only "if at the conclusion of the evidence and prior to the submission of the case to the jury, the court shall find, on the record and out of the presence of the jury, that there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed").

Oregon: Or. Rev. Stat. § 41.315 ("Except as otherwise provided by law, a claim for punitive damages shall be established by clear and convincing evidence."). See also id. § 30.925(1) (1994) ("In a product liability civil action, punitive damages shall not be recoverable unless it is proven by clear and convincing evidence that the party against whom punitive damages is sought has shown wanton disregard for the health, safety and welfare of others.").

South Carolina: S.C. Code Ann. § 15-33-135 (1993) ("In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence.").

South Dakota: S.D. Codified Laws Ann. § 21-1-4.1 (1994) ("In any claim alleging punitive or exemplary damages, before any discovery relating thereto may be commenced and before any such claim may be submitted to the finder of fact, the court shall find, after a hearing

and based on clear and convincing evidence, that there is a reasonable basis to believe that there has been willful, wanton or malicious conduct on the part of the party claimed against.").

Utah: Utah Code Ann. § 78-18-1(1)(a) (1994) ("[P]unitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others.").

APPENDIX C

No. 94-896

Statutes Imposing Limitations On Admissible Evidence In Punitive Damages Actions

California: Cal. Civ. Code § 3295(d) (1995); see Appendix A, *supra*.

Colorado: Colo. Rev. Stat. § 13-21-102(6) (1994) ("In any civil action in which exemplary damages may be awarded, evidence of the income or net worth of a party shall not be considered in determining the appropriateness or amount of such damages.").

Maryland: Md. Code Ann. § 10-913(a) (1994) ("In any action for punitive damages for personal injury, evidence of the defendant's financial means is not admissible until there has been a finding of liability and that punitive damages are supportable under the facts.").

Missouri: Rev. Stat. Mo. § 510.263(2)-(3) (1994) ("Evidence of defendant's financial condition shall not be admissible in the first stage [of a bifurcated trial to determine the amount of compensatory damages] unless for a proper purpose other than the amount of punitive damages . . . Evidence of such defendant's net worth shall be admissible during the second stage [to determine the amount of punitive damages].").

Montana: Mont. Code Ann. § 27-1-221(7) (1994) provides that "[e]vidence regarding a defendant's financial affairs, financial condition, and net worth is not admissible in a trial to determine whether a defendant is liable for punitive damages." If the jury determines that a defendant is liable for punitive damages, "[i]n the separate proceeding to determine the amount of punitive damages to be awarded, the defendant's financial affairs, financial condition, and net worth must be considered." *Id.*

Nevada: Nev. Rev. Stat. § 42.005(4) (1993) ("Evidence of the financial condition of the defendant is not admissible for the purpose of determining the amount of punitive damages to be assessed until the commencement of the subsequent proceeding to determine the amount of . . . punitive damages to be assessed.").

North Dakota: N.D. Cent. Code Ann. § 32-03.2-11(2)-(3) (1993) ("Evidence relevant only to the claim for exemplary damages is not admissible in the proceeding on liability for compensatory damages . . . Evidence of a defendant's financial condition or net worth is not admissible in the proceeding on exemplary damages.").

Oregon: Or. Rev. Stat. Ann. § 30.925(2) (1994) ("During the course of trial, evidence of the defendant's ability to pay shall not be admitted unless and until the party entitled to recover establishes a *prima facie* right to recover. . . .").

Utah: Utah Code Ann. § 78-18-1(2) (1994) ("Evidence of a party's wealth or financial condition shall be admissible only after a finding of liability for punitive damages has been made.").

APPENDIX D

No. 94-896

Statutes Codifying Jury Instructions Governing Consideration of Punitive Damages Awards

Alabama: Ala. Code § 6-11-20(b)(1)-(3), (5) (1994) (defining "fraud," "malice," "wantonness" and "oppression").

Colorado: Colo. Rev. Stat. § 13-21-102(1)(b) (1994) (defining "willful and wanton conduct").

Kentucky: Ky. Rev. Stat. Ann. § 411.184(1)(a)-(c) (Michie 1994) (defining "oppression," "fraud" and "malice").

Minnesota: Minn. Stat. Ann. § 549.20(3) (1994) provides that any award of punitive damages "shall be measured by those factors which justly bear upon the purpose of punitive damages," including "the seriousness of hazard to the public arising from the defendant's misconduct," the "profitability of the misconduct to the defendant," the "duration of the misconduct and any concealment of it," the "degree of the defendant's awareness of the hazard and of its excessiveness," the "attitude and conduct of the defendant upon discovery of the misconduct," the "number and level of employees involved in causing or concealing the misconduct," the "financial condition of the defendant," and "the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subjected."

Montana: Mont. Code Ann. § 27-1-221(2)-(4) (1994) (defining "actual malice" and "actual fraud" as prerequisites for punitive damages award). See id. 27-1-221(7)(b) (stating that when an award of punitive damages is made by the judge, he shall consider "the nature and reprehensibility of the defendant's wrongdoing; the intent of the defendant in committing the wrong; the profitability of the defendant's wrongdoing, if applicable; the amount of actual damages awarded by the jury; the defendant's net worth; previous awards of punitive or exemplary damages against the defendant based upon the same wrongful act; potential or prior criminal sanctions against the defendant based upon the same wrongful act; and any other circumstances that may operate to increase or reduce, without wholly defeating, punitive damages."

New Jersey: For product liability actions, N.J. Stat. Ann. § 2A:58C-5(b)-(c) (1993) identifies the relevant factors to be considered by the trier of fact, including whether defendant acted with reckless disregard of the likelihood of serious harm, the duration of defendant's conduct, any concealment by the defendant, the profitability of the misconduct, and defendant's financial condition. These instructions were upheld against a constitutional challenge on due process grounds in *Germanio v. Goodyear Tire & Rubber Co.*, 732 F. Supp. 1297, 1304 (D.N.J. 1990).

North Dakota: N.D. Cent. Code Ann. § 32-03.2-11(5) (1993) provides that the fact finder should consider: whether there is a reasonable relationship between the exemplary damage award claimed and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; the degree of reprehensibility of the defendant's conduct, the duration of that conduct; and mitigating circumstances such as the defendant's awareness of and any concealment of the conduct, the profitability to the defendant of the wrongful conduct and criminal sanctions imposed on the defendant for the same conduct.

Oregon: Or. Rev. Stat. Ann. § 30.925(3) (1994) provides that punitive damages shall be

awarded based on specified criteria, including the likelihood that serious harm would arise from defendant's conduct, defendant's awareness of that likelihood, the profitability of defendant's misconduct, the duration of the misconduct and any concealment of it, the financial condition of the defendant, and the deterrent effect of other punishment imposed on the defendant.

APPENDIX E

No. 94-896

Statutes Allocating Punitive Damages Between Plaintiffs And State Agencies

Colorado: Colo. Rev. Stat. § 13-21-102(4) (1994) specifies that "[o]ne-third of all reasonable damages collected pursuant to this section shall be paid into the state general fund" with "[t]he remaining two-thirds of such damages collected shall be paid to the injured party." This statutory provision was declared unconstitutional in *Kirk v. Denver Pub. Co.*, 818 P.2d 262, 266-73 (Colo. 1991), because it was deemed an impermissible "taking" of a property right with no reasonable nexus between the taking and any government services made available to the particular judgment creditor who is forced to make contribution to the state.

Florida: Fla. Stat. Ann. § 768.73(2)(a)-(b) (1994) allocates 35% of every punitive damages award to either the State's General Revenue Fund or its Public Medical Assistance Trust Fund. The constitutionality of this provision was upheld against a due process challenge in *Gordon v. State*, 585 So.2d 1033, 1035-38 (Fla. App. 3d Dist. 1991), *aff'd*, 608 So.2d 800 (Fla. 1992), because the court recognized the Florida legislature's rational basis for allocating to the public a portion of damages that are intended to promote public interests.

Georgia: Ga. Code Ann. § 51-12-5.1(e)(2) (1994) (75% of amounts awarded as punitive damages, "less a proportionate part of the costs of litigation, including reasonable attorney's fees, all as determined by the trial judge," shall be paid into the State Treasury). This statutory provision was held constitutional in *Mack Trucks, Inc. v. Conkle*, 263 Ga. 539, 436 S.E. 2d 635 (1993), in which the court rejected "equal protection" and "taking" arguments under both the Georgia and United States Constitutions.

Illinois: Ill. Compiled Stat. ch. 735, 5/2-1207 (1995) allows the trial court to apportion punitive damages among plaintiff, plaintiff's attorney and the Illinois Department of Rehabilitation Services, based on the court's consideration of all relevant factors including whether any special duty was owed by the defendant to the plaintiff.

Iowa: Iowa Code Ann. § 668A.1(2)(b) (1993) (under certain circumstances, 75% of punitive damages award -- after payment of costs and fees -- are allocated to a civil reparations trust fund). A constitutional challenge based on a "taking" argument was rejected by the Supreme Court of Iowa because a plaintiff has no vested property right to punitive damages prior to entry of judgment. See *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc.*, 473 N.W. 2d 612, 619 (Iowa 1991).

Kansas: Kan. Civ. Proc. Code Ann. § 60-3402(e) (1994) allocates one-half of punitive damages awards in medical malpractice cases to the State treasury.

Missouri: Rev. Stat. Mo. § 537.675 (1994) allocates 50% of punitive damage awards after payment of attorneys' fees to the Tort Victims Compensation Fund.

New York: N.Y. Civ. Proc. L. & R. § 8701(1) (1994) allocates 20% of every punitive damages award to the State.

Oregon: Or. Rev. Stat. § 18.540(1) (1994) allocates one-half of every punitive damages

award to the Criminal Injuries Compensation Account after deducting attorney's fees. In Honeywell v. Sterling Furniture Co., 310 Or. 206, 797 P.2d 1019, 210-12 (1990), the Supreme Court of Oregon held that a trial court's instructions containing a description of the statutory allocation scheme constituted reversible error.

Tennessee: Tenn. Code Ann. § 39-13-216(e) (1994) provides that in cases of assisted suicide, "[a]ny compensatory damages awarded shall be paid as provided by law, but exemplary damages shall be paid over to the department of revenue for deposit in the criminal injuries compensation fund."

Utah: Utah Code Ann. § 78-18-1(3) (1994) allocates one-half of any award in excess of \$ 20,000 to the State Treasury.

APPENDIX F

No. 94-896

Statutes Imposing Caps on Punitive Damages Awards

Alabama: Ala. Code § 6-11-21(1)-(3) (1994) provides that an award of punitive damages "shall not exceed" \$ 250,000, unless it is based upon a "pattern or practice of intentional wrongful conduct, even though the damage or injury was inflicted only on the plaintiff," conduct involving "actual malice other than fraud or bad faith," or libel, slander, or defamation.

Colorado: Colo. Rev. Stat. § 13-21-102(1)(a) (1994) provides that the amount of punitive damage awarded by the jury "shall not exceed an amount which is equal to the amount of the actual damages awarded to the injured party." The trial court may increase any award of punitive damages "to a sum not to exceed three times the amount of actual damages" if it is shown that the defendant "has continued the behavior or repeated the action which is the subject of the claim . . . in a willful and wanton manner, either against the plaintiff or another person or persons, during the pendency of the case" or that the defendant "has acted in a willful and wanton manner during the pendency of the action in a manner which has further aggravated the damages of the plaintiff. . . ." Id., § 13-21-102(3)(a)-(b).

Connecticut: Conn. Gen. Stat. § 52-240b (1992), which applies to product liability actions, specifies that "[i]f the trier of fact determines that punitive damages should be awarded, the court shall determine the amount of such damages not to exceed an amount equal to twice the damages awarded to the plaintiff."

Florida: Fla. Stat. Ann. § 768.73(1)(a)-(b) (1994) provides that "the judgment for the total amount of punitive damages awarded to a claimant may not exceed three times the amount of compensatory damages awarded" unless "the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive in light of the facts and circumstances" of the case.

Georgia: Ga. Code Ann. § 51-12-5.1(g) (1994) provides that in product liability actions, "there shall be no limitation" regarding the amount of punitive damages, but only one award of punitive damages may be recovered in a Georgia state court for any act or omission arising from the product liability, regardless of the number of claims arising from the act or omission. It also provides that punitive damages awarded in other tort actions "shall be limited to a maximum of \$ 250,000".

Kansas: Kan. Civ. Proc. Code Ann. § 60-3701(e)(1)-(2) and (f) (1994) provides that no award of punitive damages shall exceed the lesser of "[t]he annual gross income earned by the defendant, as determined by the court based upon the defendant's highest gross annual

income earned for any one of the five years immediately before the act for which such damages are awarded" or \$ 5 million; however, if the court finds that "the profitability of the defendant's misconduct exceeds or is expected to exceed" that limitation, "the limitation on the amount of exemplary or punitive damages which the court may award shall be an amount equal to 1-1/2 times the amount of profit which the defendant gained or is expected to gain as a result of the defendant's misconduct."

Nevada: Nev. Rev. Stat. Ann. § 42.005.1(a)-(b) (1993) provides that an award of punitive damages may not exceed "[t]hree times the amount of compensatory damages awarded to the plaintiff if the amount of compensatory damages is \$ 100,000 or more" or "[t]hree hundred thousand dollars if the amount of compensatory damages awarded to the plaintiff is less than \$ 100,000."

N.D. Dakota: N.D. Cent. Code Ann. § 32-03.2-11(4) (1993) provides that "the amount of exemplary damages may not exceed two times the amount of compensatory damages or two hundred fifty thousand dollars, whichever is greater; provided, however, that no award of exemplary damages may be made if the claimant is not entitled to compensatory damages. In a jury trial, the jury may not be informed of the limit on damages contained in this subsection. Any jury award in excess of this limit must be reduced by the court."

Oklahoma: 23 Okla. Stat. § 9 (1995) (jury may award punitive damages "in an amount not exceeding the amount of actual damages awarded"). At the conclusion of all the evidence, if the trial court makes a finding outside of the presence of the jury that there is clear and convincing evidence that defendant is guilty of oppression, fraud, or malice, this limitation on punitive damages does not apply. See *Massey v. Farmers Ins. Group*, 1993 U.S. App. LEXIS 2191, at *21 (10th Cir. Feb. 9, 1993).

Texas: Tex. Civ. Prac. & Rem. Code Ann. § 41.007 (1995) ("exemplary damages awarded against a defendant may not exceed four times the amount of actual damages or \$ 200,000, whichever is greater"). The statutory limitation, however, does not apply to punitive damages "resulting from malice . . . or to an intentional tort." *Id.*, § 41.008.

Virginia: Under Va. Code Ann. § 8.01-38.1 (1994), "the total amount awarded for punitive damages against all defendants found to be liable shall be determined by the trier of fact" and "[i]n no event shall the total amount awarded for punitive damages exceed \$ 350,000." The statute specifies that the jury "shall not be advised of" this limitation; however, "if a jury returns a verdict for punitive damages in excess of the maximum amount specified . . . the judge shall reduce the award and enter judgment for such damages in the maximum amount provided" by the statute.

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The American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury: A Timely Call for Punitive Damages Reform

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SUMMARY:

... " The United States Supreme Court noted that this approach "insures that punitive damage awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." ... The federal court would also have the power to decide which state's substantive law to apply and would produce a single punitive damage award against the defendant for all members of the class. ... A special committee of the American Bar Association that studied punitive damages proposed that Congress establish a process for creating a national class action for multiple punitive damage claims arising out of conduct that results in similar injuries. ...

TEXT:

INTRODUCTION

In 1986, the American Law Institute (ALI) commissioned a study in response to the crisis confronting the United States tort litigation/liability insurance system. The project took more than five and one-half years and was authored by prominent professors from the nation's leading law schools. Advisers from academia as well as members of both the judiciary and

the practicing bar also made contributions. The resulting report, entitled Enterprise Responsibility [*264] for Personal Injury (Reporters' Study or Study),¹ focused on a wide array of substantive and procedural issues in the law of torts. The Reporters' Study was not subjected to the formal American Law Institute approval process. Instead, the Study was made available by the ALI for the bench, bar, and state legislators to use as a resource to develop personal injury law.

The Reporters' recommendations on one topic, namely, punitive damages, are particularly appropriate and timely. In response to perceived abuses and unfairness in punitive damages awards, "more and more voices are calling for major overhauls of this area of the law."² Even the United States Supreme Court has expressed concern in recent years that punitive damages awards have "run wild."³

Part I of this article will briefly discuss the Study's analysis of the need for punitive damages reform. Part II will discuss the Study's recommendations concerning reform of the standard by which punitive damages should be awarded. Part III will discuss the Study's recommendations to set reasonable limits on the size of punitive damages awards. Part IV will discuss the Study's recommendation of a shield against tort damages, particularly punitive damages, for products that comply with federal regulatory standards. Part V will discuss the Reporters' proposal to deal with the special problem of multiple, or repetitive, punitive damages awards. [*265]

I. THE NEED FOR REFORM

After examining empirical evidence, the Reporters found that the present system for awarding punitive damages has become more like a state lottery than a system of justice.⁴ Little guidance is given to juries, courts, and litigation parties as to how to decide whether and when punitive damages should be awarded. Once a decision is made to award punitive damages, juries again are not given substantive guidance for deriving an appropriate amount to award.

Vagueness and uncertainty in punitive damages law undermines confidence in the civil justice system and has a substantial and detrimental impact on American industry. For instance, the specter of spiraling liability has sometimes discouraged manufacturers from developing and marketing new and useful products.⁵ Similar concerns have also led to the withdrawal of some products from the market.⁶ The climate of uncertainty puts American business at a sizable disadvantage in its attempt to compete with foreign enterprise.⁷ This is [*266] particularly true in the area of innovation where the United States has traditionally been a leader.⁸ Because foreign manufacturers can innovate and develop products in a more "friendly" environment, they receive a competitive advantage over their American counterparts.⁹

To confront these problems, the Reporters' Study recommends several specific reforms that judges and state legislators can incorporate into existing state procedures for the award of punitive damages.

II. STANDARDS FOR REFORM

The ALI Reporters, as discussed above, found serious flaws in the present system for awarding punitive damages. In response, the Study provides several recommendations to make clear the legal conditions in which punitive damages may be awarded. First, a standard is established by which the trier of fact can evaluate whether an enterprise defendant should be liable for punitive damages. Second, the Study recommends a burden of proof standard that a plaintiff must meet to show that a defendant's conduct warrants the imposition of punitive damages.

A. Proscribed Conduct

The Reporters' Study recommends a standard of "reckless disregard for the safety of others" as the appropriate standard for liability for punitive damages in enterprise cases. ¹⁰ "Reckless disregard," the Study explains, "should involve both conscious advertence to the risks in question . . . and gross deviation from the appropriate standard of care." ¹¹ The Study also cautions that juries must be "explicitly instructed" that manufacturers must engage in risk-utility balancing. Additionally, juries must be told that their belief that the defendant negligently struck the incorrect balance is insufficient to subject the defendant to punitive, as opposed to compensatory, damages. ¹² **[*267]**

The "reckless disregard" standard recommended by the Reporters would not significantly increase the predictability of punitive damages liability. Courts and scholars have recognized that "recklessness" and "gross negligence" standards provide little guidance to jurors because they cover "too broad and too vague an area of behavior. . . ." ¹³ Individuals and companies, therefore, are unable to identify and avoid behavior that will trigger a punitive damages award. The result is that the deterrent effect of punitive damages is undermined. ¹⁴

A similar, but more precise standard, would require a plaintiff to show that the defendant acted with "conscious, intentional indifference to safety" as a predicate to punitive damages liability. ¹⁵ Practitioners who advocate punitive damages reform recommend precisely this standard. ¹⁶ The United States Supreme Court supported this **[*268]** standard in *Pacific Mutual Life Ins. Co. v. Haslip*. ¹⁷ The Court emphasized that "the trial court specifically found the conduct in question 'evidenced intentional, malicious, gross, or oppressive fraud.'" ¹⁸ Importantly, a "conscious, intentional" standard would establish the type of clear and strong trigger that juries and defendants need to promote deterrence and make punitive damages liability consistent.

Sound public policy also suggests that punitive damages be reserved for cases of conscious, intentional wrongdoing. One must remember that in their origins, and at the time the Framers ratified the Constitution, punitive damages were reserved solely for intentional torts, such as battery, assault, trespass, and false imprisonment. ¹⁹ Punitive damages should not be awarded for less than this type of egregious conduct. The compensatory tort system with its ample awards, especially for pain and suffering, has developed mechanisms such as the collateral source rule ²⁰ to deter wrongful conduct that falls short of conscious wrongdoing. ²¹

B. Burden of Proof

The Reporters' Study recommends a "clear and convincing evidence" burden of proof standard to be applied in determining whether punitive damages are warranted in civil tort cases. ²² According to the Reporters, this burden of proof standard is proposed **[*269]** because it will "signal clearly to juries that there is something special about a punitive award, and also give s judges somewhat greater leverage in controlling the parties' allegations about, and the jury's assessments of, such evidence before and during as well as after the trial." ²³

The clear and convincing evidence standard is the accepted trend in the law of punitive damages. Each of the principal groups that have analyzed the product liability system since 1979 has recommended the clear and convincing evidence requirement. ²⁴ The American Bar Association recommended this standard in 1986 and the American College of Trial Lawyers, an association of plaintiff and defense attorneys who have substantial experience in litigation, followed with their recommendation in 1989. Further, the United States Supreme Court in *Haslip* noted: "There is much to be said in favor of a State's requiring, as many do, . . . a standard of 'clear and convincing evidence' or, even, 'beyond a reasonable doubt,' . . . as in the criminal context." ²⁵ Approximately half of the states have undertaken this initiative either by legislative action ²⁶ or judicial decision. ²⁷ **[*270]**

Public policy makes clear that legislatures and courts should adopt this middle burden of proof standard. First, the clear and convincing standard signals to juries that they should be more certain of their decision when they invoke punishment, as contrasted with awarding compensatory damages.²⁸ Second, trial courts are alerted that some cases may not be appropriate for hearing by a jury.²⁹ Finally, the standard gives appellate courts power to carefully review decisions, making sure that punitive damages are properly awarded.³⁰

III. THE SIZE OF PUNITIVE AWARDS

The recommendations made by the Reporters' Study, as described in the previous section, would rationalize and modestly tighten the standards for punitive damages liability in approximately one-half of the states. The Reporters were also concerned, however, about the size of punitive damages awards³¹ and believed that some guidelines should be adopted to control excessiveness in all of the states.³² In response, the Study recommends several reforms governing the size of punitive awards.

The Reporters' recommendations can be packaged into three categories: (1) recommendations that seek to limit prejudicial evidence from and provide structure to trials involving punitive damages; (2) recommendations to change the method by which punitive damages awards are generally assessed; and (3) recommendations that seek to establish meaningful procedures for review of punitive damages awards. **[*271]**

A. Recommendations as to Admissible Evidence and Trial Structure

The Reporters were concerned about current trial practice in many states that allows evidence of a defendant's wealth to be paraded before a jury. This procedure prejudices defendants because it improperly allows the jury to focus on the defendant's wealth, rather than the allegedly wrongful conduct. The Reporters were also concerned about the structure of many punitive damages trials. Current trial practice in many states allows jurors to hear issues relevant only to the determination of punitive damages while assessing a defendant's liability for compensatory damages. To respond to these concerns, the Study makes a couple of recommendations.

1. The Defendant's Wealth

The Study recommends that, counter to popular practice,³³ evidence of a defendant's total wealth should "no longer be admissible in assessing punitive damages."³⁴ The Study would, however, allow reference to the profits earned by the defendant from the alleged tortious activity at issue.

The Reporters offer several reasons why evidence of a defendant's total assets is "irrelevant" in claims arising out of enterprise injuries.³⁵ First, corporate wealth is typically spread among various corporate subsidiaries. Thus "it is often only an accident of the corporate structure that places this wealth in the hands of the particular defendant entity."³⁶ Second, evidence of a defendant's wealth may unduly prejudice large corporate defendants, "which incur proportionately more instances of wrongdoing simply because of their greater volume of business."³⁷ Third, imposing a burden of punitive damages on a corporation punishes persons who often are not guilty or wealthy, such as corporate employees, small shareholders, and people who buy the company's products and may have to pay more for them.³⁸ **[*272]**

The Reporters' recommendation to exclude evidence of a defendant's total wealth represents sound public policy. When a jury is allowed to focus on a defendant's wealth, the jury is free to disregard what is really at issue in the case: whether and to what extent the defendant's conduct was wrongful.³⁹

2. Bifurcation of Punitive Damages Trials

Courts and legislatures that adopt the Reporters' Study's recommendation to allow reference to the profits earned by the defendant from the particular alleged tortious activity should also permit the defendant to bifurcate the trial. ⁴⁰ The use of a bifurcated trial procedure is recommended by the Reporters' Study. ⁴¹ Bifurcation is equitable because it prevents the jury from hearing highly prejudicial evidence of profits when determining basic liability. Information regarding profits is relevant only to determining the amount of punitive damages to be awarded. ⁴² Bifurcation also allows the jury to easily separate the burden of proof that is required for compensatory damages awards (i.e., proof by a preponderance of the evidence) from that which the Reporters recommend for the award of punitive damages (i.e., proof by clear and convincing evidence). ⁴³ The American Bar Association ⁴⁴ and the American College of Trial Lawyers have endorsed this reform. ⁴⁵ **[*273]**

B. Recommendations About the Assessment of Punitive Damages Awards

Another concern among the Reporters was that in almost all states punitive damages are assessed by a jury verdict. According to the Study, juries are often without adequate guidance as to how large a punitive damages award is appropriate. In response to this problem, the Study recommends that courts assess punitive damages based on some ratio of the amount of compensatory damages previously awarded by the jury.

1. Assessment by the Court

The Study strongly recommends placing the responsibility for assessing the amount of punitive awards on judges rather than juries. ⁴⁶ This reform, the Study explains, "is, after all, the standard followed in all other explicitly penal (as opposed to remedial) legal regimes." ⁴⁷

The Council on Competitiveness ⁴⁸ under President Bush and the Council on California Competitiveness ⁴⁹ have recommended this reform. It is currently the law in some federal statutory causes of action, ⁵⁰ as well as the states of Connecticut, ⁵¹ Kansas ⁵² and Ohio. ⁵³ **[*274]**

Some critics have challenged judicial assessment of punitive damages as a violation of a defendant's right to jury trial under the Seventh Amendment to the United States Constitution. This criticism is unlikely to hold up if asserted in court. In the past, defendants in criminal cases have challenged judges' activity in sentencing as a violation of their Sixth Amendment right to a jury trial. ⁵⁴ The Supreme Court, however, has held that no violation exists because sentencing is not a determination of guilt or innocence. ⁵⁵ Rather, sentencing involves consideration of many factors, including evidence that might be inadmissible under the formal rules of evidence. Moreover, a criminal defendant's Sixth Amendment right to trial by jury is given a broader scope than a civil defendant or plaintiff's right under the Seventh Amendment. Thus, we believe that the recommendation is constitutional under the Seventh Amendment. ⁵⁶ We also believe that the Reporters' recommendation that courts set the amount of punitive damages awards has a basis in sound public policy because judges are particularly suited to evaluate such material in a dispassionate manner.

2. Ratio of Punitive to Compensatory Damages

The Reporters' Study also recommends that punitive damages awards be limited to some ratio of compensatory damages. ⁵⁷ Furthermore, the Study suggests that an alternative monetary ceiling ("perhaps \$ 25,000") should be permitted for cases "in which the plaintiff's harms were minimal, even though the defendant's behavior **[*275]** was egregious." ⁵⁸

The Reporters' Study's recommendation on this issue comports with recent commentary from

the courts. In *Haslip*, the United States Supreme Court found a four-to-one ratio of punitive to compensatory damages to be "close to the line" of being unconstitutional. ⁵⁹ The Supreme Court has made clear that this is an area where states can do the most good in providing a reasonable and rational safeguard against punitive damages awards that "run wild." ⁶⁰

Indeed, at least one state legislature ⁶¹ and two state courts since *Haslip*, including one state supreme court and one mid-level state appellate court, have met the Supreme Court's challenge and focused their actions on the important relationship between punitive and compensatory damages. In *Garnes v. Fleming Landfill, Inc.*, the Supreme Court of West Virginia stated: "Punitive damages should bear a reasonable relationship to the potential of harm caused by the defendant's action and that generally means that punitive damages must bear a reasonable relationship to actual damages. . . ." ⁶² The Maryland Court of Special Appeals, in *Alexander & Alexander, Inc. v. B. Dixon Evander & Associates*, recently applied *Haslip* to invalidate a punitive damages award. According to the court, the award **[*276]** was "all out of proportion to both the harm caused and the perniciousness of the conduct." ⁶³ The court found that the punitive damages award "surely crosse d th e line" set forth in *Haslip*. ⁶⁴

Similar to the Reporters' recommendation, but more detailed, the American College of Trial Lawyers (ACTL) has recommended that punitive damages should be limited to twice the amount of compensatory damages awarded, or \$ 250,000, whichever is greater. ⁶⁵ The ACTL's recommendation is perhaps the best approach of the many proposals advanced to place reasonable limits on punitive damages awards. ⁶⁶ The ACTL's flexible approach keeps the law from being an absolute prisoner of ratios and allows courts to do justice in the unusual case in which a defendant's conduct was egregious, but resulted in little actual harm. ⁶⁷

Note that when states act on the Reporters' Study and the ACTL's recommendations, the statute must provide: (1) that the jury should not be informed of the limit; and (2) if a jury's award for punitive damages exceeds the limit, the award will be reduced by the judge. ⁶⁸ The reason for these two provisions is that informing the jury of the dollar limit may lead jurors to perceive that the ratio, or the specific figure, is a guideline for assessing punitive damages. In practical terms, the limit could become a floor for punitive damages, rather than a ceiling. **[*277]**

A. Strict Post-Trial Review Procedures

The Reporters' Study additionally recommends establishing detailed post-trial standards for judicial review of punitive damages awards. ⁶⁹ According to the Reporters, "Such a list would give lawyers and juries somewhat clearer guidance at trial, and it would also strengthen the hand of judges in reviewing trial verdicts" ⁷⁰ This approach has already been endorsed by the American Bar Association. ⁷¹

States that establish guidelines for post-trial review should consider the approach adopted by Alabama and approved by the United States Supreme Court in *Haslip*. The Alabama Supreme Court had in place post-trial procedures for scrutinizing and, where necessary, overturning punitive awards. ⁷² As an additional check, the Alabama Supreme Court provided a meaningful standard for appellate review by undertaking both a comparative and substantive analysis to "insure that the punitive award does not "exceed the amount that will accomplish society's goals of punishment and deterrence." ⁷³ The United States Supreme Court noted that this approach "insures that punitive damage awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to **[*278]** compensatory damages." ⁷⁴

IV. COMPLIANCE WITH REGULATORY STANDARDS DEFENSE

As described in Part I of this article, punitive damages have caused a stifling effect on the development and marketing of some new and useful products. Products have been taken off the market, for example, because of the fear of punitive damages liability. The Reporters' Study responds to these concerns by recommending that states create a shield against tort damages, particularly punitive damages. The shield would be appropriate in cases where the harmcausing aspect of a product complied with the requirements of a federal administrative regulation.

The Reporters endorsed this concept in no uncertain terms:

We believe that the risk of overdeterrence of socially valuable activities through the imposition of tort liability on regulated products and activities merits more widespread recognition of a regulatory compliance defense⁷⁵ The strongest case for a regulatory compliance defense arises when punitive damages are sought. If a defendant has fully complied with a regulatory requirement and fully disclosed all material information relating to risk and its control, it is hard to justify the jury's freedom to award punitive damages.⁷⁶

In this regard, the Study sets out four guidelines for courts and legislatures to follow to develop a compliance with regulatory standards defense.⁷⁷

The public policy reason for this type of rule is clear: society wants to encourage companies to invest and develop new and useful products, especially in the area of medicine.⁷⁸ The Study's recommendation would provide a strong incentive for the innovation of [*279] pharmaceuticals and medical devices. At the same time, the recommendation calls for punishing manufacturers who withhold material information from a federal government agency, such as the Federal Food and Drug Administration. This approach would separate good manufacturing practices from the bad the dolphin from the tuna.⁷⁹ Indeed, at least five states have enacted a defense against punitive damages liability for drugs and medical devices approved by the FDA.⁸⁰

V. MULTIPLE PUNITIVE AWARDS

The last major issue studied by the Reporters was multiple, or repetitive, punitive damages awards. Mass torts pose a special problem in the law of punitive damages.⁸¹ Substantial punitive awards in cases brought in mass enterprise injuries may strip a corporate defendant of its insurance coverage and assets.⁸² Such awards endanger the ability of later claimants to receive compensation for their injuries.⁸³ In response, the Reporters' Study recommends federal action to "authorize mandatory class actions for multiple punitive [*280] damages arising out of large-scale mass torts."⁸⁴ The Study offers two approaches. First, in mass disaster types of cases, such as airplane crashes, all claims could be consolidated in a federal court. That court would have power to compel joinder by issuing injunctions against any related suits in any state or federal court. The federal court would also have the power to decide which state's substantive law to apply and would produce a single punitive damage award against the defendant for all members of the class.⁸⁵ Second, in cases involving mass exposure that occurs over years or decades, such as in asbestos product liability cases, there would be greater judicial discretion whether to consolidate such cases. The court's principal focus would be on whether the number or cost of separate actions threatens to deplete the defendant's assets.⁸⁶

Other principal groups supporting tort law reform are calling for similar federal action. A special committee of the American Bar Association that studied punitive damages proposed that Congress establish a process for creating a national class action for multiple punitive damage claims arising out of conduct that results in similar injuries.⁸⁷ The American College of Trial Lawyers concluded that the preferred approach would be a multi-district or national class action requiring all litigants to appear in the same forum, with no option to opt out.⁸⁸

The difficulty with the Reporters' Study's, American Bar Association's, and American College of Trial Lawyers' proposals is that they require burdensome and complicated procedural reforms, and impose new or national choice-of-law rules. The proposals also fail to deal with situations involving lower numbers, but potentially devastating punitive damages claims (i.e., less than one hundred claims). Most importantly, many situations exist in which common facts are insufficient to justify a class. This is particularly true when product liability actions do not involve a single incident mass tort (i.e., a plane crash or hotel fire). ⁸⁹ [***281**]

A better solution would focus on the social goals of punitive damages--punishment and deterrence. This solution could establish a presumption that the first award of punitive damages imposed against the defendant, for harm arising out of a single act or course of conduct, is sufficient to punish the defendant and to deter others from similar wrongful conduct in the future. Subsequent claimants would be allowed, however, to overcome this presumption and pursue additional punitive damages, but only by presenting new and substantial evidence of previously undiscovered conscious and deliberate misconduct by the defendant. In this way, defendants and claimants will be guarded against the counter-productive effects of repetitive overpunishment. At the same time, society preserves a way to augment punishment if it is discovered that the original punishment was based on inadequate information. This process could be most easily established by federal law, but could also be carried out by the courts themselves through the principle of comity.

VI. CONCLUSION

The ALI Reporters' Study offers several recommendations to increase the consistency and predictability of punitive damages awards. Generally, the recommendations are fair and reasonable. Many of the Study's recommendations comport with the letter and spirit of the United States Supreme Court decision in *Haslip*, ⁹⁰ and many are supported by the other principal groups advocating punitive damages reform, including the American Bar Association and the American College of Trial Lawyers. While we do not agree with all of the Study's recommendations, we do believe they should be given close attention by both legislators and the courts.

FOOTNOTES:

†n1 See 2 AMERICAN LAW INST., REPORTERS' STUDY ON ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: APPROACHES TO LEGAL AND INSTITUTIONAL CHANGE (1991) hereinafter ALI STUDY .

†n2 *Id.* at 232. There have been two major systemic reanalyses of punitive damages in the past several years. See ABA SPECIAL COMMITTEE ON PUNITIVE DAMAGES, PUNITIVE DAMAGES: A CONSTRUCTIVE EXAMINATION (1986) hereinafter ABA REPORT ; AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT ON PUNITIVE DAMAGES OF THE COMMITTEE ON SPECIAL PROBLEMS IN THE ADMINISTRATION OF JUSTICE (Mar. 3, 1989) hereinafter ACTL REPORT . The Council on Competitiveness under President Bush also recently made punitive damages reform a primary goal on its agenda. See PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (1991) hereinafter JUSTICE REFORM .

†n3 See *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1043 (1991). See also *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 280-82 (1989) (Brennan and Marshall, J.J., concurring) (O'Connor and Stevens, J.J., concurring in part and dissenting in part); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 87 (1988) (O'Connor and Scalia, J.J., concurring in part and concurring in the judgment); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270-71 (1981) (Brennan, Marshall, and Stevens, J.J., dissenting). See generally Victor E. Schwartz & Mark A. Behrens, *Haslip May Alter Tort-Claim Strategies*, *THE NAT'L L.J.*, Feb. 17, 1992, at 23. As this article went to press, the Court in *TXO Prod. Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W.Va.),

cert. granted, 113 S. Ct. 594 (1992), agreed to hear arguments in another case about the constitutionality of punitive damages. Exactly what the Court will do is, of course, mere speculation, but the decision to hear the case is evidence of the Justices' continuing concern about the frequency of excessive punitive damages awards.

✦n4 According to the Study:

The pattern depicted by the empirical research appears to be that enterprises are subject to an occasional risk of what may turn out to be a very large punitive award: an award that may be multiplied if a single business decision about, say, a product design or warning leads to numerous successful tort claims, each with its own punitive component.

ALI STUDY, *supra* note 1, at 235.

✦n5 See PETER HUBER & ROBERT LITAN, *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION*, 7 (1991) (reporting on American Medical Association study finding that "innovative new products are not being developed or are being withheld from the market because of liability concerns or inability to obtain adequate insurance"). See also WALTER OLSON, *THE LITIGATION EXPLOSION* (1991); PETER HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988); Victor E. Schwartz & Liberty Mahshigian, *Issues in Tort Reform: National Childhood Vaccine Injury Act of 1986: An Ad Hoc Remedy or a Window for the Future?*, 48 OHIO ST. L.J. 387 (1987); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) ("The threat of such enormous awards has a detrimental effect on the research and development of new products.") (O'Connor, J., and Scalia, J., concurring).

✦n6 See *Brown v. Superior Ct.*, 44 Cal. 3d 1049, 1064, 751 P.2d 470, 479 (1988) (discussing withdrawal of Bendectin from the market after the price increased by more than 300 percent and the withdrawal of all but two manufacturers of diphtheria-tetanus-pertussis vaccine when the price increased a hundredfold from eleven cents per dose to \$ 11.40 per dose).

✦n7 See S. REP. NO. 215, 102d Cong., 1st Sess. 9 (1991) ("American manufacturers and product sellers generally pay product liability insurance rates that are 20 to 50 times higher than those of foreign competitors. This disparity is attributable in large part to the uncertainties and costs of the American tort litigation system."); H.R. REP. NO. 748, 100th Cong., 2d Sess., pt. 1, at 24 (1988) ("Without having to absorb the costs of product liability exposure for most of their sales, foreign corporations have an obvious price advantage. In Japan and Europe, product liability laws are more stable, litigation less frequent, and large damage awards uncommon.").

✦n8 See Man C. Maloo & Benjamin A. Neil, *Products Liability Exposure: The Sacrifice of American Innovation*, 13 J. PROD. LIAB. 361 (1991).

✦n9 In Japan and Europe contingency fees are prohibited and judges, not juries, decide the amount of verdicts. Our competitors also have the advantage of a predictable law. The United States patchwork of product liability laws stands in stark contrast to the uniform approach taken by the European Community. See generally FIRST ANNUAL REPORT OF THE U.S.-JAPAN WORKING GROUP ON THE STRUCTURAL IMPEDIMENTS INITIATIVE (MAY 22, 1991) (comments of the Japanese delegation); Alfred W. Cortese, Jr. & Kathleen L. Blaner, *The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at Our Own Game?*, 9 J.L. & COM. 167 (1989).

✦n10 ALI STUDY, *supra* note 1, at 248.

✦n11 *Id.*

†n12 Id. In reviewing a case heard by the Alabama state courts, the United States Supreme Court stressed that the Alabama jury instructions at issue "enlightened the jury" on the "nature and purpose" of punitive damages. *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1044 (1991). These instructions could be easily drafted into statutory form enabling a legislature to provide clear and unequivocal guidelines for the jury to determine whether punitive damages should be awarded.

†n13 *Tuttle v. Raymond*, 494 A.2d 1353, 1360-61 (Me. 1985). See, e.g., *Owens v. Illinois v. Zenobia*, 601 A.2d 633, 651 (Md. 1992); *Rawlings v. Apodaca*, 726 P.2d 565, 577 (Ariz. 1986); *Freeman v. Andersen*, 651 S.W.2d 450, 452 (Ark. 1983); *Jardel v. Hughes*, 523 A.2d 518, 527 (Del. 1987); *Preston v. Murty*, 512 N.E.2d 1174, 1175 (Ohio 1987); *Lee v. Bank of America*, 218 Cal. App. 3d 914, 920, 267 Cal. Rptr. 387, 390 (1990). See also David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1283 n.135 (1976) ("A ny definition of the punishable conduct, such as . . . 'reckless' . . . disregard of the public safety will necessarily be quite vague."). See PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 128 (1988).

†n14 See David G. Owen, *The Moral Foundation of Punitive Damages*, 40 ALA. L. REV. 705, 729 (1989); E. Donald Elliot, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 ALA. L. REV. 1053, 1057-60, 1065 (1989); 2 LINDA L. SCHLUETER & KENNETH R. REDDEN, *PUNITIVE DAMAGES* 418-19 (2d ed. 1989).

†n15 An example of purely "intentional" wrongdoing would be an individual purposely firing a handgun at a specific person. In contrast, an example of "conscious" wrongdoing would be an individual purposely firing a handgun into a crowd of people.

†n16 The American College of Trial Lawyers recommends that "the appropriate minimum standard for culpability for punitive awards . . . requires a conscious indifference to the safety of others." ACTL REPORT, *supra* note 2, at 10. The American Bar Association recommends a standard of "conscious or deliberate disregard with respect to the plaintiff." ABA REPORT, *supra* note 2, at 18. See also W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS*, 2 at 9-10 (5th ed. 1984) (punitive damages require circumstances of outrage, such as a "conscious and deliberate disregard of the interests of others").

†n17 111 S. Ct. 1032 (1991). See generally 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 (1993).

†n18 See *Haslip*, 111 S. Ct. at 1046.

†n19 See KEETON ET AL., *supra* note 16, at 9. See also *Haslip*, 111 S. Ct. at 1047- 50 (Scalia, J., concurring); 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, 351 (1983); Victor E. Schwartz & Liberty Magarian, *Challenging the Constitutionality of Punitive Damages: Putting Rules of Reason on an Unbounded Legal Remedy*, 28 AM. BUS. L.J. 485, 485 (1990); Samuel Freifield, *The Rationale of Punitive Damages*, 1 OHIO ST. L.J. 5, 7 (1935); and David L. Walther & Thomas A. Plein, *Punitive Damages: A Critical Analysis: Kink v. Combs*, 49 MARQ. L. REV. 369, 371 (1965).

†n20 The "collateral source rule" prohibits a defendant from reducing damages based on benefits received by a plaintiff from outside, or collateral, sources such as insurance companies. See generally John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478 (1986).

†n21 See Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517 (1957): "If

an act is particularly wrongful, society imposes criminal sanctions in order to deter the wrongdoer and others from repeating the offense. But while some faults, such as ordinary negligence, should be discouraged, they do not warrant the stigma and severity of criminal punishment. Such deterrence is effected in tort law by shifting the loss: the defendant is forced to repair the harm done to the plaintiff." *Id.* at 523 (emphasis added).

†n22 ALI STUDY, *supra* note 1, at 249.

†n23 *Id.* at 248.

†n24 See ABA REPORT, *supra* note 2, at 19; ACTL REPORT, *supra* note 2, at 15; Uniform Product Liability Act, 44 Fed. Reg. 62714, 62748 (1979). See also Dorsey D. Ellis, Jr., Punitive Damages, Due Process, and the Jury, 40 ALA. L. REV. 975, 994-95 (1989); Malcolm E. Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 VA. L. REV. 269, 298 (1983); David G. Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. CHI. L. REV. 1, 58-59 (1982).

†n25 Haslip, 111 S. Ct. at 1046 n.11. One state, Colorado, requires proof beyond a reasonable doubt to support a punitive damages award. See COLO. REV. STAT. 13-25- 127 (2) (1989).

†n26 See ALA. CODE 6-11-20 (Supp. 1992); ALASKA Stat. 09.17.020 (Supp. 1992); CAL. CIV. CODE 3294(a) (West Supp. 1992); GA. CODE ANN. 51-12-5.1 (Michie Supp. 1992); IND. CODE ANN. 34-4-34-2 (Burns 1986); IOWA CODE ANN. 668A.1 (West 1987); KAN. STAT. ANN. 60-3701(c) (1991); KY. REV. STAT. ANN. 411.184(2) (Michie/Bobbs-Merrill 1991); MINN. STAT. ANN. 549.20 (West 1992); MISS. H.B. 1270 2(1)(a) (signed by governor Feb. 18, 1993); MONT. CODE ANN. 27- 1-221 (5) (1991); NEV. REV. STAT. ANN. 42.005(1) (Michie 1991); N.D. CENT. CODE 32-03.2-11 (signed by governor Mar. 31, 1993); OHIO REV. CODE ANN. 2307.80(A) (Anderson 1991); OKLA. STAT. ANN. tit. 23, 9 (West 1992); OR. REV. STAT. 30.925 (1991); S.C. CODE ANN. 15-33-135 (Law. Co-op., Supp. 1992); S.D. CODIFIED LAWS ANN. 21-1-4.1 (1987); UTAH CODE ANN. 78-18-1 (1992). Colorado requires proof of punitive damages liability "beyond a reasonable doubt." COLO. REV. STAT. 13-25- 127(2) (1987).

†n27 See Travelers Indem. Co. v. Armstrong, 442 N.E.2d 349 (Ind. 1982); Linthicum v. Nationwide Life Ins. Co., 723 P.2d 675 (Ariz. 1986); Masaki v. General Motors Corp., 780 P.2d 566 (Haw. 1989); Tuttel v. Raymond, 494 A.2d 1353 (Me. 1985); Wangen v. Ford Motor Co., 294 N.W.2d 437 (Wis. 1980); Owens-Illinois v. Zenobia, 601 A.2d 633 (Md. 1992); Hodges v. S.C. Toof and Co., 833 S.W.2d 896, 901 (Tenn. 1992).

†n28 See Haslip, 111 S. Ct. at 1064 (O'Connor, J., dissenting). Justice O'Connor argues that a clear and convincing evidence standard should be required of states because it would "signal to the jury that it should have a high level of confidence in its factual findings before imposing punitive damages." *Id.*

†n29 *Id.* (a clear and convincing evidence standard would "permit closer scrutiny of the evidence by trial judges and reviewing courts").

†n30 See *id.* (clear and convincing evidence standard would "constrain jury discretion"); See also Zenobia, 601 A.2d at 657; Masaki, 780 P.2d at 575. In Masaki, the Supreme Court of Hawaii held:

Punitive damages are a form of punishment and can stigmatize the defendant in much the same way as a criminal conviction. It is because of the penal character of punitive damages that a standard of proof more akin to that required in criminal trials is appropriate, rather than the preponderance of the evidence standard generally employed in trials of civil

actions A more stringent standard of proof will assure that punitive damages are properly awarded.

780 P.2d at 575.

†n31 See ALI STUDY, supra note 1, at 252-53.

†n32 See id. at 253 ("we shall call for more searching reform of the criteria governing the size of punitive awards").

†n33 See 1 JAMES D. GHIARDI & JOHN M. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE 5.36 & Table 5-3 (1985 & Supp. 1989); Kenneth S. Abraham & John C. Jeffries, Punitive Damages and the Rule of Law: The Role of Defendant's Wealth, 18 J. LEGAL STUD. 415, 415 n.1 (1989); Dan B. Dobbs, Ending Punishment in "Punitive" Damages: Deterrence Measured Remedies, 40 ALA. L. REV. 831, 870 n.96 (1989).

†n34 ALI STUDY, supra note 1, at 254-55.

†n35 See id. See also Dobbs, supra note 33, at 870-85.

†n36 ALI STUDY, supra note 1, at 254.

†n37 Id. at 254-55.

†n38 Id. at 255. See also PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 118 (1988) ("When assessed against a corporation, for example, punitive damages are paid by stockholders, not by the responsible executives, and often not even by the stockholders who owned the company when the original mistakes were made.").

†n39 See Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1045 (1991) ("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."). Alabama allows the defendant's wealth to be considered on appellate review, but during trial the jury is precluded from considering the wealth of the defendant. The Haslip opinion suggests that the jury's focus in determining punitive damages should be on the defendant's active wrongdoing, not on his wealth. In finding that Alabama's procedure met due process standards, the Supreme Court in Haslip relied on the Alabama trial court's decision to not allow the jury to consider the defendant's wealth.

†n40 Bifurcation requires the same jury, usually at the defendant's request, to determine subsequent to deciding liability for compensatory damages whether liability for punitive damages exists and, if liability does exist, the amount of punitive damages.

†n41 See ALI STUDY, supra note 1, at 255 n.41.

†n42 See ALI STUDY, supra note 1, at 264. A jury that is informed about a firm's substantial profits from the product at issue in the case could be improperly influenced to issue a favorable plaintiff's verdict even though the case is weak for finding liability.

†n43 See ALI STUDY, supra note 1, at 255 n.41. See also Ellis, supra note 24, at 1003-07.

†n44 See ABA REPORT, supra note 2, at 19.

†n45 See ACTL REPORT, supra note 2, at 18-19. In the first common law decision on this point by a state supreme court, the Tennessee Supreme Court recently held that defendants may move for bifurcation in punitive damages cases. Hodges v. S.C. Toof & Co., 833 S.W.2d

896 (Tenn. 1992). The Tennessee holding follows changes made in several other states through court rules and legislation. See ALI STUDY, *supra* note 1, at 95, 101.

✦n46 See ALI STUDY, *supra* note 1, at 256. This reform has been supported by commentators as well. See Griffin B. Bell & Perry E. Pearce, Punitive Damages and the Tort System, 22 U. RICH. L. REV. 1 (1987); David G. Owen, Punitive Damages in Products Liability Litigation, 74 MICH. L. REV. 1257 (1976); Malcolm E. Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 VA. L. REV. 269 (1983).

✦n47 ALI STUDY, *supra* note 1, at 256. See also Ellis, *supra* note 20, at 1003-07.

✦n48 See JUSTICE REFORM, *supra* note 2.

✦n49 See Council on California Competitiveness Report, California's Jobs And Future, 90 (April 23, 1992) (Peter V. Ueberroth, Chairman).

✦n50 For federal statutes requiring judicial assessment of punitive damages, see Petroleum Marketing Practices Act, 105(d)(2), 15 U.S.C. 2805(d)(2) (1988), and Fair Credit Reporting Act, 616, 15 U.S.C. 1681n(2) (1988). For federal statutes requiring judges to determine the amount of any damages, see Equal Credit Opportunity Act, 706, 15 U.S.C. 1691e(b) (1988); Patent Act, July 19, 1952, ch. 950, 35 U.S.C. 284 (1988); and Fair Housing Act, Title VIII, 812, Civil Rights Act of 1968, 42 U.S.C. 3612(c) (1988).

✦n51 See CONN. GEN. STAT. ANN. 52-240b (West Supp. 1990) (product liability actions).

✦n52 See KAN. STAT. ANN. 60-3702 (1989).

✦n53 See OHIO REV. CODE ANN. 2307.80(B) (Baldwin 1990).

✦n54 See *Spaziano v. Florida*, 468 U.S. 447 (1984); *Clemons v. Mississippi*, 494 U.S. 738 (1990); *Hildwin v. Florida*, 490 U.S. 638 (1989); *Cabana v. Bullock*, 474 U.S. 376 (1986).

✦n55 See cases cited *supra* note 54. Note especially the Court's reasoning in *Spaziano*: "The Sixth Amendment never has been thought to guarantee a right to a jury determination of appropriate punishment to be imposed on an individual" 468 U.S. at 459.

✦n56 Several federal courts of appeals, including most recently the Fourth Circuit Court of Appeals, have held that the Seventh Amendment does not prohibit judicial assessment of punitive damages at the trial or appellate level. See *Shamblin's Ready-Mix v. Eaton Corp.*, 873 F.2d 736 (4th Cir. 1989); *Thomson v. Kerr-McGee Refining Corp.*, 660 F.2d 1380 (10th Cir. 1981); *Swofford v. B & W, Inc.*, 336 F.2d 406 (5th Cir. 1964). The United States Supreme Court has approved of judicial assessment of discretionary damages that serve a punitive purpose in civil penalty cases. See *Tull v. United States*, 481 U.S. 412 (1987). The Court has also implicitly upheld the practice in patent cases. See *Curtis v. Loether*, 415 U.S. 189, 196 n.12 (1974). See generally Alan H. Scheiner, Note, Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power, 91 COLUM. L. REV. 142 (1991).

✦n57 The Reporters Study does not recommend a specific ratio of punitive to compensatory damages that states should adopt. See ALI STUDY, *supra* note 1, at 259 ("Our concern in this Report is to endorse the substantive principle of the ratio of punitive to compensatory damages, not to commit ourselves to specific judgments about each of the issues in the operative formula.").

✦n58 *Id.*

†n59 Pacific Mut. Life Ins. Co. v. Haslip, 111 S.Ct. 1032, 1046 (1991).

†n60 See *id.* at 1043. The Court has provided states with an opportunity to meet this challenge in recent cases, vacating at least twelve decisions "in light of Haslip." See Fleming Landfill, Inc. v. Garnes, 111 S. Ct. 2882 (1991); Transamerica Occidental Life Ins. Co. v. Koire, 111 S. Ct. 2253 (1991); Southern Life & Health Ins. Co. v. Turner, 111 S. Ct. 1678 (1991); AMCA Int'l Fin. Co. v. Hilgedick, 111 S. Ct. 1614 (1991); Intercontinental Life Ins. Co. v. Lindblom, 111 S. Ct. 1575 (1991); Clayton Brokerage Co. v. Jordan, 111 S. Ct. 1298 (1991); Reserve Life Ins. Co. v. Eichenseer, 111 S. Ct. 1298 (1991); Hospital Auth. of Gwinnett County v. Jones, 111 S. Ct. 1298 (1991); Church of Scientology of Calif. v. Wollersheim, 111 S. Ct. 1298 (1991); International Soc. for Krishna Consciousness of Calif. v. George, 111 S. Ct. 1299 (1991); Pacific Lighting Co. v. MGW, Inc., 111 S. Ct. 1299 (1991); Portec, Inc. v. The Post Office, 111 S. Ct. 1299 (1991).

†n61 See N.D. CENT. CODE 32-03.2-11(1)-(5) (signed by governor Mar. 31, 1993).

†n62 413 S.E.2d 897, 908 (W. Va. 1991). In *Garnes*, the Supreme Court of Appeals of West Virginia found an award of \$ 105,000 punitive damages with nominal compensatory damages to be unconstitutional. *Id.* at 910.

†n63 596 A.2d 687, 710, (Md. Ct. Spec. App. 1991), cert. denied, 605 A.2d 137 (Md. 1992).

†n64 *Id.* at 720, 596 A.2d at 711.

†n65 See ACTL REPORT, *supra* note 2, at 15. Some states have already adopted similar limitations. See, e.g., NEV. REV. STAT. 42.005 (1991) (limiting punitive damages awards to \$ 300,000 in cases where compensatory damages are less than \$ 100,000 and to three times the amount of compensatory damages in cases of \$ 100,000 or more); TEX. CIV. PRAC. & REM. CODE ANN. 41.007 (West Supp. 1992) (confining punitive damages to four times actual damages, or \$ 200,000, whichever is greater); N.D. CENT. CODE 32-03.2-11(4) (signed by governor Mar. 31, 1993) (limiting punitive damages to twice compensatory damages, or \$ 250,000, whichever is greater); Cf. CONN. GEN. STAT. 52-240a (West Supp. 1990) (punitive award may not exceed twice the compensatory damages).

†n66 The American Bar Association has proposed a three-to-one ratio of punitive to compensatory damages. See ABA REPORT, *supra* note 2, at 62. Cf. FLA. STAT. ANN. 768.73 (1)(b) (West Supp. 1992) (punitive damages capped at three times compensatory damages unless "clear and convincing evidence" is presented by the plaintiff to show that a higher award is not excessive). In a model punitive damages statute, President Bush's Council on Competitiveness limited punitive damages to the amount of compensatory awards. See PRESIDENT'S COUNCIL ON COMPETITIVENESS REPORT, MODEL PUNITIVE DAMAGES ACT (1991). See also COLO. REV. STAT. 13-21-102(1)(a)(1987) (punitive award may not exceed compensatory damages). Cf. OKLA. STAT. tit. 23, 9 (1987) (punitive damages capped at compensatory damages awarded unless plaintiff establishes case by clear and convincing evidence).

†n67 Sometimes this flexibility is needed. For example, if a person throws acid at another, but only damages his clothing which is worth \$ 250, it seems inappropriate to limit punitive damages awards to \$ 1,000. In such a case it may be appropriate to invoke damages up to \$ 250,000.

†n68 ACTL REPORT, *supra* note 2, at 15.

†n69 ALI STUDY, *supra* note 1, at 256.

†n70 Id.

†n71 See ABA REPORT, *supra* note 2, at 63-64 (listing seventeen possible factors that courts should consider in reviewing jury awarded damages).

†n72 The Alabama Supreme Court set forth specific factors for the trial court to consider and required trial courts to note in the record their reasons for sustaining a jury verdict or setting it aside. *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1044 (1991).

†n73 Id. at 1045. In a key footnote, the Court contrasted Alabama's detailed appellate guidelines with the punitive damages schemes of two other states about which "Justices expressed concern" in previous cases. See *Haslip*, 111 S. Ct. at 1045 n.10 ("In those respective schemes, an amount awarded would be set aside or modified only if it was 'manifestly and grossly excessive,' or would be considered excessive when 'it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience.'") (citations omitted). The Court's footnote suggests that states with open-ended appellate review schemes may be vulnerable to constitutional attack on the ground that their review of punitive damage awards is vague and arbitrary, and therefore violates due process. Indeed, since *Haslip*, several courts have set aside state punitive damages review standards analogous to those questioned in *Haslip*. See *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991) (setting aside South Carolina punitive damages scheme); *Gamble v. Stevenson*, 406 S.E.2d 350 (S.C. 1991) (same); *Johnson v. Hugo's Skateaway*, 949 F.2d 1338 (4th Cir. 1991) (setting aside Virginia punitive damages procedure); *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991) (West Virginia law; same); *Alexander & Alexander, Inc. v. B. Dixon Evander & Assocs., Inc.*, 596 A.2d 687 (Md. Ct. Spec. App. 1991), cert. denied, 605 A.2d 137 (Md. 1992) (Maryland law; same).

†n74 *Haslip*, 111 S. Ct. at 1045.

†n75 ALI STUDY, *supra* note 1, at 95.

†n76 Id. at 101.

†n77 The Study recommends the following four guidelines:

1. The regulation must have been promulgated by a specialized administrative agency with the statutory responsibility to monitor risk-creating activities in that domain and to establish and revise regularly specific standards governing enterprise behavior;
2. The agency must have addressed the specific risk at issue in the case at hand, and must have made an explicit judgment about what type of legal conditions are appropriate;
3. The enterprise in question must have complied with all the relevant standards prescribed by the agency; and
4. The defendant must have disclosed to the regulatory agency any material in its possession (or of which it had good reason to be aware) concerning either the hazards posed by the defendant's activities or the available means of controlling the related risks.

Id. at 110.

†n78 A recent study by the prestigious Brookings Institution points out the strong need for the adoption of a compliance with regulatory standards defense, particularly with regard to the pharmaceutical industry. See PETER HUBER & ROBERT LITAN, *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* (1991). See also PETER HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988).

†n79 Note that in all of the controversial product liability medical device and drug litigation, plaintiffs allege that the manufacturer wrongfully withheld material information from the FDA. See, e.g., *Lee v. Baxter Healthcare Corp.*, 721 F. Supp. 89 (D. Md. 1989); *Bravman v. Baxter Healthcare Corp.*, 984 F.2d 71 (2nd Cir. 1993).

†n80 See ARIZ. REV. STAT. ANN. 12-701 (1992); N.J. STAT. ANN. 2A:58C-5(c) (West 1987); OHIO REV. CODE ANN. 2307.80 (Anderson 1991); OR. REV. STAT. 30.927 (1991); UTAH CODE ANN. 78-18-12 (1992). Recently, the First and Fifth Circuit Courts of Appeals recognized the strong public policy for the "compliance with FDA standards" defense. Both circuits shielded a medical device manufacturer from any liability for damages because the medical devices had been approved by the FDA before the manufacturer marketed the device. See *King v. Collagen Corp.*, 983 F.2d 1130 (1st Cir. 1993); *Stamps v. Collagen Corp.*, 984 F.2d 1416 (5th Cir. 1993).

†n81 See Victor E. Schwartz & Liberty Magarian, Multiple Punitive Damage Awards in Mass Disaster and Product Liability Litigation: An Assault on Due Process, 8 ADELPHI L.J. 101 (1992); Dennis N. Jones et al., Multiple Punitive Damages Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process, 43 ALA. L. REV. 1 (1991); John C. Jeffries, Jr., A Comment on the Constitutionality of Punitive Damages, 72 VA. L. REV. 139, 147 (1986).

†n82 See Lester Brickman, The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?, 13 CARDOZO L. REV. 1819, 1866-67 (1992); R. Barclay Surrick, Punitive Damages and Asbestos Litigation in Pennsylvania: Punishment or Annihilation?, 87 DICK. L. REV. 265 (1983).

†n83 See ALI STUDY, supra note 1, at 261 n.50. See also *Roginsky v. RichardsonMerrell, Inc.*, 378 F.2d 382 (2d Cir. 1967) (criticizing application of punitive damages in mass marketed product litigation); *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506 (5th Cir. 1984) (same).

†n84 ALI STUDY, supra note 1, at 260.

†n85 Id. at 412-19.

†n86 Id. at 419-21.

†n87 See ABA REPORT, supra note 2, at 78-81. Upon motion by a defendant and a finding by a court that "there is a reasonable possibility that adequate compensatory damages will not be available if punitive damages are not brought under control," there would be a single mass trial in federal court on the punitive damages issue. Id. at 79. The results of that trial would be binding on all class members. Id. at 81.

†n88 See ACTL REPORT, supra note 2, at 20-26.

†n89 The principal advantage of these proposals is that they would apportion punitive damages awards to all claimants. Policymakers considering a solution to the mass tort problem, however, should not embrace these approaches they contain the false assumption that punitive damages serve as a "bonus" to compensatory damages, rather than as a tool for punishment and deterrence.

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ARTICLE: REINING IN **PUNITIVE DAMAGES** "RUN WILD": PROPOSALS FOR **REFORM** BY
COURTS AND LEGISLATURES*

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SUMMARY:

... ¹ The Court has provided some general controls, holding that the Due Process Clause of the Fourteenth Amendment imposes both substantive limits on the size of punitive damages awards ² and procedural limits on when and how punitive damages may be awarded. ... ⁷ Courts and commentators alike have emphasized the "potentially devastating" ramifications of a punitive damages award on a civil defendant's character, reputation, business, and good will. ... The unpredictability of a prospective punitive damage award contributes significantly

to the uncertainty (and therefore the risk) of a court trial outcome. ... ⁶² This recommendation reflects the practical reality that a punitive damages award exceeding \$ 250,000 would bankrupt most individuals and small businesses. ... ⁹⁸ Having found the verdict tainted, the court reduced the punitive damages award to \$ 2 million, believing that this amount was "a constitutionally reasonable" punishment for BMW's conduct in Alabama. ...

TEXT:**[*1003]**

Introduction

The United States Supreme Court has expressed serious concern in recent years that punitive damages awards in this country have "run wild," jeopardizing fundamental constitutional rights. ¹ The Court has provided some general controls, holding that the Due Process Clause of the Fourteenth Amendment imposes both substantive limits on the size of punitive damages awards ² and procedural limits on when and how **[*1004]** punitive damages may be awarded. ³ Yet, excessive punitive damages awards continue to be a major problem in many states. ⁴ Reform is urgently needed to restore balance, fairness, and predictability to the law. Jackpot justice should not be permitted to replace fairness and rationality in punitive damages law.

Punitive damages are not normal civil or tort law damages. They are not awarded to compensate for a harm; that purpose is accomplished by compensatory damages, which provide compensation for both economic losses (e.g., lost wages, medical expenses, and substitute domestic services) and noneconomic losses (e.g., "pain and suffering"). Punitive damages are awarded "to further the aims of the criminal law: 'to punish reprehensible conduct and to deter its future occurrence.'" ⁵ They provide a "windfall recovery" for plaintiffs. ⁶

Punitive damages, like many forms of punishment, are by their nature, designed to "engender adverse social consequences," including in many instances, debilitating stigma. ⁷ Courts and commentators alike have emphasized the "potentially devastating" ramifications of a punitive damages award on a civil defendant's character, reputation, business, and good will. ⁸ The problems created by this stigma are amplified by **[*1005]** the way the media reports on punitive damages awards. While a large initial punitive damages verdict may frequently make front page national news, an appellate decision reducing or reversing the award several years later usually gets little coverage, if it is reported at all. The truth often fails to catch up with the perception created about the defendant.

This Article traces the history of punitive damages awards from their early limited inception to the modern expansive trend. It will then describe the problems of runaway and unpredictable awards. Finally, the article will provide background and support for a number of needed **reforms** to our nation's **punitive damages** jurisprudence. Nearly all of these **reforms** could be accomplished both by courts through the development of the common law and by legislatures; a few would require legislation; one calls for congressional action. ⁹

By way of summary, we propose establishing a "trigger," or standard, for punitive damages liability that reflects the intentional tort roots of punitive damages awards. We believe that punitive damages should only be awarded if there is "clear and convincing evidence" that the defendant acted with "actual malice" toward the claimant. We also propose limits on punitive damages awards so that the punishment fits the offense. This would help prevent due process violations and promote settlements.

We also call for a number of procedural and evidentiary changes in punitive damages law to safeguard fundamental due process rights. We believe that, at a defendant's request, a trial

involving a punitive damages claim should be "bifurcated" so that the proceedings on punitive damages are separate from and subsequent to the proceedings on compensatory damages before the same jury. This would prevent evidence that is highly prejudicial and relevant only to the issue of punishment from being heard by the jurors and improperly considered when they are determining basic liability. We also suggest that **[*1006]** evidence of a defendant's net worth should be excluded from consideration at trial. Further, we explain that evidence of a defendant's out-of-state activity should not be considered when determining an award of punitive damages.

Next, to encourage the innovation and distribution of lifesaving and life-enhancing products that are socially beneficial to society, we recommend that punitive damages should not be permitted in cases alleging harms caused by FDA pre-market approved pharmaceuticals, vaccines, or medical devices, unless the approval was obtained through fraud or bribery.

Finally, we argue for federal legislation to address the special problem of multiple punitive damages awards for a single act or course of conduct. Repetitive punishment is not only unfair overkill, but it can strip a company of assets and endanger the ability of future claimants to recover even basic out-of-pocket expenses and damages for their pain and suffering.

I. Background: The Development of Punitive Damages Law

A. The First 200 Years

Punitive, or exemplary, damages first received explicit recognition by the English common law in 1763 in two cases involving illegal searches and seizures by officers of the Crown.¹⁰ In *Huckle v. Money*,¹¹ the first case to use the term "exemplary damages," and its companion case, *Wilkes v. Wood*,¹² English courts for the first time expressed that "the punitive and deterrent purposes of damage awards could be separated from their compensatory function."¹³ **[*1007]**

Huckle and *Wilkes* were followed by cases approving punitive damages awards in a narrow category of torts involving conscious and intentional harm inflicted by one person on another. These "intentional torts" included assault and battery,¹⁴ malicious prosecution,¹⁵ false imprisonment,¹⁶ and trespass.¹⁷ Punitive damages were allowed in these cases as an auxiliary, or "helper," to the criminal law system, which in eighteenth century England "punished more severely for infractions involving property damage than for invasions of personal rights."¹⁸

As in England, punitive damages in colonial America (and through the nineteenth and well into the twentieth centuries) were available only in a comparatively small class of torts—"the traditional intentional torts."¹⁹ These included: assault and battery,²⁰ libel and slander,²¹ malicious prosecution,²² false imprisonment,²³ and intentional interferences with property **[*1008]** such as trespass and conversion, malicious attachment, or destruction of property,²⁴ private nuisance,²⁵ and similar wrongful conduct.²⁶ In general, punitive damages "merited scant attention," because they "were rarely assessed and likely to be small in amount."²⁷ Typically, punitive damages awards only slightly exceeded compensatory damages awards, if at all.²⁸

B. The Modern Era

Beginning in the late 1960s, American courts began to depart radically from the historical "intentional tort" moorings of punitive damages.²⁹ The advent of "mass tort" litigation resulted in an increase of punitive damages claims against manufacturers,³⁰ including the possibility of repeated imposition of punitive damages for an alleged risk in a single product line or a single decision.³¹ **[*1009]**

"Reckless disregard" became a popular standard for punitive damages liability.³² A number of states utilize a triple "trigger"-punitive damages can be awarded if the defendant engaged in either willful, wanton, or gross misconduct. The triple trigger approach gives plaintiffs three separate paths to obtain punitive damages. In some states, "gross negligence" can support a punitive damages award.³³

Changes in punitive damages law and practice also impacted both the frequency and size of punitive damages awards. For example, until 1976, there were only three reported appellate court decisions upholding awards of punitive damages in product liability cases, and the punitive damages award in each case was modest in proportion to the compensatory damages awarded.³⁴ Then, in the late 1970s and 1980s, the size of punitive damages awards "increased dramatically"³⁵ and "unprecedented numbers of punitive awards in product liability and other mass tort situations began to surface."³⁶ "Today," as one respected commentator in the field has noted, "hardly a month goes by without a multi-million dollar punitive damages verdict in a product liability case."³⁷

This phenomenon is fueled in part by evidentiary rules that permit a contingency fee plaintiff's lawyer to tell the jury not only about the profit the defendant made on a product, but also the general wealth of the corporation as a whole. Plaintiffs' lawyers argue to juries that large, wealthy corporations will "get the message" only if punitive damages are substantial. As the United States Supreme Court noted in *Honda Motor Co., Ltd. v. Oberg*,³⁸ a products liability punitive damages case, "The 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."³⁹

II. Punitive Damages Reform Is Needed

A. The Problem with Runaway Punitive Damages

Reform is needed to address the chilling effect that the threat of runaway punitive damages can have on job-creators and the general public, who are denied socially beneficial products. Reform also would help prevent due process violations.

The chilling effect of punitive damages is illustrated by the litigation involving the drug Bendectin, an anti-nausea morning sickness drug once marketed by Merrell Dow Pharmaceuticals, Inc.⁴⁰ Although the drug had been and still is approved by the Food and Drug Administration and is widely acclaimed by health care professionals worldwide, Merrell Dow withdrew Bendectin from the market in 1983, in part [*1011] from concerns about punitive damages liability. Merrell Dow has never lost a final judgment in any Bendectin case in the twenty-year history of the litigation; trial judges often dismiss these cases prior to trial.⁴¹ The lack of any meaningful standards, however, has resulted in some substantial punitive damages verdicts, which eventually have been overturned by trial courts or on appeal.⁴²

The sheer unpredictability of the current system has also resulted in overdeterrence. A Conference Board Study of corporate executives found that fear of liability suits had prompted thirtysix percent of the firms to discontinue a product and thirty percent to decide against introducing a new product.⁴³

B. "Data Wars" and the In Terrorem Effect of Punitive Damages

Opponents of **punitive damages reform** have argued that changes in the law are not needed, because headline-grabbing awards are often reduced on appeal. For example, one study funded by plaintiffs' lawyers has suggested that there were only 355 punitive damages awards in products liability cases from 1965 to 1990.⁴⁴ While the author of this study has

conceded that this number was only a "guesstimate," ⁴⁵ the study also overlooked the practical reality that actual punitive awards represent just the tip of the iceberg in regard to their impact. They are dwarfed by the amounts paid out in settlements due to the in terrorem effect of punitive damages.

On average, over ninety percent of cases are settled out of court or otherwise disposed of without trial. ⁴⁶ In many of [*1012] these cases, the threat of punitive damages may be abused as a "wild card" to force higher settlements. ⁴⁷ As Yale law professor George Priest has observed:

The availability of unlimited punitive damages affects the 95% to 98% of cases that settle out of court prior to trial. It is obvious and indisputable that a punitive damages claim increases the magnitude of the ultimate settlement and, indeed, affects the entire settlement process, increasing the likelihood of litigation. ⁴⁸

Professor Priest's observation is supported by the findings of a 1996 Pacific Research Institute for Public Policy study, which concluded:

1. The unpredictability of a prospective punitive damage award contributes significantly to the uncertainty (and therefore the risk) of a court trial outcome.
2. Both the uncertainty posed by the prospect of unlimited punitive damages, combined with the relative probability of a punitive damage award if a case goes to jury trial, provide litigants who demand punitive damages with potent leverage against risk-averse defendants, and tip the balance in settlement bargains in favor of litigants with weak or frivolous cases. ⁴⁹

III. Proposals For **Punitive Damages Reform**

In order to address the United States Supreme Court's concern that punitive damages awards in this country have "run wild," ⁵⁰ clear, rational rules are needed to protect fundamental constitutional rights, remove barriers to interstate commerce, and promote economic growth and innovation, while at the same time providing incentives for responsible business practices. Below, we discuss a number of proposals that find strong support in both the law and sound public policy. [*1013]

A. Actual Malice "Trigger"

Punitive damages should only be awarded if the defendant's conduct exhibited actual malice. This "trigger" reflects the roots of punitive damages law. At the time the Founding Fathers ratified the Constitution and until relatively recent times, punitive damages were reserved for clearly intentional torts such as assault, battery, trespass, and false imprisonment. While the actual malice standard is more conservative than the current law in most states, ⁵¹ we believe it is preferable to other standards, such as the "triple trigger" approach, because it would help separate conduct that is particularly reprehensible and worthy of punishment from that which is not.

B. "Clear and Convincing Evidence" Burden of Proof

A claimant should be required to establish proof of punitive damages liability by "clear and convincing evidence." The "clear and convincing evidence" burden of proof standard reflects the quasi-criminal nature of punitive damages; it takes a middle ground between the burden

of proof standard ordinarily used in civil cases (i.e., proof by a "preponderance of the evidence") and the criminal law standard (i.e., proof "beyond a reasonable doubt").⁵² The standard is now law in twenty-nine states and the District of Columbia,⁵³ and has been recom [*1014] mended by each of the principal academic groups to analyze the law of punitive damages over the past decade, including the American Bar Association, the American College of Trial Lawyers, and the National Conference of Commissioners on Uniform State Laws.⁵⁴ The United States Supreme Court has specifically endorsed the "clear and convincing evidence" burden of proof standard in punitive damages cases.⁵⁵

C. Proportionality: Making the Punishment Fit the "Offense"

1. A Proposal for **Reform**

Reasonable parameters should be put on **punitive damages** awards to make the punishment fit the offense.⁵⁶ Proportionality has been an important part of the United States Supreme Court's consideration of the validity of criminal punishment.⁵⁷ Even very serious crimes such as larceny, robbery, and arson [*1015] have sentences defined by a statutory maximum.⁵⁸ As former Supreme Court Justice Lewis Powell wrote: "It is long past time to bring the law of punitive damages into conformity with our notions of just punishment."⁵⁹

A number of states have enacted statutes to address excessiveness in punitive damages awards.⁶⁰ We support permitting punitive damages awards against larger businesses up to two times the amount awarded to the claimant for economic and noneconomic losses, or \$ 250,000, whichever is greater.⁶¹ This flexible approach accomplishes punishment and deterrence in the unusual situation where there is serious misconduct and relatively minor actual damages. We also support limiting the maximum single punishment against an individual or small business to two times the amount awarded to the claimant for economic and noneconomic losses, or \$ 250,000, whichever is less (i.e., \$ 250,000 would be the maximum).⁶² [*1016] This recommendation reflects the practical reality that a punitive damages award exceeding \$ 250,000 would bankrupt most individuals and small businesses.

2. Arguments Challenging Proportionality Are Unsupported

It has been argued that proportionality may result in inadequate deterrence. As Thomas Jefferson noted, however, "if the punishment were only proportional to the injury, men would feel that their inclination as well as their duty to see the laws observed."⁶³ Indeed, federal antitrust laws have worked well for decades with punishment set in proportion to actual losses.

Furthermore, it should be remembered that there is no limit on the number of times a business can be punished and that when a business engages in wrongful conduct it does not know how many people will be hurt and how much harm might occur. There is simply no way for a company to predetermine the actual damages of all persons who may be injured by its conduct. One also must remember that compensatory damages themselves can run very high, so they can definitely have a deterrent effect on wrongful behavior as well.⁶⁴

The argument that proportionality may somehow result in inadequate deterrence has been rebutted by empirical fact. A study by two Cornell University Law School professors and the National Center for State Courts found that awards in product liability punitive damages cases, after all appeals were exhausted, have almost always been within two times compensatory damages.⁶⁵ [*1017]

We have been asked, in light of this report, why a so-called "**cap**" on punitive damages is needed. The answer is that the present system is time consuming and wasteful. It may take months or years until the final "appeal" is determined. It is our judgment that having a firm outer limit on punitive damages will reduce appeals and legal costs without sacrificing

deterrence. This should benefit both plaintiffs and defendants.

In addition, it has been argued that totally unlimited punitive damages are needed to police corporate wrongdoing. This assertion is not supported by fact. There is no credible evidence that the behavior of businesses is less safe in either those states that have set limits on punitive damages or in the states that do not permit punitive damages at all. ⁶⁶ Furthermore, plaintiffs in these states have no more difficulty obtaining legal representation than in those states where the "sky is the limit."

Finally, it has been suggested that a proportionality requirement for punitive damages could be unfair to women and other minority groups that tend to recover less in compensatory damages than other groups, because it may reduce the amount such individuals could recover in punitive damages. ⁶⁷ First, this argument totally misapprehends the basic premise that punitive damages have absolutely nothing to do with compensating an individual for a loss; they are purely a "windfall" to the claimant.

Second, the argument ignores the needs of women and minority groups in business, particularly small businesses, who face threats to their enterprises as a result of unlimited punitive damages. The U.S. Small Business Administration's Office of Women's Business Ownership has reported that there are 8 million women-owned businesses in the United States. ⁶⁸ In addition, the U.S. Small Business Administration's Office of Advocacy has reported that, by 1997, there were an estimated 3.25 million minority-owned businesses in the United States, **[*1018]** generating \$ 495 billion in revenues, and employing nearly 4 million workers. ⁶⁹ From 1987 to 1997, the number of minority-owned businesses increased 168%, while revenues grew twice as fast-343%. ⁷⁰ **Punitive damages reform** would benefit these businesses greatly.

D. Bifurcation

At a defendant's request, a trial involving a punitive damages claim should be divided so that the proceedings on punitive damages are separate from and subsequent to the proceedings on compensatory damages. Judicial economy would be achieved by having the same jury determine both compensatory damages and punitive damages issues.

Bifurcated trials are equitable, because they prevent evidence that is highly prejudicial and relevant only to the issue of punishment from being heard by jurors and improperly considered when they are determining basic liability. For example, plaintiffs' lawyers like to introduce evidence of a company's net worth. Although a jury is often instructed to ignore such evidence unless it decides to punish the defendant, it is difficult, as a practical matter, for jurors to do so. The net result may be that jurors overlook key issues regarding whether a defendant is liable for compensatory damages; they may make an award simply because they believe that the defendant "can afford it." Bifurcation would help prevent that unfair result because evidence of the defendant's net worth would be inadmissible in the first part (i.e., compensatory damages phase) of the case.

Bifurcation also helps jurors "compartmentalize" a trial, allowing them to more easily separate the burden of proof that is required for compensatory damage awards (i.e., proof by a preponderance of the evidence) from a higher burden of proof for punitive damages (i.e., proof by clear and convincing evidence).

Recognizing the benefit of bifurcation, some courts have adopted the procedure as a matter of common law reform. ⁷¹ **[*1019]** Other states have made changes through court rules or legislation. ⁷² Bifurcation of punitive damages trials is supported by the American Bar Association, the American College of Trial Lawyers, and the National Conference of Commissioners on Uniform State Laws, among other well-known organizations. ⁷³

E. Excluding Evidence of a Defendant's Net Worth by Plaintiffs

Evidence of a defendant's net worth can lead to a punitive damages award based on bias, prejudice, or passion. Introduction of such evidence by plaintiffs is, at bottom, "an improper 'appeal to class prejudice and pandering to the perception that corporations wield disparate power,'" generally made for no reason "other than to prejudice . . . the jury's sworn duty to reach a fair, honest and just verdict."⁷⁴ To reduce the possibility that quasi-criminal punishment could be meted out for improper purposes, plaintiffs should be precluded from making such "deep pockets" arguments.⁷⁵

1. The United States Supreme Court Speaks and Leading Academics Agree

The United States Supreme Court has indicated that overreliance upon a corporate defendant's financial condition may violate due process. For example, one of the reasons the [*1020] Court gave for upholding Alabama's punitive damages scheme in *Pacific Mutual Life Insurance Co. v. Haslip*⁷⁶ was the fact that Alabama does not permit introduction of the defendant's financial condition, and its juries therefore "must be guided by more than the defendant's net worth."⁷⁷ The Court stated: "Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket."⁷⁸

Subsequently, the Court said in *TXO Production Corp. v. Alliance Resources Corp.*⁷⁹ that "the emphasis on the wealth of the wrongdoer increased the risk that the [punitive damages] award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident."⁸⁰ Most recently, in *BMW of North America, Inc. v. Gore*⁸¹ the Court expressed its strongest reservations about the use of wealth evidence in punitive damages cases. The Court stated that "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose."⁸²

The defendant's right to notice would be a "phantom" right if a punitive damages award could be based on a defendant's net worth at the time of trial. Indeed, in *BMW*, the Supreme Court was careful to emphasize that "the fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business."⁸³ [*1021]

The risk of a punitive damages award reflecting jury bias is particularly great where the defendant is a large corporation.⁸⁴ For precisely this reason, a report prepared by tort scholars for the prestigious American Law Institute recommended that evidence of a corporation's net worth should "no longer be admissible in assessing punitive damages."⁸⁵ After all, as one respected federal appellate judge has noted, "having a large net worth [is not] the wrong to be deterred!"⁸⁶

Furthermore, consideration of a corporate defendant's net wealth can lead to arbitrary awards. Corporations can incur proportionately more instances of punishment simply because of their greater volume of business. For example, in a given period there might be fifty punitive damages awards against a larger company and only five against a smaller company. If each punitive damages assessment is one percent of the [*1022] defendant's assets, the large company will have lost half its assets after this period. The smaller company, which behaved in exactly the same way, would still have ninety-five percent of its assets.⁸⁷

2. Arguments for Net Worth Evidence Admissibility Are Ill-Considered

Plaintiffs generally argue that evidence of a defendant's overall financial condition is rationally related to the goals of punishment and deterrence, on the theory that the wealthier the defendant, the higher the financial penalty must be in order to give a culpable defendant

both the punishment it deserves and the economic incentive not to repeat its wrongdoing.

While this may be true in the case of individual defendants acting personally out of malicious or spiteful motives-i.e., it may take a larger punishment to deter a millionaire from punching someone in the nose than to deter a person of modest means-it has no applicability to corporate behavior, which is almost invariably motivated by economics.⁸⁸ As two noted scholars on punitive damages awards have explained: **[*1023]**

Deterrence theory is based on the (usually and to one or another extent plausible) assumption that actors weigh the expected costs and benefits of their future actions. Specifically, a potentially liable defendant will compare the benefits it will derive from an action that risks tort liability against the discounted present expected value of the liability that will be imposed if the risk occurs. Whether a defendant is wealthy or poor, this cost-benefit calculation is the same. If, as is likely, a wealthy defendant derives no greater benefit from a given action than a poor defendant, then both will be equally deterred (or equally undeterred) by the threat of tort liability. A defendant's existing assets do not increase the expected value of a given future action. Therefore they do not require any adjustment in the level of sanction needed to offset that expected value. The defendant's wealth or lack of it is thus irrelevant to the deterrence of socially undesirable conduct.⁸⁹

F. Excluding Evidence of Extraterritorial Conduct

Evidence of a defendant's out-of-state activity to award and calculate punitive damages can violate constitutional principals of interstate commerce, state sovereignty, comity, and due process. Plaintiffs should be precluded from admitting such evidence.

This issue was a principal focus of the Supreme Court's opinion in *BMW of North America, Inc. v. Gore*.⁹⁰ In *BMW*, the Court indicated that the Commerce and Due Process Clauses of the United States Constitution prohibit state courts from using the punitive damages mechanism as a means of regulating conduct in other states. In a crucial sentence, the Court said: "While each State has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation."⁹¹

Months after purchasing a new BMW sedan from an Alabama dealer, and without noticing any flaws in its appearance, Dr. Gore took his vehicle to a "detailer"-someone who would thoroughly clean the car inside and out to make it look "snazz **[*1024]** ier than it normally would appear."⁹² The detailer noted that portions of Dr. Gore's car had been repainted and brought this to the doctor's attention. Dr. Gore sued the American distributor of BMW automobiles seeking both compensatory and punitive damages on the theory that BMW's failure to disclose the repainting constituted "gross, oppressive or malicious" fraud under Alabama law.⁹³

At trial, BMW acknowledged that it had a national policy of repairing cars that were damaged in the course of manufacture or during shipment. If the cost of a repair exceeded 3% of the car's suggested retail price, it was placed in company service for a period of time and then sold as used. If the repair was less than 3% of the purchase price, however, BMW sold the car as "new" without advising the dealer or the customer that any repairs had been made.⁹⁴

Because the cost of repainting Dr. Gore's car was only about 1.5% of the car's suggested retail price, BMW did not disclose its repair to the Alabama dealer or to Dr. Gore. BMW's nondisclosure policy was consistent with the statutory laws of approximately twenty-five states which define disclosure obligations of automobile manufacturers, distributors, and retailers.⁹⁵ Under these state laws, BMW's failure to disclose minor refinishing was lawful and

did not constitute an unfair trade practice.

The Alabama jury awarded Dr. Gore \$ 4,000 as compensatory damages for the difference in the value of the car he "bargained for" and the car he received. ⁹⁶ The jury also awarded \$ 4 million in punitive damages, which the jury apparently calculated by multiplying Dr. Gore's damage estimate (\$ 4,000) by 1,000, the number of cars BMW allegedly sold throughout the country under its nondisclosure policy. ⁹⁷

On appeal to the Alabama Supreme Court, BMW contended, among other things, that its out-of-state conduct was permissible under the disclosure statutes of other states and, therefore, could not serve to augment a punitive damages [*1025] award. The Alabama Supreme Court agreed, holding that the jury should not have been permitted to consider sales by BMW outside of Alabama. ⁹⁸ Having found the verdict tainted, the court reduced the punitive damages award to \$ 2 million, believing that this amount was "a constitutionally reasonable" punishment for BMW's conduct in Alabama. ⁹⁹

Ultimately, the United States Supreme Court decided that the \$ 2 million award still left a punishment that exceeded Alabama's legitimate interests in protecting the rights of its citizens and was, therefore, unconstitutionally excessive. ¹⁰⁰

Before tackling the "excessiveness" issue, however, the Court commented at length on constitutional principles that are involved when a state attempts to punish out-of-state conduct, observing that the Constitution has a "special concern both with the maintenance of a national economic union unfettered by stateimposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." ¹⁰¹ The Court outlined the following three basic principles.

Interstate Commerce: The Court noted that a defendant's participation in the "national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce." ¹⁰² Congress is permitted to make nationwide rules involving interstate commerce, but "it is clear that no single State can do so, or even impose its policy choice on neighboring States." ¹⁰³

State Sovereignty and Comity: Next, the Court noted that "one State's power to impose burdens on interstate commerce is not only subordinate to the federal power over interstate commerce, but is also constrained by the need to respect the interests of other States." ¹⁰⁴ The Court made the critical admonition that: "Principles of state sovereignty and comity demand that a State may not impose economic sanctions on [*1026]

violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." ¹⁰⁵

Due Process: Finally, the Court suggested that punishing a defendant for lawful extraterritorial conduct would violate due process. The Court stated:

Alabama may insist that BMW adhere to a particular disclosure policy in that State. Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions. ¹⁰⁶

Applying these fundamental principles, the Court approvingly concluded that the Alabama Supreme Court "properly eschewed reliance on BMW's out-of-state conduct and based its remitted award solely on conduct that occurred within Alabama." ¹⁰⁷

Although BMW involved conduct (i.e., failure to disclose minor refinishing) that was permissible outside Alabama under the disclosure statutes of other states, the Supreme Court was careful to explain that its holding was not limited to instances of state legislation, but applied broadly to any form in which state power is exercised—specifically including state court decisions. The Court said: "State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute." ¹⁰⁸ Elsewhere in the opinion, the [*1027] Court again emphasized that "the economic penalties that a State . . . inflicts on those who transgress its laws, whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting its own consumers and its own economy." ¹⁰⁹

Indeed, as a tort policy matter, a state court judgment that a defendant's conduct is not tortious provides a signal that the defendant's conduct does not justify the imposition of punitive damages in that state. Such a finding should be given equal (and perhaps greater) legal weight than a statutory "safe harbor," such as the disclosure laws at issue in BMW. The reason is that, in most jurisdictions, conduct comporting with a legislative or regulatory standard may still be found tortious by a jury asked to determine whether the defendant met applicable standards of care. ¹¹⁰ On the other hand, a finding of "no liability" in a tort action suggests strongly that, in that jurisdiction, the defendant's conduct was lawful. BMW says that it is unconstitutional for a jury in a forum state to consider lawful conduct in other states when deciding punitive damages issues. ¹¹¹

Precluding evidence of the defendant's out-of-state activity would prevent such due process violations. It also would prevent the possibility of due process violations that could arise if the forum state were examining conduct that occurred in jurisdictions that had not yet determined for themselves whether the defendant's conduct should subject it to liability. Tort law varies widely between states and one state cannot assume what the legislature or citizens (jurors) of other states may decide. ¹¹² In that regard, if the forum state's court "guessed" [*1028] wrong and concluded that another state ("State X") would find the defendant's conduct to be unlawful, but State X later decides either through legislation or judicial decision that the conduct is lawful, the forum state's ruling would be violative of the principles set forth in BMW. ¹¹³

Finally, it is important to note that precluding evidence of a defendant's conduct outside the forum state would not result in culpable defendants "escaping" appropriate punishment because those other states would be free to impose punishment on behalf of their own citizens if it was determined that the defendant's conduct should subject it to liability.

G. Compliance with FDA Pre-Market Approval Standards Defense

Punitive damages should not be permitted in cases alleging harms caused by FDA pre-market approved pharmaceuticals, vaccines, or medical devices, unless the approval was obtained through fraud or bribery. The public policy reason for this type of rule is that society should encourage companies to invest in and develop new and useful life-prolonging and life-saving products. This reform, which is already law in several states, ¹¹⁴ received strong support in a comprehensive [*1029] study of the civil justice system by the American Law Institute. The study's authors concluded:

We believe that the risk of overdeterrence of socially valuable activities through the imposition of tort liability on regulated products and activities merits more widespread recognition of a regulatory compliance defense.

....

The strongest case for a regulatory compliance defense arises when punitive damages are sought. If a defendant has fully complied with a regulatory requirement and fully disclosed all

material information relating to risk and its control, it is hard to justify the jury's freedom to award punitive damages. ¹¹⁵

If implemented, a compliance with FDA pre-market approval standards defense against punitive damages would provide a strong incentive for the innovation of products that may otherwise be withheld because of concerns about uncertain and arbitrary liability. At the same time, such a defense could punish manufacturers who intentionally withhold material information from the FDA by subjecting such manufacturers to punitive damages liability.

H. Limiting Multiple **Punitive Damages** Awards

The **reforms** that have been discussed in this Article could be accomplished at the state or federal level; many could be (and have been) accomplished by judicial decision. Because of the limits on the ability of individual states to control conduct in other states, however, and the United States Supreme Court's past unwillingness to clarify due process limits on multiple punitive damages awards, Congress should enact legislation making clear that defendants are not to be punished ad infinitum for a single act or course of conduct. [***1030**]

1. Problems Caused by Multiple Punitive Damages

As a result of the expansion of punitive damages beyond the traditional intentional torts, courts in the 1970s began to apply punitive damages more than once against the same defendant, for example, in the developing field of products liability. As a result, defendants began to be punished over and over again for what was essentially a single act or course of conduct. ¹¹⁶

Multiple punitive damages awards present significant problems for plaintiffs and defendants. For instance, multiple "windfall" recoveries of punitive damages can deplete a defendant's limited resources, endangering the ability of future claimants to recover even basic out-of-pocket expenses and damages for their pain and suffering. ¹¹⁷

Moreover, excessive imposition of awards may drive a company out of business. ¹¹⁸ When this occurs, the devastating "ripple" effect can extend far beyond the defendant company to injured persons who are thereafter unable to recover compensation for their injuries. There are concomitant losses suffered by the company's employees, who may lose their jobs, as well as by those other businesses that rely on the company or its employees for income. Economic harm to the company also affects shareholders, such as pension funds and ordinary citizens, and other investors who face the loss of their savings.

The detrimental impact of multiple punitive damages exists even in cases which are settled, rather than tried. A federal appellate judge astutely recognized this problem when he wrote: [***1031**]

The potential for punitive awards is a weighty factor in settlement negotiations and inevitably results in a larger settlement agreement than would ordinarily be obtained. To the extent that this premium exceeds what would otherwise be a fair and reasonable settlement for compensatory damages, assets that could be available for satisfaction of future compensatory claims are dissipated. ¹¹⁹

Multiple imposition of punitive damages also poses a significant obstacle to global settlement negotiations in repetitive litigation and blocks the ability of claimants to recover quickly for their injuries or the loss of loved ones. As one federal district judge wrote: "Barring

successive punitive damages awards against a defendant for the same conduct would remove the major obstacle to settlement of mass tort litigation and open the way for the prompt resolution of the damage claims of many thousands of injured plaintiffs." ¹²⁰

Furthermore, federal and state courts have expressed strong concerns that multiple punitive damages awards may

violate constitutionally protected due process rights. ¹²¹ Com [*1032] mentators in the field have expressed the same concerns. ¹²²

Lastly, multiple punitive damages awards undermine the integrity of the justice system by transforming it into a lottery where a few people collect arbitrary "wins" at the expense of everyone else-the company, its employees, its shareholders, and ordinary consumers. With the exception of those lawyers who reap windfalls from repetitive punitive damages, nobody can seriously argue that repeatedly punishing anyone for a single act makes sense or benefits society.

2. Uniform, National Legislative Action Is Needed

"Unquestionably, a national solution is needed" to the problem of multiple punitive damages awards. ¹²³ The individual states are powerless to provide a comprehensive remedy because one state cannot dictate judicial or legislative policies to another state. ¹²⁴ Thus, even though a state may act to con [*1033] trol the problems of multiple punitive damages awards within its borders, it cannot control the imposition of punitive damages awards in other jurisdictions. ¹²⁵

The clearest evidence of this weakness was described in an opinion written by former United States District Judge H. Lee Sarokin. In *Juzwin v. Amtorg Trading Corp.*, ¹²⁶ involving claims against an asbestos manufacturer, Judge Sarokin vacated an earlier order striking plaintiffs' punitive damages claims on the ground that multiple imposition of punitive damages imposed without guidelines violated due process, in part, because he believed that he was powerless to limit other courts from imposing punitive damages awards against the same defendant. ¹²⁷

Unfortunately, the United States Supreme Court has proven unwilling to solve the problem of multiple punitive damages and appears unlikely to do so at any time soon. ¹²⁸ Indeed, the [*1034] Florida Supreme Court has asserted that "any realistic solution to the problems caused by [multiple punitive damages awards] in the United States . . . can only be effected by federal legislation." ¹²⁹

Congressional action is needed to "disallow[] the repeated sanction of punitive damages against the same defendant for one act." ¹³⁰ This would "protect[] the due process rights of corporate defendants as well as the rights of injured plaintiffs to be compensated, rather than see money which is rightfully theirs be distributed as a windfall." ¹³¹

Conclusion

Larger and larger punitive damages verdicts are being rendered based on weak burdens of proof, irrelevant and even prejudicial evidence, and often multiple times against the same defendant for the same activity. This has led the United States Supreme Court to express serious concern that punitive damages awards in this country have "run wild." ¹³²

The civil justice system should not be a "litigation lottery" characterized by excessiveness and arbitrariness. **Punitive damages reform** is needed to restore balance, fairness, and predictability to the law. We recommend a number of reforms. While all of these could be achieved through legislation, many could be accomplished by courts through the

development of the common law; only one would require federal action. Specifically, we recommend:

(1) Establishing a liability "trigger" that reflects the intentional tort origins and quasi-criminal nature of punitive damages [*1035] requires awards of "clear and convincing evidence" of "actual malice."

(2) Requiring proportionality in punitive damages so that the punishment fits the offense.

(3) Permitting a defendant to request "bifurcation" of a punitive damages trial so that the proceedings on punitive damages would be separate from and subsequent to the proceedings on compensatory damages. The same jury would hear both phases of the case. This would prevent evidence that is highly prejudicial and relevant only to the issue of punishment from being heard by jurors and improperly considered when they are determining basic liability.

(4) Precluding plaintiffs from introducing prejudicial net worth evidence.

(5) Precluding evidence of a defendant's out-of-state conduct to award and calculate punitive damages.

(6) Encouraging the development and marketing of lifesaving and life-enhancing pharmaceuticals, vaccines, and medical devices by creating a defense to punitive damages based on compliance with FDA pre-market approval standards, except in cases where the approval was obtained through fraud or bribery.

(7) Federal legislation to address the special problem of multiple punitive damages awards; this would protect against unfair overkill, guard against possible due process violations, and help preserve the ability of future claimants to recover basic out-of-pocket expenses and damages for their pain and suffering.

FOOTNOTES:

†n1 *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991).

†n2 See *BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 585-86 (1996); see also *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 458 (1993); *Pacific Mutual*, 499 U.S. at 23-24; cf. *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 661 (8th Cir. 1995) (opinion by retired Supreme Court Justice Byron White) (striking down punitive damages award as "excessive, unreasonable and violative of due process").

†n3 See *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994).

†n4 See **Punitive Damages Tort Reform**: Hearing Before the Senate Comm. on the Judiciary, 104th Cong. (Apr. 4, 1995) (testimony of Theodore Olson, former Assistant United States Attorney for the Office of Legal Counsel); Special Report, *The Top Ten Verdicts of 1999*, Law. Wkly. USA, Jan. 10, 2000, at 2000 LWUSA 25.

†n5 *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 297 (1989) (O'Connor, J., concurring in part and dissenting in part) (quoting *Banker's Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 87 (1988) (O'Connor, J., concurring in part and concurring in judgment)). All jurisdictions, except Louisiana, Nebraska, Massachusetts, Michigan and Washington state, permit the award of punitive damages. Michigan permits "exemplary" damages as compensation for mental suffering consisting of a sense of insult, indignity, humiliation, or injury to feelings, but does not permit punitive damages for purposes of punishment. See *Product Liability Desk Reference-A Fifty State Compendium* (Morton Daller ed., 2000).

†n6 *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981) (Brennan, J., dissenting).

†n7 *Addington v. Texas*, 441 U.S. 418, 426 (1979).

†n8 *Browning-Ferris*, 492 U.S. at 281 (Brennan and Marshall, J.J., concurring); see also *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 50 (1979) ("The impact of [a punitive damages award] is unpredictable and potentially substantial."); Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. Chi. L. Rev. 408, 417 (1967) (Punitive damages awards have "'momentous and serious' . . . consequences" for civil defendants.) (citation omitted).

†n9 See generally 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 (1993).

†n10 See James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 Vand. L. Rev. 1117 (1984); see also *Beardmore v. Carrington*, 95 Eng. Rep. 790 (C.P. 1764) (illegal search and seizure); *Bruce v. Rawlins*, 95 Eng. Rep. 934 (C.P. 1770) (same); *Sharpe v. Brice*, 96 Eng. Rep. 557 (C.P. 1774) (same).

†n11 95 Eng. Rep. 768 (C.P. 1763).

†n12 98 Eng. Rep. 489 (C.P. 1763).

†n13 Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. Rev. 1, 14 (1982). In *Wilkes*, Lord Chief Justice Pratt announced: "A jury shall have it in their power to give damages for more than the injury received . . . as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." *Wilkes*, 98 Eng. Rep. at 498-99; see also Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons From History*, 40 Vand. L. Rev. 1233 (1987).

†n14 See, e.g., *Grey v. Grant*, 95 Eng. Rep. 794 (C.P. 1764); *Benson v. Frederick*, 97 Eng. Rep. 1130 (K.B. 1766).

†n15 See, e.g., *Hewlett v. Cruchley*, 128 Eng. Rep. 696 (C.P. 1813); *Leith v. Pope*, 96 Eng. Rep. 777 (C.P. 1779).

†n16 See, e.g., *Fabrigas v. Mostyn*, 96 Eng. Rep. 549 (C.P. 1774).

†n17 See, e.g., *Merest v. Harvey*, 128 Eng. Rep. 761 (C.P. 1814); *Sears v. Lyons*, 171 Eng. Rep. 658 (K.B. 1818). Punitive damages also were allowed for seduction. See, e.g., *Tullidge v. Wade*, 95 Eng. Rep. 909 (C.P. 1769). In addition, for a period, English courts permitted an award of punitive damages for criminal conversation (i.e., adultery). See *Duberly v. Gunning*, 100 Eng. Rep. 1226 (K.B. 1792).

†n18 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, 355 (1983).

†n19 The use of "private attorneys general" to sanction antisocial conduct unregulated by the criminal law reached America in 1784. See *Genay v. Norris*, 1 S.C. 6 (1784); see also David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1257, 1263, 1287-88 (1976).

†n20 See, e.g., *Ward v. Blackwood*, 41 Ark. 295 (1883); *Lyon v. Hancock*, 35 Cal. 372

(1868); *Corwin v. Walton*, 18 Mo. 71 (1853); *Trogden v. Terry*, 172 N.C. 540 (1916); *Porter v. Seiler*, 23 Pa. 424 (1854).

✚n21 See, e.g., *Sheik v. Hobson*, 64 Iowa 146 (1884); *Louisville & Nashville R.R. Co. v. Ballard*, 85 Ky. 307 (1887); *Vanch v. Hall*, 3 N.J.L. 814 (Sup. Ct. 1811).

✚n22 See, e.g., *Brown v. McBride*, 24 Misc. 235, 52 N.Y.S. 620 (Sup. Ct. Queens County 1898).

✚n23 See, e.g., *Lake Shore & Mich. S. Ry. Co. v. Prentice*, 147 U.S. 101 (1893); *Green v. Southern Express Co.*, 41 Ga. 515 (1871); *Schlencker v. Risley*, 4 Ill. 483 (1842); *Taber v. Hutson*, 5 Ind. 322 (1854); *Jackson v. American Tel. & Tel. Co.*, 51 S.E. 1015 (N.C. 1905); *Parsons v. Harper*, 57 Va. 64 (1860); *Hamlin v. Spaulding*, 27 Wis. 360 (1870).

✚n24 See, e.g., *Dorsey v. Manlove*, 14 Cal. 553 (1860); *Treat v. Barber*, 7 Conn. 274 (1828); *Singer Mfg. Co. v. Holdfodt*, 86 Ill. 455 (1877); *Taylor v. Giger*, 3 Ky. 586 (1808); *Schindel v. Schindel*, 12 Md. 108 (1858); *Huling v. Henderson*, 161 Pa. 553 (1894); *Bradshaw v. Buchanan*, 50 Tex. 492 (1878).

✚n25 See, e.g., *Yazoo & Miss. Valley R.R. Co. v. Sanders*, 87 Miss. 607 (1905); *Schumacher v. Shawhan Distillery Co.*, 178 Mo. App. 361 (1914).

✚n26 See, e.g., *Linsley v. Bushnell*, 15 Conn. 225 (1842); *Whipple v. Walpole*, 10 N.H. 130 (1839); *Pickett v. Crook*, 20 Wis. 358 (1866). As in England, punitive damages were also awarded in cases involving seduction. See, e.g., *Reutkemeier v. Nolte*, 179 Iowa 342 (1917); *Coryell v. Colbaugh*, 1 N.J. 77 (1791).

✚n27 *Ellis*, supra note 13, at 2.

✚n28 See, e.g., *Southern Kan. Ry. v. Rice*, 38 Kan. 398 (1888) (\$ 35 costs and fees, \$ 10 injury to feelings, \$ 71.75 punitive); *Fay v. Parker*, 53 N.H. 342 (1872) (\$ 150 actual, \$ 331.67 exemplary); *Woodman v. Nottingham*, 49 N.H. 387 (1870) (\$ 578 actual, \$ 100 exemplary); *Taylor v. Grand Trunk Ry. Co.*, 48 N.H. 304 (1869) (\$ 500 actual damages, \$ 858.50 exemplary).

✚n29 In 1967, a California court of appeals held for the first time that punitive damages were recoverable in a strict products liability action. See *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689 (Cal. Ct. App. 1967).

✚n30 "Mass tort" litigation began in the late 1960s with cases involving the sale of the anti-cholesterol drug MER/29. See Paul D. Rheingold, *The MER/29 Story-An Instance of Successful Mass Disaster Litigation*, 56 Cal. L. Rev. 116 (1968); *Roginsky v. RichardsonMerrell, Inc.*, 378 F.2d 832 (2d Cir. 1967). See generally Richard A. Seltzer, *Punitive Damages In Mass Tort Litigation: Addressing The Problems of Fairness, Efficiency And Control*, 52 Fordham L. Rev. 37 (1983).

✚n31 See Victor E. Schwartz et al., *Multiple Imposition Of Punitive Damages: The Case For Reform*, Critical Legal Issues: Working Paper Series (Wash. Legal Found. Mar. 1995).

✚n32 See, e.g., Utah Code Ann. § 78-18-1(1)(a) (West 1992) (malice or fraud or reckless indifference toward, and a disregard of, the rights of others).

✚n33 See e.g., *Wisker v. Hart*, 766 P.2d 168 (Kan. 1988) ("gross negligence").

✚n34 See *Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975) (\$ 125,000 compensatory damages, \$ 50,000 attorneys' fees, \$ 100,000 punitive damages); *Toole v. Richardson-*

Merrell, Inc., 251 Cal. App. 2d 689 (Cal. Ct. App. 1967) (\$ 175,000 compensatory, \$ 250,000 punitive damages); Moore v. Jewel Tea Co., 253 N.E.2d 636 (Ill. App. 1969) (\$ 920,000 compensatory damages, \$ 10,000 punitive damages), aff'd, 263 N.E.2d 103 (Ill. 1970).

†n35 George L. Priest, Punitive Damages and Enterprise Liability, 56 S. Cal. L. Rev. 123, 123 (1982).

†n36 John Calvin Jeffries, Jr., A Comment on The Constitutionality of Punitive Damages, 72 Va. L. Rev. 139, 142 (1986); see also Peter W. Huber, The Legal Revolution and its Consequences (1988); Walter K. Olson, The Litigation Explosion (1991).

†n37 Malcolm Wheeler, A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Products Liability Litigation, 40 Ala. L. Rev. 919 (1989).

†n38 512 U.S. 415 (1994).

†n39 Id. at 432. Honda Motor involved an all terrain vehicle that flipped over when an inebriated plaintiff tried to drive it up a hill. See id. at 418. The Court struck down a punitive damages award on the ground that Oregon law violated due process because it did not provide an opportunity for meaningful appellate review of the size of punitive damages awards. See id. at 432. One year earlier, in TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993), Justice O'Connor observed:

Corporations are mere abstractions and, as such, are unlikely to be viewed with much sympathy. Moreover, they often represent a large accumulation of productive resources: jurors naturally think little of taking an otherwise large sum of money out of what appears to be an enormously larger pool of wealth. Finally, juries may feel privileged to correct perceived social ills stemming from unequal wealth distribution by transferring money from "wealthy" corporations to comparatively needier plaintiffs.

Id. at 491 (O'Connor, J., dissenting) (citation omitted).

†n40 See generally Bruce N. Kuhlik & Richard F. Kingham, The Adverse Effects of Standardless Punitive Damage Awards on Pharmaceutical Development and Availability, 45 Food Drug Cosm. L.J. 693, 693 (1990) ("There is a growing body of evidence that the threat of punitive damages deters the development and marketing of beneficial products.").

†n41 See, e.g., Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311 (9th Cir. 1995); Turpin v. Merrell Dow Pharm., Inc., 736 F. Supp. 737 (E.D. Ky. 1990), aff'd, 959 F.2d 1349 (6th Cir. 1992).

†n42 See, e.g., Ealy v. Richardson-Merrell, Inc., 897 F.2d 1159 (D.C. Cir. 1990) (overturning \$ 75 million punitive damages award).

†n43 See S. Rep. No. 105-32, at 41-42 (1997) (Senate Commerce Committee Report on Product Liability Reform Act of 1997).

†n44 See Michael Rustad, Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts (Roscoe Pound Found. 1991).

†n45 Professor Rustad said in his report: "The actual number of punitive damages awards in product liability litigation is unknown and possibly unknowable because no comprehensive recording system exists." Id. at 2 (emphasis added).

†n46 See Brian J. Ostrom & Neal B. Kauder, Examining the Work of State Courts, 1993: A National Perspective from the Court Statistics Project 24 (State Justice Inst. 1993).

†n47 See Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1, 28 (1990) (noting that "jury verdicts in the minority of matters actually adjudicated play an important role in determining the worth, or settlement value, or civil matters filed but not tried").

†n48 George L. Priest, **Punitive Damages Reform: The Case of Alabama**, 56 La. L. Rev. 825, 830 (1996).

†n49 Steven Hayward, *The Role of Punitive Damages in Civil Litigation: New Evidence from Lawsuit Filings 8* (Pacific Research Inst. Public Pol'y Feb. 1996).

†n50 *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991).

†n51 Actual malice is required in Maryland and the District of Columbia. See *Owens-Illinois v. Zenobia*, 601 A.2d 633 (Md. 1992), *Jonathan Woodner, Co. v. Breeden*, 665 A.2d 929 (D.C. 1995).

†n52 See Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damage Procedures*, 69 Va. L. Rev. 269, 298 (1983).

†n53 See Ala. Code § 6-11-20 (1993); Alaska Stat. § 09.17.020 (1998); Cal. Civ. Code § 3294(a) (West 1997); Fla. Stat. Ann. § 768.73 (West 1997); Ga. Code Ann. § 51-12-5.1 (1999); Iowa Code Ann. § 668A.1 (1998); Kan. Stat. Ann. § 60-3701(c) (1998); Ky. Rev. Stat. Ann. § 411.184(2) (Michie/Bobbs-Merrill 1998); Minn. Stat. Ann. § 549.20 (West Supp. 1998); Miss. Code Ann. § 11-1-65(1)(a) (Supp. 1998); Mont. Code Ann. § 27-1-221(5) (1998); N.J. Stat. Ann. § 2A:15-5.12 (1999); Nev. Rev. Stat. Ann. § 42-005(1) (1998); N.C. Gen. Stat. 10-15(b) (1999); N.D. Cent. Code § 32-03.2-11 (Supp. 1999); Ohio Rev. Code Ann. § 2307.80(A) (Anderson 1999); Okla. Stat. Ann. tit. 23, § 9.1 (West Supp. 1998); Or. Rev. Stat. § 18.537 (1997); S.C. Code Ann. § 15-33-135 (Law. Co-op. Supp. 1998); S.D. Codified Laws Ann. § 21-1-4.1 (1999); Tex. Civ. Prac. & Rem. Code § 41.003 (1999); Utah Code Ann. § 78-18-1 (1999); *Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d 675 (Ariz. 1986); *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929 (D.C. App. 1995); *Masaki v. General Motors Corp.*, 780 P.2d 566 (Haw. 1989); *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349 (Ind. 1982); *Tuttel v. Raymond*, 494 A.2d 1353 (Me. 1985); *Owens-Illinois v. Zenobia*, 601 A.2d 633 (Md. 1992); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437 (Wis. 1980). One state, Colorado, requires proof "beyond a reasonable doubt" in punitive damages cases. See Colo. Rev. Stat. § 13-25-127(2) (1987).

†n54 See *Punitive Damages: A Constructive Examination*, 1986 A.B.A. Sec. Litig. Special Comm. on Punitive Damages 19 [hereinafter ABA Report]; *Report on Punitive Damages of the Comm. on Special Problems in the Administration of Justice*, Am. College of Trial Law. 15-16 (1989) [hereinafter ACTL Report]; *Uniform Law Commissioners' Model Punitive Damages Act* § 5 (approved July 18, 1996) [hereinafter Model Punitive Damages Act]; see also 2 *Enterprise Responsibility for Personal Injury-Reporters' Study* 248-49 (1991) [hereinafter ALI Reporters' Study].

†n55 See *Pacific Mutual*, 499 U.S. at 23 n.11 (stating that "there is much to be said in favor of a State's requiring, as many do, . . . a standard of 'clear and convincing evidence'"). Congress has responded to the Court's observation by requiring plaintiffs to prove "clear and convincing evidence" of punitive damages liability before punitive damages can be imposed against volunteers of nonprofit organizations. See *Volunteer Protection Act of 1997*, Pub. L. No. 105-19, 111 Stat. 218.

†n56 See *Lane v. Hughes Aircraft Co.*, 993 P.2d 388 (Cal. 2000) (Brown, J., concurring).

†n57 See *Solem v. Helm*, 463 U.S. 277, 284 (1983) ("The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence."); *Weems v. United States*, 217 U.S. 349, 366-67 (1910) (It is "a precept of the fundamental law" as well as "a precept of justice that punishment for crime should be graduated and proportioned to the offense.").

†n58 Some examples of federal criminal fines, even for particularly egregious crimes, do not exceed \$ 250,000 and include: (1) tampering with consumer products (\$ 250,000, if death results); (2) assault on the President (\$ 30,000); (3) bank robbery (\$ 75,000); (4) sexual exploitation of children (\$ 100,000); and (5) treason (\$ 10,000). See Federal Sentencing Guidelines § § 2N1.1, 5E1.2, 2A6.1, 2B3.1, 2G2.1, 2M1.1 (Phyllis Skloot Bamberger & David J. Gottlieb eds., 3d ed. Supp. 1999).

†n59 Lewis Powell, The "Bizarre" Results of Punitive Damages, *Wall St. J.*, Mar. 8, 1995, at A21.

†n60 See Ala. Code § 6-11-21 (1993); Alaska Stat. § 9.17.020(f)-(h) (1998); Colo. Rev. Stat. § 13-21-102(1)(a) (1998); Conn. Gen. Stat. § 52240b (1999); Fla. Stat. Ann. § 768.73 (1)(b) (West 1997); Ind. Code Ann. § 34-51-3-4 (1999); Kan. Stat. Ann. § 60-3701 (1998); N.J. Stat. Ann. § 2A:15-5.14 (West 1999); N.C. Gen. Stat. § 1D-25 (1999); N.D. Cent. Code § 32.03.2-11(4) (1999); 23 Okl. St. § 9.1 (1998); Tex. Civ. Prac. & Rem. Code Ann. § 41.008 (West 1999); Va. Code Ann. § 8.01-38.1 (1999).

†n61 See generally ACTL Report, *supra* note 54, at 15 (proposing that punitive damages be awarded up to two times a plaintiff's compensatory damages or \$ 250,000, whichever is greater); ABA Report, *supra* note 54, at 64-66 (recommending that punitive damages awards in excess of three-to-one ratio to compensatory damages be considered presumptively "excessive"); ALI Reporters' Study, *supra* note 54, at 258-59 (endorsing concept of ratio coupled with alternative monetary ceiling).

†n62 At the federal level, Congress included a **cap** on punitive damages for individuals and small businesses in the Year 2000 Readiness and Responsibility Act, Pub. L. 106-37, 113 Stat. 135 [hereinafter Y2K Act]. The Y2K Act established procedures and legal standards for lawsuits stemming from Year 2000 date-related computer failures. A bill to **cap** punitive damages for individuals and small businesses in all civil actions was reported out of the House Judiciary Committee in February of 2000 by voice vote. See H.R. Rep. No. 106-494 (2000). The House passed the bill on February 16, 2000.

†n63 Thomas Jefferson, A Bill for Proportioning Crimes and Punishment in Cases Heretofore Capital (1779), in *Papers of Thomas Jefferson* 2:492, 493 (Julian P. Boyd ed., 1950).

†n64 For example, in a 1999 products liability case arising out of an automobile accident involving a drunk driver, a California court left untouched a jury award of \$ 107 million in compensatory damages; the court approved punitive damages in the case totaling \$ 1.09 billion. See Frederic M. Biddle, *GM Verdict Cut \$ 3.8 Billion in Suit Over Explosion*, *Wall St. J.*, Aug. 27, 1999, at B5. In a 1996 case, an Alabama jury awarded \$ 50 million in compensatory damages and \$ 100 million in punitive damages. The automobile's manufacturer argued that the plaintiff had been intoxicated and lost control of his car after falling asleep at the wheel. See *Hardy v. General Motors Corp.*, CV-93-56 (Ala. Cir. Ct. Lowndes County verdict June 3, 1996).

†n65 See Edward Felsenthal, *Punitive Awards Are Called Modest, Rare*, *Wall St. J.*, June 17, 1996, at B4.

†n66 See W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations In*

Environmental and Safety Torts, 87 Geo. L.J. 285, 294 (1998).

†n67 See Troy L. Cady, Disadvantaging the Disadvantaged: The Discriminatory Effect of Punitive Damage **Caps**, 25 Hofstra L. Rev. 1005 (1997).

†n68 See U.S. Small Bus. Admin. (visited Mar. 7, 2000)
<<http://www.sba.gov/womeninbusiness>>.

†n69 See U.S. Small Bus. Admin., Minorities in Business iii (Office of Advocacy 1999).

†n70 See id.

†n71 See Hodges v. S.C. Toof & Co., 833 S.W.2d 896 (Tenn. 1992); Transportation Ins. Co. v. Moriel, 879 S.W.2d 10 (Tex. 1994).

†n72 See, e.g., Cal. Civ. Code § 3295(d) (West Supp. 1999); Minn. Stat. Ann. § 549.20 (West Supp. 1999); Miss Code Ann. § 11-1-65(1)(a) (Supp. 1999).

†n73 See ABA Report, supra note 54, at 19; ACTL Report, supra note 54, at 18-19; Model Punitive Damages Act, supra note 54, § 11; ALI Reporters' Study, supra note 54, at 255 n.41.

†n74 Strickland v. Owens Corning, 142 F.3d 353, 359 (6th Cir. 1998) (citations omitted). As one leading commentator noted:

Juries have a natural sympathy for injured persons and not infrequently a corresponding hostility to "big business." The notion that juror consideration of the multimillion, often multibillion, dollar figures on a corporate balance sheet would operate to protect such defendants against excessive liability is, in context, almost laughable.

John Calvin Jeffries, Jr., A Comment on the Constitutionality of Punitive Damages, 72 Va. L. Rev. 139, 146-47 (1986) (citations omitted).

†n75 Defendants, however, should be able to introduce net worth evidence to mitigate damages. When introduced for this purpose, net worth evidence is not likely to produce a verdict based on bias or prejudice.

†n76 499 U.S. 1 (1991).

†n77 Id. at 22.

†n78 Id.

†n79 509 U.S. 443 (1993).

†n80 Id. at 464. The Court did not rule on this potential due process violation because TXO had not preserved the issue for appeal. See id.

†n81 517 U.S. 559 (1996).

†n82 Id. at 574. In BMW, the United States Supreme Court established three guideposts to determine when a punitive award is excessive and violates due process. See infra Part III.F. Significantly, the Court did not even discuss wealth as a factor in developing its guideposts. That fact has led Judge Easterbrook to conclude that such evidence is irrelevant and inadmissible. See Pivot Point Int'l v. Charlene Prods., Inc., 932 F. Supp. 220 (N.D. Ill. 1996) (Easterbrook, J., sitting by designation).

✚n83 *BMW*, 517 U.S. at 585; see also *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly . . .").

✚n84 Dissenting in *TXO*, Justice O'Connor stated:

Corporations are mere abstractions and, as such, are unlikely to be viewed with much sympathy. Moreover, they often represent a large accumulation of productive resources; jurors naturally think little of taking an otherwise large sum of money out of what appears to be an enormously larger pool of wealth. Finally, juries may feel privileged to correct perceived social ills stemming from unequal wealth distribution by transferring money from "wealthy" corporations to comparatively needier plaintiffs.

TXO, 509 U.S. at 491 (O'Connor, J., dissenting). Justice O'Connor dissented because she believed that *TXO* had preserved the "wealth issue" for appeal. She would have overturned the punitive damages award on the ground that the jury was "unduly influenced by the fact that *TXO* was a very large, out-of-state corporation." *Id.* at 489; see also *Dick Thornburgh, No End in Sight as Punitive Damages Go Up, Up, Up*, *Wall St. J.*, Mar. 13, 2000, at A47.

✚n85 ALI Reporters' Study, *supra* note 54, at 254-55 (stating that "in determining the size of the award that is sufficient for deterrence, what is relevant is not the defendant's overall wealth, but rather the profit it realized from the particular tortious activity in question Use of evidence of the defendant's wealth in calculating punitive damages against organizational defendants therefore cannot be justified even by the rationale of economic deterrence, let alone of retributive punishment.") (second emphasis added); see also Victor Schwartz & Mark 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, 271-72 (1993) ("The Reporters' recommendation to exclude evidence of a defendant's total wealth represents sound public policy. When a jury is allowed to focus on a defendant's wealth, the jury is free to disregard what is really at issue in the case: whether and to what extent the defendant's conduct was wrongful.").

✚n86 *Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992) (Easterbrook, J.).

✚n87 See ALI Reporters' Study, *supra* note 54, at 255 n.40. The ALI Reporters also pointed to another reason that a defendant's assets are irrelevant to the issue of punitive damages:

The actual burden of imposing a higher legal penalty on account of size cannot be borne by the formal corporate entity and will rarely be borne by the officials actually responsible; instead, the burden ultimately falls on the shareholder, customer, or worker constituencies of the firm, who often are not especially wealthy.

ALI Reporters' Study, *supra* note 54, at 255.

✚n88 See *Kemezy v. Peters*, 79 F.3d 33, 35 (7th Cir. 1996) (Posner, J.) (The idea that a larger punishment is needed to deter a rich person than a person of modest means "does not apply to institutions as distinct from natural persons."). As Judge Easterbrook has explained:

Corporations . . . are not wealthy in the sense that persons are. Corporations are abstractions; investors own the net worth of the business. These investors pay any punitive awards (the value of their shares decreases), and they may be of average wealth. Pension trusts and mutual funds, aggregating the investments of millions of average persons, own the bulk of many large corporations. Seeing the corporation as wealthy is an illusion, which like other mirages frequently leads people astray.

Zazu Designs, 979 F.2d at 508.

¶n89 Kenneth S. Abraham & John Calvin Jeffries, Jr., Punitive Damages and the Rule of Law: The Role of Defendant's Wealth, 18 J. Legal. Stud. 415, 417 (1989) (emphasis added).

¶n90 517 U.S. 559 (1996).

¶n91 Id. at 585.

¶n92 Id. at 563.

¶n93 Id. at 565.

¶n94 See id. at 563-64.

¶n95 See BMW, 517 U.S. at 565.

¶n96 Id.

¶n97 See id. at 567.

¶n98 See id.

¶n99 Id.

¶n100 See BMW, 517 U.S. at 585-86.

¶n101 Id. at 571-72 (quoting Healy v. Beer Inst., 491 U.S. 324, 335-36 (1989)).

¶n102 Id. at 585.

¶n103 Id. at 571.

¶n104 Id. (citation omitted).

¶n105 BMW, 517 U.S. at 572; see also Bigelow v. Virginia, 421 U.S. 809, 824 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State."); New York Life Ins. Co. v. Head, 234 U.S. 149, 161 (1914) ("It would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called into question and hence authorities directly dealing with it do not abound."); Bonaparte v. Tax Court, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction Each State is independent of all the others in this particular.").

¶n106 BMW, 517 U.S. at 572-73; see also Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.").

¶n107 BMW, 517 U.S. at 573-74.

¶n108 Id. at 572 n.17; see also Cipollone v. Liggett Group, Inc., 505 U.S. 504, 521 (1992) (holding that state regulation for preemption purposes can be as effectively exerted through

an award of tort damages as through state administrative or legislative lawmaking processes); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) ("The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) ("Regulation can be as effectively exerted through an award of damages as through some form of preventative relief.").

✚n109 *BMW*, 517 U.S. at 572.

✚n110 See generally *Restatement (Third) Of The Law Of Torts: Products Liability* § 4(b) (1998) (evidence of product's compliance with safety statutes or regulations "does not preclude as a matter of law a finding of product defect").

✚n111 See *BMW*, 517 U.S. at 572.

✚n112 See *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996) (decertifying class action, in part, because the trial court judge failed to consider how negligence law differed from jurisdiction to jurisdiction); *Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996) (multistate class action decertified, because trial court failed to consider how variations in state law would affect federal rule requirements regarding class actions); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995) (Posner, J.) (comparing differing state pattern instructions on negligence and differing formulations on the meaning of negligence).

✚n113 See Margaret Meriwether Cordray, *The Limits of State Sovereignty and the Issue of Multiple Punitive Damages Awards*, 78 Or. L. Rev. 275, 309 (1999) ("Constitutional principles of sovereignty and federalism thus forbid a state from imposing punitive damages based on the defendant's out-of-state conduct, regardless of whether the defendant's conduct was lawful or unlawful where it occurred. To allow an individual state to impose punitive damages based on conduct, lawful or unlawful, having no significant contacts with that state would indeed, 'throw down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends.'" (quoting *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914))).

✚n114 See *Ariz. Rev. Stat. Ann.* § 12-701 (West 1999); *Mich. Stat. Ann.* § 600.2946(5) (1999); *N.J. Stat. Ann.* § 2A:58C-5(c) (West 1999); *Ohio Rev. Code Ann.* § 2307.801(c) (West 1999); *Or. Rev. Stat.* § 30.927(1) (1998); *Utah Code Ann.* § 78-18-2 (1999); see also *Colo. Rev. Stat.* § 1321-403(1)(b) (1999) (rebuttable presumption that product was not defective if it complied with federal or state standards); *N.D. Cent. Code* § 28-01.402 (1)(a) (1999) (same).

✚n115 ALI Reporters' Study, *supra* note 54, at 95, 101.

✚n116 See Victor E. Schwartz & Liberty Magarian, *Multiple Punitive Damage Awards in Mass Disaster and Product Liability Litigation: An Assault on Due Process*, 8 *Adelphia L.J.* 101 (1992).

✚n117 See *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"); *Bishop v. General Motors Corp.*, 925 F. Supp. 294, 298 (D.N.J. 1996) ("Indeed, one of the many cogent criticisms of punitive damages is that multiple punitive damage liability can both bankrupt a defendant and preclude recovery for tardy plaintiffs.").

✚n118 See generally *Froud v. Celotex Corp.*, 437 N.E.2d 910, 914 (Ill. 1982) (Sullivan, J.,

concurring) ("It cannot be denied that the spectre of the destruction of companies, and even individuals, as a result of punitive damage awards is a threatening, present reality.").

✚n119 *Dunn v. Hovic*, 1 F.3d 1371, 1398 (3d Cir. 1993) (Weis, J., dissenting), modified in part, 13 F.3d 58 (3d Cir. 1993).

✚n120 William Schwartz, *Punishment Ad Absurdum*, 11 Cal. Law. 116 (Oct. 1991).

✚n121 See *Racich v. Celotex Corp.*, 887 F.2d 393, 398 (2d Cir. 1989) ("We agree that the multiple imposition of punitive damages for the same course of conduct may raise serious constitutional concerns, in the absence of any limiting principle."); *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1064 (D.N.J. 1989) ("The court holds that due process places a limit on the number of times and the extent to which a defendant may be subjected to punishment for a single course of conduct. Regardless of whether a sanction is labelled 'civil' or 'criminal' in nature, it cannot be tolerated under the requirements of due process if it amounts to unrestricted punishment."), vacated, 718 F. Supp. 1233 (D.N.J. 1989), rev'd on other grounds sub nom., *Juzwin v. Asbestos Corp.*, 900 F.2d 686 (3d Cir. 1990); In re Northern Dist. of Calif. "Dalkon Shield" IUD Prod. Liab. Litig., 526 F. Supp. 887, 899 (N.D. Cal. 1981) ("A defendant has a due process right to be protected against unlimited multiple punishment for the same act."), vacated and remanded on other grounds, 693 F.2d 847 (9th Cir. 1982); see also *King v. Armstrong World Indus., Inc.*, 906 F.2d 1022, 1031 (5th Cir. 1990) ("It must be said that a strong arguable basis exists for applying the due process clause . . . to a jury's award of punitive damages in a mass tort context."), reh'g denied, 914 F.2d 251 (5th Cir. 1990); In re Federal Skywalk Cases, 680 F.2d 1175, 1188 (8th Cir. 1982) (Heaney, J., dissenting) (Unlimited punishment for one course of conduct "would violate the sense of 'fundamental fairness' that is essential to constitutional due process."); *Morse v. Southern Union Co.*, 38 F. Supp. 2d 1120, 1126 n.12 (W.D. Mo. 1998) ("While the Missouri courts seem not to have considered whether the likelihood of multiple claims should limit punitive damages recovery, I believe such a factor may be required by Due Process."); *McBride v. General Motors Corp.*, 737 F. Supp. 1563, 1570 (M.D. Ga. 1990) ("Due process may place a limit on the number of times and the extent to which a defendant may be subjected to punishment for a single course of conduct."); *Magallanes v. Superior Ct.*, 167 Cal. App. 3d 878, 888, (Cal. Ct. App. 1985) ("It is also fair to ask whether a defendant who has been punished with punitive damages when the case is first tried should be punished again when the second, or the tenth, or the hundredth case is tried.").

✚n122 See Dan D. Dobbs, *Law of Remedies* § 3.11(8) (2d ed. 1993) ("If the first verdict for punitive damages . . . represents the appropriate level of punishment, it may be seriously unfair to inflict additional punishment in all subsequent cases. Besides the unfairness, such awards may destroy a valuable business and may exhaust its assets so that later victims of the same tort collect nothing at all."); John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139 (1986); Dennis Jones et al., *Multiple Punitive Damages Awards For A Single Course of Wrongful Conduct: The Need For A National Policy To Protect Due Process*, 40 Ala. L. Rev. 1 (1991).

✚n123 *Dunn v. Hovic*, 1 F.3d 1371, 1399 (3d Cir. 1993) (Weis, J., dissenting); see also *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 415 (5th Cir. 1986) (en banc) (Clark, C.J., dissenting) ("The court is frustrated by the lack of congressional action [to solve the multiple punitive damages problem]. Clearly the powers of Congress to tax and regulate give that forum the interstate reach and flexibility needed to allocate the relatively scarce resources that must be available to present and future claimants to achieve the greatest good for society.").

✚n124 This problem was described by the ALI:

Single-state action . . . is an ineffectual response to the problem, because one state cannot

control what happens in other jurisdictions. In fact, the state that acts alone may simply provide some relief to out-of-state manufacturers at the expense of its own citizen-victims, a situation that hardly provides much law reform incentive for state legislators.

ALI Reporters' Study, *supra* note 54, at 261. Recognizing that a uniform remedy can only be achieved at the federal level, the ALI Reporters' Study recommended Congressional action. See ALI Reporters' Study, *supra* note 54, at 261.

¶n125 Florida does not permit punitive damages to be awarded more than once for the same act or course of conduct unless the court determines by clear and convincing evidence that the amount of punitive damages previously awarded was insufficient to punish the defendant. In that situation, the court may permit a jury to consider an award of subsequent punitive damages. Any subsequent awards must be reduced by the amount of any earlier punitive damages awards. See Fla. Stat. Ann. § 768.73(2) (West 1997). Missouri passed a statute, applicable in most tort actions, that allows a defendant to file a post-trial motion requesting a credit for prior awards arising out of the same conduct. See Mo. Ann. Stat. § 510.263.4 (1999). A Georgia statute limiting punitive damages in product liability cases to a single award, see Ga. Code Ann. § 51-125.1(e) (1999), was declared unconstitutional. See *McBride v. General Motors Corp.*, 737 F. Supp. 1563 (M.D. Ga. 1990).

¶n126 718 F. Supp. 1233 (D.N.J. 1989), *rev'd on other grounds sub nom.*, *Juzwin v. Asbestos Corp.*, 900 F.2d 686 (3d Cir. 1990).

¶n127 See *id.* at 1235 ("This 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 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."); see also *Davis v. Celotex Corp.*, 420 S.E.2d 557, 566 (W. Va. 1992) (noting that, because punitive damages can be awarded "nationwide, it is doubtful that one state's ruling would necessarily bind other jurisdictions"); *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 480 (N.J. 1986) ("At the state court level we are powerless to implement solutions to the nationwide problems created by [multiple punitive damages awards]."). See generally David Lafferty, Note, *Juzwin v. Amtorg Trading Corp.: Multiple Assessments of Punitive Damages In Toxic Tort Litigation*, 8 Pace Envtl. L. Rev. 647, 665 (1991) (concluding that the problem of multiple punitive damages awards "cries out for congressional action").

¶n128 See generally *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 472 (1993) (Scalia and Thomas, J.J., concurring in the judgment) (indicating a belief that "any perceived 'unfairness' in the common-law punitive damages regime" should be fixed by legislatures).

¶n129 *W.R. Grace & Co.-Conn. v. Waters*, 638 So. 2d 502, 505 (Fla. 1994); see also *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 865-66 (Iowa 1994) ("We do not disagree that the problem of successive punitive damages awards in mass tort cases arising from the same conduct is a serious one We believe neither our action nor legislative action in Iowa will curb the problem of multiple punitive damage awards in mass tort litigation.").

¶n130 140 Cong. Rec. S14835-6 (daily ed. Oct. 7, 1994) (statement of Sen. Danforth).

¶n131 *Id.*

¶n132 *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991).

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ARTICLE: RECALIBRATING THE SCALES OF JUSTICE THROUGH NATIONAL PUNITIVE DAMAGE REFORM

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SUMMARY:

... As little as 30 years ago, punitive damages awards were "rarely assessed" and usually "small in amount." ... 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. ... C. The Fourteenth Amendment - Can a Punitive Damage Award Violate Due Process? ... 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. ... 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. ... 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" rule may not punish the defendant adequately for her misconduct. ... Federal tort reform will benefit both the consumer and the manufacturer with consumers knowing their rights and manufacturers knowing their responsibilities. ...

TEXT:

[*1573] [*1574]

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 [*1575]

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:

We 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 [*1576]

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 [*1577] 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, [*1578] 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, [*1579] 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 [*1580] 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 [*1581] 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; [*1582]

- (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 **[*1583]**

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 **[*1584]** 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 **[*1585]** 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 **[*1586]** 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 [*1587]

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 [*1588] \$ 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 [*1589] 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 **[*1590]** 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 **[*1591]**

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- **[*1592]** 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

Nor 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 state-ment, 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 [*1593] 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 [*1594] 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 [*1595] (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 [*1596] 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 "although 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 [*1597] 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?

Nor 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 **[*1598]**

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: **[*1599]**

(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
[*1600]

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 counterclaimed. 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:
[*1601]

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 [*1602]

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 [***1603**]

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 "transcended 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 [***1604**]

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 [*1605] 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 [*1606] 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 **[*1607]** 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 **[*1608]** 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 **[*1609]** 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, "At 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" **[*1610]** 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 **[*1611]** 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 **[*1612]** 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. [*1613]

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 [*1614] 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 awards ²¹⁷ 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 [*1615]

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.

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 [*1616] 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 [*1617] 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 [*1618] 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 **[*1619]** 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 **[*1620]** 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 economic ²⁵¹ and **[*1621]** 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 **[*1622]** 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 **[*1623]** 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 **[*1624]**

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 **[*1625]** 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 bill ²⁷⁴ 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 million ²⁷⁶ and if every injured plaintiff also received the maximum punitive damage award, Compact would owe an [*1626] 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 [*1627] 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. [*1628]

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 [*1629] 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 [*1630] 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 [*1631] 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 earning 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 [*1632] 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 **[*1633]** 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:

The 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 [*1634] 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 [*1635]

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 **[*1636]** 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.
[*1637]

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 **[*1638]** 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.

FOOTNOTES:

†n1. *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 500-01 (1993) (O'Connor, J., dissenting) (internal citations omitted).

†n2. 142 Cong. Rec. S2344 (daily ed. Mar. 20, 1996) (statement of Sen. Hollings).

†n3. 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").

†n4. 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).

†n5. 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).

†n6. 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).

†n7. See *Restatement (Third) of Torts: Products Liability* (Proposed Final Draft 1997).

†n8. See *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589 (1996).

†n9. 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.

†n10. See *infra* notes 70-207 and accompanying text (analyzing Supreme Court review of damages under Fifth, Seventh, Eighth, and Fourteenth Amendments).

†n11. 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).

†n12. 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).

†n13. See 142 Cong. Rec. S2560 (daily ed. Mar. 21, 1996) (statement of Sen. Rockefeller).

†n14. 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).

†n15. 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).

†n16. See Fieweger, *supra* note 11, at 823 (stating that congressional solution to excessive punitive awards is needed to address problem on national scale).

†n17. See *Day v. Woodworth*, 54 U.S. 363, 371 (1851) (recognizing propriety of awarding punitive damages).

†n18. 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).

†n19. 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.

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.

✚n20. 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).

✚n21. 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").

✚n22. 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).

✚n23. 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.").

✚n24. 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 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.

†n25. 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).

†n26. 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) ("Punitive 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).

†n27. Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 2 (1982).

†n28. 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) ("The 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).

†n29. *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").

†n30. See *Haslip*, 499 U.S. at 19 (finding that most states impose punitive damages "for purposes of retribution and deterrence"); *Day v. Woodward*, 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 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.

✦n31. 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.

✦n32. 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.

✦n33. 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:

In *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 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").

†n34. See Restatement, *supra* note 20, 908(2) & cmts. b-e.

†n35. See *Owen*, *supra* note 28, at 9 (noting that juries consider the seriousness of defendant's misconduct when assessing punitive damages).

†n36. 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))); *Garnes 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.

†n37. 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).

†n38. 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.

†n39. 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).

†n40. 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.

†n41. See TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 880, 889 (W. Va. 1992) ("An 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).

†n42. 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) ("This 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 determining amount of punitive damages to award); Restatement, *supra* note 20, 908(2) & cmts. b-e.

†n43. 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.

†n44. 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).

†n45. 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.

†n46. 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).

†n47. See, e.g., Kan. Stat. Ann. 60-3701 (1994); Mont. Code Ann. 27-1-221(7)(a) (1991).

†n48. 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, 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 ("The 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.").

†n49. 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").

†n50. 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) ("Punitive 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).

†n51. 499 U.S. 1 (1991).

†n52. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 61-62 (1991) (O'Connor, J., dissenting) (internal citations omitted).

†n53. Petition for Writ of Certiorari at 26, BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589 (1996) (No. 94-896).

†n54. 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 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).

✦n55. 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.*

✦n56. 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 minimizing consideration of irrelevant factors").

✦n57. See Product Liability Fairness Hearing, *supra* note 24, at 432 (statement of Theodore B. Olson, Esq., Gibson, Dunn & Crutcher LLP) ("The frequency and magnitude of punitive damage awards are exploding out of control when measured either by jury verdicts or by amounts affirmed on appeal").

✦n58. See *id.*

✦n59. 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).

✦n60. 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.

✦n61. See Pace, *supra* note 6, at 841.

✦n62. 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 Martin, 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.").

✦n63. See, e.g., Ga. Code Ann. 51-12-5.1(c) (1993 & Supp. 1996) ("Punitive 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) ("'Punitive 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").

✦n64. 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).

✦n65. 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. 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).

✦n66. 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).

✦n67. See *supra* note 65 and accompanying text.

†n68. 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).

†n69. 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**).

†n70. 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).

†n71. See U.S. Const. amend. V ("Nor 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 ("Nor shall any State deprive any person of life, liberty, or property, without due process of law....").

†n72. 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).

†n73. 116 S. Ct. 1589 (1996).

†n74. 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).

†n75. U.S. Const. amend. V.

†n76. 490 U.S. 435 (1989).

†n77. *United States v. Halper*, 490 U.S. 435, 446 (1989).

†n78. See *id.* at 437-38.

†n79. 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.*

†n80. *Id.* at 451.

†n81. 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 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).

†n82. See Stevens, *supra* note 81, at 884.

†n83. U.S. Const. amend. VIII.

†n84. 492 U.S. 257 (1989).

†n85. 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.

†n86. 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.

†n87. *Id.* at 264 (emphasis added).

†n88. 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 apply where states require that a percentage of a punitive damage award be paid into the state treasury or to a state-sponsored fund).

†n89. 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.").

†n90. 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).

†n91. See *supra* note 90 and accompanying text.

†n92. 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).

†n93. 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 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 ("The 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.").

✦n94. 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.*

✦n95. 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).

✦n96. 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).

✦n97. 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).

†n98. *Browning-Ferris*, 492 U.S. at 279.

†n99. 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.").

†n100. 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).

†n101. U.S. Const. amend XIV, 1.

†n102. See *infra* note 186 and accompanying text.

†n103. 499 U.S. 1 (1991).

†n104. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) ("We 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.").

†n105. *Id.*

†n106. See *id.* at 4.

†n107. 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.*

†n108. See *id.*

†n109. See *id.* The cancellation notices never were forwarded to the city. See *id.*

†n110. 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.*

†n111. See *id.* Ruffin was sued individually and as a proprietorship, and Pacific Mutual was sued under a theory of respondeat superior. See *id.*

¶n112. 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.

¶n113. 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.

¶n114. 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.

¶n115. *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.

¶n116. 419 S.E.2d 870 (W. Va. 1992), *aff'd*, 509 U.S. 443 (1993).

¶n117. 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.

¶n118. 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.*

¶n119. 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.

¶n120. 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.*

¶n121. See *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 447-49 (1993).

¶n122. 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.*

¶n123. See *id.* at 448.

¶n124. See *id.*

¶n125. See *id.* at 449.

¶n126. See *id.*

¶n127. See *id.* at 449-50.

†n128. See *id.* at 450.

†n129. 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).

†n130. See *TXO*, 509 U.S. at 451.

†n131. *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.

†n132. See *TXO*, 509 U.S. at 462.

†n133. See *id.* at 458.

†n134. 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.*

†n135. 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.

†n136. 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.

†n137. 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, "exactly what will cause a punitive damages award to cross this moving line in a given case remains unanswered").

†n138. 512 U.S. 415 (1994).

†n139. See *Honda Motor Co. v. Oberg*, 512 U.S. 415, 435 (1994).

†n140. See *id.* at 418.

†n141. See *id.*

†n142. See *id.*

†n143. See *id.*

†n144. 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.

†n145. See id. at 426.

†n146. 116 S. Ct. 1589 (1996).

†n147. 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.

†n148. 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.

†n149. See id. at 1592-93.

†n150. 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.

†n151. 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)).

†n152. 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).

†n153. See id. at 1610-11 (Scalia, J., dissenting).

†n154. Id. at 1611 (Scalia, J., dissenting).

†n155. See id. at 1611-12 (Scalia, J., dissenting).

†n156. See id. at 1612 (Scalia, J., dissenting) (internal citations omitted).

†n157. See id. at 1613 (Scalia, J., dissenting).

†n158. See supra note 156 and accompanying text.

✚n159. 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).

✚n160. See *infra* note 163 and accompanying text (explaining why current system does not work).

✚n161. See Marcia Coyle, *Punies Decision Gives Business Potent Ammo*, Nat'l L.J., June 3, 1996, at A11.

✚n162. 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).

✚n163. 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).

✚n164. See Lykowski, *supra* note 74, at 247 (citing factors that limit usefulness of comparison with criminal penalties).

✚n165. See *id.* (recognizing that tools such as maximum fine levels and imposition of fines per incident give judges "infinite flexibility" when determining damage award).

✚n166. 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").

✚n167. See *supra* note 156 and accompanying text (describing why Supreme Court's guideposts articulated in *BMW* are not helpful).

✚n168. 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).

✚n169. The Court remanded *Ford Motor Co. v. Sperau*, 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).

†n170. 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).

†n171. See S. Rep. No. 104-69, at 5-6 (1995) (calling current product liability litigation system "a lottery").

†n172. See *id.* at 14 (stating that only federal legislation can create uniformity necessary in liability system).

†n173. 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).

†n174. 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).

†n175. See *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 820 (1981) (awarding damages to individuals severely burned in Ford Pinto).

†n176. 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).

†n177. 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. Schwartz, Director, Federal Judicial Center) (footnote omitted).

†n178. See Judith Camile 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).

†n179. 1 F.3d 1371 (3d Cir. 1993).

†n180. See *Dunn v. Owens-Corning Fiberglass*, 774 F. Supp. 929, 933-34 (D.V.I. 1991).

†n181. See *Dunn v. Hovic*, 1 F.3d 1371, 1373 (3d Cir. 1993). The Third Circuit remitted the punitive award to \$ 1 million. See *id.*

†n182. See *id.* at 1374.

†n183. See *id.* at 1389 (ruling that evidence produced by defendant fell short of due process violation).

†n184. 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).

†n185. See *Dunn*, 1 F.3d at 1386 ("No 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).

†n186. 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).

†n187. See Seltzer, *supra* note 26, at 55.

†n188. 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:

This 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).

†n189. 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-comer" 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.

†n190. See id. (recognizing impossibility of ensuring that one award covers all of defendant's misconduct).

†n191. 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).

†n192. 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").

†n193. 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).

†n194. 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).

†n195. 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).

†n196. U.S. Const. amend. VII.

†n197. 116 S. Ct. 2211 (1996).

†n198. See *Gasperini v. Center for Humanities, Inc.*, 116 S. Ct. 2211, 2215 (1996).

†n199. 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).

†n200. See *id.* at 431.

†n201. *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).

†n202. 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.

†n203. See *Gasperini*, 116 S. Ct. at 2217-18 (citing "shock the conscience" as federal standard).

†n204. 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.*

†n205. 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).

†n206. 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.*

†n207. 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).

†n208. 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....").

†n209. See S. Rep. No. 104-69, at 1-2 (1995) (charging current liability system with stifling innovation and with keeping beneficial products off market).

†n210. 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).

†n211. See S. Rep. No. 104-69, at 14-17 (1995) (providing history of tort reform legislation in Congress).

†n212. 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).

†n213. 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, Table C-2A, at 138 (1996). Limiting these reforms to product liability actions thus would not have the widespread impact some might expect.

†n214. 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**.

†n215. See *id.* 108(a) (awarding **punitive damages** only if there is "clear and convincing" evidence of defendant's misconduct).

†n216. *Id.*

✚n217. See id. 108(b) (placing cap on punitive damage awards of two times economic and noneconomic loss or \$ 250,000, whichever is greater).

✚n218. 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).

✚n219. 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.").

✚n220. 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.

✚n221. See Ellis, *supra* note 27, at 34-53 (arguing that vague **punitive damage standards** and broad jury discretion is unfair and inefficient).

✚n222. 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).

✚n223. 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).

✚n224. 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.

✚n225. 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).

✚n226. 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).

✚n227. 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 judicature."); 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).

✚n228. 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).

✚n229. 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).

✚n230. 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).

✚n231. 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).

†n232. See discussion supra Part IV.B.

†n233. See discussion supra Part IV.A.

†n234. See H.R. 956, 104th Cong. 108(a) (1996); Model Act, supra note 9, 5(2).

†n235. 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).

†n236. 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).

†n237. See *In re Winship*, 397 U.S. 358, 363-64 (1970).

†n238. H.R. 956, 101(4).

†n239. Id. 108(a) (emphasis added).

†n240. See infra notes 241-42 (providing examples of differing approaches to punitive damages).

†n241. 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 5/2-1115.05(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.

†n242. 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).

†n243. 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**.

†n244. 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).

†n245. 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 problematic).

†n246. 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).

†n247. See H.R. 956, 108(c) (stating that bifurcation is permissible).

†n248. 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).

†n249. 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).

†n250. 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").

†n251. 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.*

†n252. See *id.* 101(12). Noneconomic loss is pain and suffering or non-pecuniary damages. See *id.*

†n253. 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, *Remittiturs (and Additurs) 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) ("The trial judge may suggest an additur in such amount or amounts as the trial judge deems proper.").

†n254. 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).

†n255. 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.

†n256. 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).

†n257. 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).

†n258. 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).

†n259. See *id.* (pointing out that some experts on women's health believe that IUD is excellent option for many women).

†n260. See *id.* (stating that many manufacturers believe that introducing device to U.S. market is not worth potential exposure to liability).

†n261. 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).

†n262. 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 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.

†n263. See Wilson, *supra* note 25, at 513-14 (indicating that punitive damages assist in deterring misconduct).

†n264. 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).

✚n265. 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.

✚n266. 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).

✚n267. 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).

✚n268. See *id.* (stating that company will take action only if cost of such action is less than its potential benefits).

✚n269. See Landes & Posner, *supra* note 266, at 4-5 (discussing view that tort liability discourages behavior that is unjustified by utilitarian **standards**).

✚n270. 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.

✚n271. 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.

†n272. 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.).

†n273. 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.

†n274. H.R. 956, 104th Cong. (1996).

†n275. 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).

†n276. 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.

†n277. 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.

†n278. 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).

†n279. 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").

†n280. See id. at 1312.

†n281. See Elliott, supra note 244, at 1057 (claiming that unpredictability is the "central failing" of punitive damages).

†n282. Rustad & Koenig, supra note 18, at 1277.

†n283. 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).

†n284. Michael Rustad & Thomas Koenig, Punitive Damages in Products Liability: A Research Report, 3 Prod. Liab. L.J. 85, 94 (1992).

†n285. 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").

†n286. 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).

†n287. Proponents for national tort reform contend that punitive damage awards need regulation because consumers, especially the low income purchasers, ultimately bear the costs 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).

†n288. See 141 Cong. Rec. S5950 (daily ed. May 2, 1995) (statement of Sen. Kyl) (musing that "these 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."").

†n289. 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.

†n290. See generally Stigler, *supra* note 287, at 87 (describing type of competitive market in which sellers outnumber buyers).

†n291. See generally *id.* (describing type of competitive market in which buyers outnumber sellers).

†n292. See generally *id.* at 21-44 (discussing factors affecting consumer demand including responses to price increases).

†n293. Such a situation could arise if a corporation had a patent on one of its product and chose not to license it to others.

†n294. 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).

†n295. 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).

†n296. 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).

†n297. See Punitive Damages Hearing, *supra* note 24, at 80 (statement of Robert Creamer, Executive Director, Illinois Public Action).

This 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).

†n298. 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.

†n299. 138 Cong. Rec. S6521 (daily ed. May 12, 1992) (statement of Sen. Cranston).

†n300. 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").

†n301. 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).

†n302. See supra notes 23-31 and accompanying text.

†n303. Model Act, supra note 9, 7.

†n304. 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*, 499 U.S. 1, 21-22 (1991).

†n305. Punitive Damages Hearing, supra note 24, at 1 (statement of Sen. Hatch).

†n306. See Model Act, supra note 9, 10(a).

†n307. 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).

†n308. Id. 10.

†n309. 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).

†n310. See id. 10.

†n311. 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.

†n312. 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.

†n313. 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).

†n314. 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).

†n315. See Huber, *supra* note 314, at 335 (indicating that licensing agencies such as Nuclear Regulatory Commission compare public risks among industry competitors).

†n316. See *id.* (expressing view that courts are not qualified to second-guess agencies).

†n317. 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 than our methods of checking up on the changing picture." (quoting John L. McLucas, a former FAA administrator)).

†n318. 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) ("Compliance 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).

†n319. See Restatement (Third) of Torts, *supra* note 7, 7(a).

†n320. See *id.* 7(b).

†n321. 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.").

†n322. 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.

†n323. 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).

†n324. 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).

†n325. See Schwartz, *Products Liability*, *supra* note 163, at 1147.

†n326. See Seidenfeld, *supra* note 324, at 1565.

†n327. 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).

†n328. See *Model Act*, *supra* note 9, 7.

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