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Disadvantaging the Disadvantaged: The Discriminatory Effects of Punitive Damage Caps

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I. INTRODUCTION

Recent legislative action in the area of tort reform, both realized and proposed, will adversely affect many people who lack a strong voice in our society. Women are one such group, as recent studies showing that

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1. State legislatures have passed various measures in an effort to reform their tort systems, and continue to do so even in the face of possible federal preemption. Echoing the themes of their Contract with America, Republicans in Congress remain committed to enacting sweeping changes in the civil litigation system. See Kenneth Jost, Tort Issues Resurrected, A.B.A. J., Mar. 1997, at 18; infra Parts III.B-C.
tort law is gender-biased have concluded. Moreover, and at least as disquieting, the economically disadvantaged will also be affected. Pending congressional proposals which seek to impose a punitive damage cap in products liability law will have a disparate impact upon the poor—those with little or no means to seek redress in our legal system and limited access to legislatures.

2. See, e.g., Thomas Koenig & Michael Rustad, His and Her Tort Reform: Gender Injustice in Disguise, 70 WASH. L. REV. 1 (1995) (arguing that restrictions of punitive and noneconomic damages in the areas of products liability and medical malpractice negatively impact women); see also Leslie Bender, An Overview of Feminist Torts Scholarship, 78 CORNELL L. REV. 575, 585-86 (1993) (outlining the various ways in which women are undercompensated for tortious injuries). Bender also argues that eliminating self-interested “corporate violence” against individuals “would reduce the frequency and quantity of mass tort litigation better than any proposed statutory reforms curbing plaintiffs’ abilities to recover for their losses.” Id. at 581-82.

3. Economically disadvantaged individuals are rarely able to access legislatures through lobbying efforts and their general unfamiliarity with the courts effectively bars access to many who are deserving of a legal remedy. See Marc Galanter, Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change, 9 L. & SOC’Y REV. 95, 103-04 (1974) (discussing the disadvantages presented to those who are unfamiliar with the legal system and have limited access to legal services). Similarly, “[f]or people with less than a high school education and incomes of $15,000 or less, the voter participation rates are dismayingly low.” Bob Herbert, Untapped Power, N.Y. TIMES, Oct. 7, 1996, at A17. Many politicians, responding to the consistently low voter participation rates by those with lower incomes, focus on the concerns of the more upscale socioeconomic class and “give short shrift to the interests of . . . the poor.” Id.


5. This Note defines the economically disadvantaged or poor in terms of income level. Although frequently used in a way that stigmatizes, it should be recognized that of the 38 million Americans recently defined as poor by the federal government, 22 million were either employed or lived with someone who was employed. See Matthew Bowers, Working Hard, Working Poor, VIRGINIAN-PILOT (Norfolk), Feb. 15, 1996, at A8. Bowers discussed the flaws in many assumptions surrounding the welfare reform debate, including the idea that putting welfare recipients to work will necessarily lead to a reduction in the welfare rolls. Many people working full-time fall below the poverty level because of low wages and still require some sort of public assistance. See id.

6. See generally Galanter, supra note 3 (arguing that the legal system predominantly favors those who “have”). Congress’s proposals come at a time when the poor have to contend with additional hurdles when seeking access to the courts—federal cutbacks of the Legal Services Corporation (“LSC”). See David Barringer, Downsized Justice, A.B.A. J., July 1996, at 60; cf: Penelope Eileen Bryan, Toward Deconstructing the Deconstruction of Law and Lawyers, 71 DENV. U. L. REV. 161, 171 (1993) (calling for an “[e]xpansion of legal aid services, government funding for law school staffed poverty clinics, or national insurance for legal representation” in order to increase substantive changes that could benefit the disadvantaged); Holly Metz, Invasion of the Nonlawyers, STUDENT LAW., Mar. 1997, at 38, 38 (reporting on the debate concerning paralegals who provide legal services to “low-income people and . . . middle-income people [who] lacked legal assistance because they could not afford to hire a lawyer”).

The LSC, which transfers federal grant money to state programs operating approximately 1,200 local law offices nationwide, had its funding slashed by one-third in 1996, from $400 million in 1995 to $278 million in 1996. “Because of cuts in LSC funds, 300 to 400 of those offices will be forced to close this year, hundreds of the 4,700 lawyers employed by LSC grantees will be laid
Without a reconsideration of the proposed cap by Congress, and by legislatures in those states that have already enacted such caps,\(^7\) the economically disadvantaged will undoubtedly experience dwindling prospects for recovering even compensatory damages. Products liability actions are typically brought through the use of contingency fees. As the possibility for larger awards diminish as a result of punitive damage caps, a risk-averse lawyer will become increasingly unwilling or unable to represent poor plaintiffs who are injured by huge corporate defendants that have the ability to bankroll a lengthy and expensive litigation process.\(^8\) This effectively shuts out prospective poor plaintiffs from access to the courts—in essence, if punitive damage caps are in place, a person with little present or future economic harm other than the injury itself can be left without any legal recourse.\(^9\)

This Note explores the issues surrounding the discriminatory impact
that statutory punitive damage caps have upon those individuals in our society who are economically disadvantaged, and identifies alternatives which avoid this danger. Part II examines the “quasi-criminal” nature of punitive damages and its twin objectives of deterrence and retribution. This Part also explores three ancillary functions that punitive damages commonly accomplish: education, policing, and compensation.

As mentioned above, Congress has proposed a punitive damage cap in products liability actions, but it is not the only governmental institution that has entered the tort reform arena in general, or products liability law in particular. Recently, state legislatures have successfully passed tort reform legislation, much of it primarily impacting products liability litigation. In addition, the Supreme Court has struggled with the constitutional limits of punitive damages during the last decade. The roles that the Supreme Court, Congress, and state legislatures have played in this area is recounted in Part III.

Part IV argues that much of the fervor surrounding a perceived litigation crisis is unfounded. Pointing to runaway jury verdicts that award excessive punitive damages, tort reform proponents claim that the tort system has run amok and is in dire need of repair. It is argued that the alternative to reform is increased costs which must be passed on to consumers, reduction of new product innovation in an effort to avoid products liability litigation, and an economy that cannot compete in the global market. Advocates for reform, however, rely primarily on anecdotal evidence to support their claims. The few notable empirical studies reach a much different conclusion; a tort system that is functioning properly, with little or no threat to the economic health of American businesses.

Even assuming that tort reform is necessary or desirable, Part V suggests specific tort reform proposals which are not susceptible to charges of discrimination against those who cannot claim large economic losses. While offering defendants adequate protection from the possibility of excessive punitive damage awards, these proposals will not eradicate or limit an economically disadvantaged individual’s access to our court system.

II. THE NATURE AND FUNCTIONS OF PUNITIVE DAMAGES

Punitive damages are monetary damages awarded to a plaintiff in a civil action, usually determined by a jury, after a finding that a defendant was guilty of flagrantly violating a plaintiff’s rights. Such a violation will be found where a defendant has acted intentionally, maliciously or with
a conscious, reckless, willful or wanton disregard for a plaintiff's interests. The amount assessed is typically based upon a jury's determination of the seriousness of the plaintiff's injury, combined with the extent of the defendant's wealth. A jury's consideration of a defendant's wealth is commonly held to be appropriate, insofar as awards must be large enough to support the two most often stated objectives of punitive damages: (1) retribution, to punish the defendant for outrageous conduct; and (2) deterrence, to prevent or discourage similar misconduct in the future, not only by the defendant but by others as well. The objectives of punitive damages directly reflect one of the two overriding principles of tort law, which are compensation to injured people for harm that others are liable for, and deterrence of that harmful behavior in the future. Unlike these tort law principles, when a person acts in a particularly egregious manner—by intentionally causing harm, for example—tort law allows for exemplary or punitive damages as a form of retribution. The element of retribution in punitive damages, however, is more commonly associated with its analog in criminal law, rather than civil tort law.

Because of the retribution objective, punitive damages are viewed as falling somewhere between the civil and the criminal law, and are commonly regarded as "quasi-criminal." They are awarded to plaintiffs in civil lawsuits, yet they are noncompensatory and more similar to penal fines. This overlap between the civil and criminal laws' objectives and effects "assures that controversy and debate follow such assessments wherever they may roam, as surely as summer follows spring." However, an inspection of the ancillary functions that punitive damages accomplish arguably renders these "quasi-criminal" concerns less troublesome.

11. See id. § 908(2).
12. See id. § 908 cmt. a.
13. There is, of course, a logical inconsistency when applying the deterrence function of tort law to merely negligent behavior: Can an individual "choose" to act negligently? In the sphere of punitive damages, however, this does not present a problem. Punitive damages are awarded only when a person or entity engages in egregious behavior, encompassing actions for which a tortfeasor either had knowledge or should have had knowledge.
15. See id. at 364-65.
16. Id. at 366; see also Jason S. Johnston, Punitive Liability: A New Paradigm of Efficiency in Tort Law, 87 COLUM. L. REV. 1385, 1403 (1987) (noting that "two of the areas in which punitive damages awards have been most controversial are medical malpractice and products liability").
Education, the first ancillary function of punitive damages, serves a twofold purpose; it notifies the public of both the existence of a particular legally protected right and the importance the legal system attaches to the remedy of egregious breaches of society's rules. As an expression of the community's disapproval of serious misconduct, punitive damages serve to reaffirm society's commitment to upholding legal and moral standards. In products liability actions, the education function also serves to inform the public of defective products.

Unfortunately, the education function is not always fulfilled for two reasons. First, while instances of extreme misconduct (for example, the Ford Pinto and the Dalkon Shield) are highly publicized, not all instances of egregious misconduct receive the type of media coverage which reaches large portions of our society. Second, it is not unusual for settlement negotiations to occur after a jury awards punitive damages. Defendants offer not to pursue avenues of appeal, and a corresponding protraction of litigation and increased expense, in return for a successful plaintiff's silence regarding the terms of the monetary settlement reached and the issues surrounding his or her injuries. In cases where the plaintiff is poor or of relatively modest means, a confidential settlement in return for an end to the litigation is often accepted.

Society rarely learns the truth about dangerous products whenever confidential settlements occur. Either the facts become obscured or distorted, when post-verdict settlements are reached, or the issues are

17. See David G. Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1258, 1280-81 (1976) In addition, Owen notes that punishment also educates wrongdoers as to society's legal values and "serves as a reformatory device," allowing for the offender "to atone for his misdeed through suffering." Id. at 1281.
18. It should be recognized that the general news media does not have the ability or desire to report every award of punitive damages. Typically, reports are limited to situations in which the subject of the litigation affects a broad spectrum of society. At times, the punitive damage award itself is deemed newsworthy merely because of its amount.
20. See id. at 76 (discussing plaintiff's motivation to accept a pretrial confidential settlement because "money that is often desperately needed, without further delay or risk of losing the case in trial"); cf. Galanter, supra note 3, at 119-22 (arguing that overcrowded court systems create delays that increase the cost and risk associated with adjudication, which tends to favor the influential to the detriment of the economically disadvantaged who cannot survive long waits without relief).
21. For example, many people remain unaware of the true circumstances of the McDonald's coffee case involving Stella Liebeck, which is frequently cited by tort reform advocates as an example of a tort system run wild. Liebeck later entered into a confidential settlement with McDonald's after winning her case. See infra text accompanying notes 154-56.
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never reported, when pretrial settlements occur. This hampers "the justice system's vital role of warning society about safety hazards and stigmatizing, and thereby deterring, unethical conduct."

Policing, the second ancillary function, reflects the fact that punitive damages often serve the important purpose of providing reluctant individuals and their attorneys incentives to bring lawsuits to curtail serious misconduct and enforce the rules of law. Because most of the misconduct in this area is not within the realm of the criminal law, plaintiffs act as "private attorneys general." Although punitive damages are frequently criticized as a "windfall" to plaintiffs and their attorneys, it is precisely this windfall which provides the incentive and monetary means whereby both will undertake the often time-consuming and expensive task of "prosecuting" wrongdoers. Corporations possess large financial reserves which enable them to mount lengthy pretrial and appeal mechanisms, often to the detriment of not only poor plaintiffs, but their lawyers as well. Given the frequent contingency arrangement arrived at in tort cases, it becomes clear that punitive awards are the fuel that drives risk-averse lawyers toward bringing such actions. Individuals with limited earning capacity have little present or future economic damages that can be claimed, other than the specific injury itself. Lawyers are less likely to offer representation to these prospective clients.

22. The public, perhaps, is the biggest loser and suffers most when pretrial confidential settlements occur. It allows defendants to claim that they did nothing wrong and prevents the public from learning if a particular product, for example, is unsafe.

Worse, the settlement offer will require that all the evidence discovered in the case be sealed against disclosure to other persons similarly injured, other lawyers representing such persons, the media, and government regulators—even if the secrecy serves no beneficial public purpose, and even if it endangers the public safety.

NADER & SMITH, supra note 19, at 76.

23. Id. at 356.

24. See Owen, supra note 17, at 1287-90.


27. See Leslie E. John, Comment, Formulating Standards for Awards of Punitive Damages in the Borderland of Contract and Tort, 74 Cal. L. Rev. 2033, 2051 (1986); see also DOBBS, supra note 25, § 3.9, at 205 (describing punitive damage awards as a "bounty" that provides a plaintiff with an incentive to sue).

without the availability of punitive damages unfettered by statutory caps.29

Compensation, the last ancillary function, can be a confusing concept. Rarely viewed as compensatory, punitive damages are monetary awards given separately and in addition to compensatory damages. How, then, can they be construed as fulfilling a “compensatory” function? When one considers the policing function, punitive damages can often serve to give economically disadvantaged individuals access to the courts and an opportunity to seek restitution which would otherwise be unavailable.30 Moreover, computation of future earnings, a component of compensatory damages, is based largely on what an individual plaintiff presently earns or can expect to earn. There is little acknowledgement of the possibility that economically disadvantaged plaintiffs might substantially increase their earnings capacity in the future.31 Additionally, the contingency fee system itself ensures that plaintiffs will be systematically undercompensated, given the large legal fees they must pay.32 In fact, many commentators have argued that compensatory awards suffer from systemic undervaluation even before lawyers’ fees are deducted, noting that the imposition of punitive damages merely aids the effort to make plaintiffs whole.33 Thus punitive damages can serve as a means to more

29. See Laura Duncan, Painful Decisions: New Business Risks Await Both Plaintiff and Defense Lawyers, A.B.A. J., Aug. 1995, at 66, 69 (“If fewer cases are viable for plaintiff’s lawyers, the revamped laws may prompt lawyers to redouble marketing efforts to woo the ‘best’ clients.”).
30. Others have recognized this pitfall as well, particularly in jurisdictions that have already imposed some type of cap on damages. “[P]eople who are unemployed or have low incomes—and thus traditionally could prove little, if any, economic damages—are now less attractive as potential clients because of caps on noneconomic damages.” Id. at 66.
31. This is a lesser concern for wealthier plaintiffs earning relatively high wages because of the marginal increase of benefit accruing from an increase in their income.
32. See Owen, supra note 17, at 1295-96 (finding that punitive damages serve a valuable role by fulfilling a compensatory function in products liability cases); Rustad & Koenig, supra note 25, at 1321 (same). Professor Owen also noted that
[t]he total costs of preparation and litigation tend to be especially high in product cases because of the technical and complex nature of the issues and the resulting difficulties of discovery and proof. . . . Even in cases in which liability is fairly clear, the vagaries of the litigation process insure that some valid claims will go completely or partially unpaid.
Owen, supra note 17, at 1293; see also RICHARD POSNER, TORT LAW: CASES AND ECONOMIC ANALYSIS 34 (1986) (noting the argument that punitive damages may compensate tort victims for their litigation costs).
33. See, e.g., Johnston, supra note 16, at 1388-89 (arguing that punitive damage awards correct the legal system’s tendency to underestimate a plaintiff’s damages); 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, 1221 (1992) (stating that “[i]n higher stakes case, such as air crashes, product liability, and medical malpractice, the undercompensation will be dramatic”).
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fully compensate a deserving plaintiff’s injury.

III. PUNITIVE DAMAGES AND TORT REFORM

Much of the clamor for tort reform has focused on a perceived “litigation crisis.”34 Although merely rancorous at times, the ensuing debate has shaped reaction by the government on both the federal and state level. In the area of punitive damages, recent Supreme Court decisions may lead to increasingly adverse judicial determinations for otherwise successful plaintiffs. Proposed legislation by Congress, capping punitive damages in products liability law, would preempt existing state law altogether. In addition, states continue to impose limitations on the

Similarly, Marc Galanter, Director of the Institute for Legal Studies and Professor of Law at the University of Wisconsin, while commenting on caps of pain and suffering awards, noted that “it is the most severely injured who are, on the whole, the least adequately compensated. Hence caps not only frustrate the compensation goal of the system, but they detract from its equity.” Marc Galanter, Real World Torts: An Antidote to Anecdote, 55 Md. L. Rev. 1093, 1122 (1996).

The costs associated with bringing personal injury cases in products liability actions where punitive damages are awarded just became even more costly. In 1996, the Internal Revenue Service (“IRS”), Congress, and the Supreme Court teamed up to subject punitive damage awards to personal income tax liability. The IRS began by pushing to find cracks in the Internal Revenue Code’s rule that “gross income does not include . . . the amount of any damages received . . . on account of personal injuries.” I.R.C. § 104(a)(2) (1995); see also Richard C. Reuben, Pouring Salt in the Wound, A.B.A. J., Sept. 1996, at 40.

Prompted by the IRS, Congress entered the fray in August, and amended the tax code to read “gross income does not include . . . the amount of any damages (other than punitive damages) received on account of personal physical injuries or physical sickness.” I.R.C. § 104(a)(2) (1996). The amendment operates prospectively, however, covering only those punitive awards received after it was enacted. See generally Jill Schachner Chanen, Uncle Sam’s Outstretched Hand, A.B.A. J., Mar. 1997, at 30; Henry J. Reske, Taxing Times for Plaintiffs, A.B.A. J., Nov. 1996, at 22.

Later that December, agreeing with arguments presented by the IRS, the Supreme Court, in O’Gilvie v. United States, 117 S. Ct. 452 (1996), ruled that punitive awards in personal injury cases are taxable as gross income as well. This subjects punitive damage awards to taxation even when received prior to the congressional amendment of the tax code. See Chanen, supra, at 30. Estimates in the O’Gilvie case are that “the family will take home about $2.2 million of the $10 million punitive award” after paying taxes, attorney fees, and costs. Id.

Many believe that the IRS’s next target will likely be structured, post-verdict settlements in cases where punitive awards could have been claimed. The IRS has already begun questioning settlements that allocate a large amount of money to compensatory damages, while limiting the amount designated as punitive. See id. (reporting on Bagley v. Commissioner, 105 T.C. 396 (1995), appeal docketed, No. 96-1768 (8th Cir. 1996), which will determine the limitations of IRS review on structured settlements). The upshot is that plaintiffs who are awarded punitive damages will incur large tax liabilities, even if they enter into a settlement after the case. Increasingly, the argument that punitive damages represent a “windfall” for plaintiffs is becoming even more overstated, if not obsolete.

34. For one of the most widely read works to assert that the legal system is in dire need of reform, see WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1991).
tort system and many have recently passed legislation which places limits on punitive damages despite the spectre of congressional preemption. Unfortunately, the resulting impact that these developments will have upon the economically disadvantaged has been largely ignored.

A. Supreme Court Decisions Regarding Punitive Damages

Within the past decade, the Supreme Court has attempted to solve some of the more nettlesome constitutional problems presented by punitive damages—primarily a determination of when, if ever, a punitive award violates the Fourteenth Amendment’s Due Process Clause. The Court, however, has been reluctant to announce any clear set of boundaries or procedures for determining the constitutional limits of punitive damages. Accordingly, the problem facing reviewing courts remains how to discern if a particular award is excessive.

Banker’s Life & Casualty Co. v. Crenshaw\(^3\) concerned an award of $20,000 in compensatory damages and $1.6 million in punitive damages on a finding that an insurer-defendant had acted in bad faith by failing to settle a health and accident policy that provided benefits for accidental loss of limb.\(^6\) Before the Supreme Court, the defendant argued that the punitive award violated the Due Process, Contract, and Excessive Fines Clauses of the Constitution,\(^7\) but the Court ruled that the constitutional issues were not properly raised below and failed to rule on them.\(^3\) In a concurring opinion that presaged subsequent Court decisions on the subject, Justices Sandra Day O’Connor and Antonin Scalia voiced a deep concern for the “wholly standardless discretion to determine the severity of punishment [which] appears inconsistent with due process.”\(^3\)

\(^6\) See id. at 73-75.
\(^7\) The Contracts Clause prohibits the states from passing any “Law impairing the Obligation of Contracts.” U.S. Const. Art. I, § 10. The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Id. amend. VIII (emphasis added).
\(^3\) See Banker’s Life & Casualty, 486 U.S. at 76. “[W]e may, for good reason, even at this stage, decline to decide the merits of the issue, much as we would dismiss a writ of certiorari as improvidently granted.” Id. at 77 (quoting Mishkin v. New York, 383 U.S. 502, 512 (1966)).
\(^3\) Id. at 88. Under Mississippi law at that time, the standard for awarding punitive damages centered on the mental state of the tortfeasor, but “the determination of the amount of punitive damages is a matter committed solely to the authority and discretion of the jury.” Id. (quoting Banker’s Life & Cas. Co. v. Crenshaw, 483 So. 2d 254, 278 (Miss. 1985)).
In Browning-Ferris Industries v. Kelco Disposal, Inc., the Court ruled that the Eighth Amendment’s Excessive Fines Clause was limited to criminal cases and did not apply to civil actions, and thereby did not apply to punitive damage awards as well. The jury below had awarded $51,146 in compensatory damages and $6 million in punitive damages based on a finding of tortious interference through predatory pricing. After a careful and extensive analysis, the Court stated that even if we were prepared to extend the scope of the Excessive Fines Clause . . . , we would not be persuaded to do so with respect to cases of punitive damages awards in private civil cases . . . . [T]he Eighth Amendment places limits on the steps a government may take against an individual, whether it be keeping him in prison, imposing excessive monetary sanctions, or using cruel and unusual punishment . . . . While we agree with petitioners that punitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law, we fail to see how this overlap requires us to apply the Excessive Fines Clause in a case between private parties.

In Pacific Mutual Life Insurance Co. v. Haslip, the Court upheld a punitive award, ruling that punitive damages were not per se unconstitutional. The Court stated that “[w]e need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and constitutionally unacceptable that would fit every case.” The issue in Haslip centered around a punitive damage award of approximately $800,000 to a group of insureds against a life insurance agent who had continued to collect premiums after their policies had been cancelled. The ratio of punitive to compensatory damages was roughly four to one, which the Court thought might be “close to the line” of constitutional acceptability. “[G]eneral concerns of reasonableness and adequate guidance from the court when the case is tried to a jury

41. See id. at 275-76.
42. See id. at 259-61.
43. Id. at 275.
45. See id. at 17.
46. Id. at 18 (emphasis added).
47. See id. at 7 n.2.
48. See id. at 5.
49. Id. at 23.
When examining due process challenges to punitive damage awards, it is interesting to note that Haslip was the first case in which the Court took the opportunity to state that both procedural and substantive due process analysis is necessary. "One must concede that unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." The Court continued its analysis by identifying factors that it hoped would ensure procedural due process for defendants subjected to punitive damages. These factors are as follows:

(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.

The Haslip Court recognized that in "determining whether a punitive award is reasonably related to the goals of deterrence and retribution ... the factfinder must be guided by more than the defendant's net worth." In general, the Haslip factors reflect many of the underlying principles for imposing punitive damages. Factor (a), a reasonable relationship between the harm and the amount of the award, however, is apparently the Court's answer to a substantive due process safeguard. Factors (b) the degree of reprehensibility, (c) profitability, (d) the defendant's wealth and (e) the costs associated with the litigation, reflect punitive damage's retribution and deterrence objectives. Moreover, factor (e) can be viewed as an implicit recognition of punitive damage's "compensatory" function. The mitigating factors, (f) whether criminal

50. Id. at 18.
51. Id.
52. Id. at 21-22.
53. Id. at 21, 22.
54. See supra text accompanying notes 30-33.
sanctions have been imposed and (g) whether other civil awards have been awarded, are safeguards to multiple award assessments against defendants for the same conduct. Although these factors are broad in scope and lack definitive application, that fact should not detract from their usefulness. As the Court noted, there can be no “bright-line” rule for the determination of the constitutional reasonableness of a particular punitive damage award.

Furthermore, unlike the imposition of statutory caps on punitive damages, Haslip’s factors do not have the effect of inhibiting economically disadvantaged plaintiffs from seeking redress in the courts. The mitigating factors, which can be used to limit the amount of punitive damages awarded, do not impose clearly quantifiable ceilings on those awards—ceilings that discourage risk-averse plaintiffs’ attorneys from bringing such claims whenever the prospective client is poor.

In TXO Production Corp. v. Alliance Resources Co., a jury award of $19,000 in compensatory and $10 million in punitive damages was upheld by the Court against a charge of excessiveness, despite a ratio of approximately 526 to 1. The Court retreated slightly from the procedural due process standards espoused in Haslip—due process was not violated even though the trial judge’s review of the punitive damages awarded did not include a written opinion stating reasons for upholding the award. Under TXO, however, it is unclear how an appellate court can determine whether a particular defendant is in fact deserving of a high punitive damage assessment, other than mere reliance on the record alone; precisely what the Court did in TXO itself. The lack of a written opinion stating the reasons for upholding a punitive damage award creates a situation wherein federal appellate courts will continue to grant great deference to state court decisions, even when the precise reasoning of those decisions is unknown. This result is strange indeed, particularly when constitutional matters are being decided.

Ironically, it is noteworthy to recognize that the primary reasons why the TXO Court upheld such a large punitive damage award is that it complied with some of the Haslip factors: (a) the reasonable relation-

56. See id. at 446.
57. See id. at 453, 459, 462.
58. See 449 U.S. at 21-22; see also supra text accompanying note 52.
60. "[W]ith its decision in TXO... the Court has effectively limited federal review of punitive damage awards..." Sandra N. Hurd & Frances E. Zollers, State Punitive Damages Statutes: A Proposed Alternative, 20 J. LEGIS. 191, 194 (1994).
ship between the punitive damage award and the harm likely to result from the defendant's conduct; (b) the degree of reprehensibility of the defendant's conduct; and, (c) the profitability to the defendant of the wrongful conduct. At the trial level, the court found that TXO Corporation was engaged in an ongoing pattern of attempting to fraudulently transfer land titles which, if successful, would have netted the corporation millions of dollars.  

The fact remains, however, that if written opinions which include the reasons for upholding a punitive damage award are not required, both plaintiffs who argue inadequacy and defendants who argue excessiveness of those awards may be disadvantaged on appeal. Similar to the situation in the TXO litigation itself, it is impossible for an appellate court to determine with any certainty whether the Haslip factors actually formed the basis for a reviewing court's decision to either reduce or uphold a jury's punitive damage award.

The Court, in Honda Motor Co. v. Oberg, 62 held that procedural due process requires courts to provide some form of meaningful judicial review to defendants who are challenging punitive damages for reasons of excessiveness. 63 Focusing on issues of procedural due process, the Court criticized the Oregon Supreme Court for interpreting Oregon's Constitution as allowing only limited judicial review of any punitive damages determination made at the trial level. 64 Oregon courts had held that a jury's punitive award may not be reduced on review; it may be set aside entirely, but only if there is no basis for the award at all. 65 The Court noted that punitive damages may be unfairly assessed against defendants for the wrong reasons. 66 Therefore, courts must provide adequate procedural safeguards in order to protect defendants from arbitrary jury awards, thereby satisfying the Due Process Clause. 67

63. See id. at 2341.
64. See id. at 2338 (citing Van Lom v. Schneiderman, 210 P.2d 461 (Or. 1949) (interpreting amended Article VII § 3 of the Oregon Constitution)).
65. See id. at 2338-39.
66. The Court stated:
Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and 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.
Id. at 2340-41.
67. See id. at 2341.
In 1996, the Court decided *BMW of North America, Inc. v. Gore*, which addressed, once again, the constitutional limits of punitive damage awards. For the first time, however, the Court overruled a state court's decision to uphold a punitive award, based on a finding that the constitutional boundary of excessiveness had been crossed.

The case involved an owner whose car had undisclosed paint touch-ups prior to sale. The plaintiff was awarded $4,000 in compensatory damages and $4 million in punitive damages. The jury reached the figure for the punitive award by multiplying the number of instances that BMW had engaged in pre-sale refurbishing, documented at trial as approximately 1,000 cars nationwide, by the amount of the compensatory award.

On review, the Alabama Supreme Court reduced this amount by half, to $2 million, based primarily on the fact that only 14 of the 1,000 occurrences took place within the state. Moreover, there was no evidence offered at trial to indicate how many of the nationwide instances took place in states that outlawed such conduct.

In a narrow five-to-four decision, the Court reiterated its position that it is impossible to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." In determining that the punitive damage award was excessive, three "guideposts" were enunciated by the Court: "the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm... and [the] punitive damages award[ed]; and the difference between this remedy [in this case] and the civil penalties authorized or imposed in comparable cases." According to the Court, "perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." Pointing out that the harm to the plaintiff was purely economic and had no effect on the car's performance or safety,
the Court found that in this case none of the aggravating factors which indicate particularly reprehensible misconduct were present.77

In a blistering dissent, Justice Scalia chided the majority for rendering a decision that was merely "dressed up as a legal opinion,"78 and stated that none of the precedents upon which the majority relied "actually took the step of declaring a punitive award unconstitutional simply because it was 'too big.'"79 In a separate dissent, Justice Ruth Bader Ginsburg agreed with Justice Scalia's observation that the decision was "an unjustified incursion into the province of state governments."80 Justice Ginsburg also found "[t]he Court's readiness to superintend state court punitive damages awards . . . all the more puzzling in view of the Court's longstanding reluctance to countenance review, even by courts of appeals, of the size of verdicts returned by juries in federal district court proceedings."81

Interestingly, BMW seems to add another layer onto a state court's determination of the constitutional reasonableness of any punitive damages awarded. Even though "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition,"82 the Court added that "[t]he

77. See id. Professor Michael Rustad, commenting on this aspect of the decision, stated the following:

One of the things the decision does, which is interesting, is that it sets a hierarchy of what is considered societally harmful. It says protecting consumers from fraud is less important than preventing harms to the public safety. It would give unscrupulous businesses a competitive advantage if punitive damages are not appropriate where there has been fraud. What kind of example is that?

I see BMW's action as far more serious than portrayed by the popular press. In all consumer laws, one of the paramount values is disclosure and that didn't occur here. Alabama had the right to set a high value on that, to set the morals of the market quite high.

Timothy J. Mullaney, Court Limit on Punitive Damages Clouds Product Liability Cases, BALTIMORE SUN, June 2, 1996, at 1L.

78. BMW, 116 S. Ct. at 1611.

79. Id. In addition, Justice Scalia believed that "the 'guideposts' mark a road to nowhere; they provide no real guidance [to state courts] at all." Id. at 1613.

80. Id. at 1610. Justice Ginsburg was convinced that the Court had "unnecessarily and unwise...
sanction imposed in this case cannot be justified on the ground that it was necessary . . . without considering whether less drastic remedies could be expected to achieve that goal. 83 Lower courts may now have the daunting task of determining whether legitimate state interests can be furthered by lesser penalties. 84

Although tort reformers generally applaud the BMW decision, many debate its significance. 85 It seems clear, however, that the Supreme Court is still struggling to offer some sort of meaningful guidance to state courts when reviewing punitive damage awards for excessiveness. The Court’s refusal to give a clear ruling on the issue, preferring instead to create Haslip “factors” and BMW “guideposts,” does not clearly generate the level of discriminatory impact that statutory caps place upon the poor. It does, however, serve to pave the way for a judicial system that will be more willing to reduce punitive awards, deserving or not. Although less drastic, systemic reductions of punitive damage awards can exhibit the same discriminatory effect upon the poor as outright caps. Court-imposed reductions, however, offer a more flexible approach than statutory caps, which lie within the province of federal and state legislatures. 86

B. Congress’s Proposals for Tort Reform

In keeping with their Contract with America, Republicans in the 104th Congress helped hammer through proposed legislation that would

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83. Id. at 1603.
84. On the other hand, Justice Scalia identified this as merely a “loophole that will encourage state reviewing courts to uphold awards as necessary” to adequately protect their citizens. Id. at 1613 (dissenting opinion).
85. See, e.g., Baker, supra note 81 (“[I]n some ways, this decision is like finding out the score in a baseball game in the fifth inning. We know that the game is not over and it is far from clear who will win and who will lose.”); Marcia Coyle, Punies Decision Gives Business Potent Ammo, NAT’L L.J., June 3, 1996, at A11 (reporting that the BMW award “‘could simply be the aberration’”); Pamela Anagnos Liapakis, Don’t Rely Yet on the ‘Gore’ Decision, NAT’L L.J., June 17, 1996, at A23 (“Gore may yet turn out to be a Waterloo for the business community—more curiosity than landmark.”); Henry J. Reske, Guidelines Instead of Bright Lines, A.B.A. J., July 1996, at 36, 36 (noting that even “players in the tort reform debate are divided on the impact of the ruling”).
86. As Justice Ginsburg observed in BMW, the Court should not unnecessarily involve itself in “an area dominantly of state concern,” 116 S. Ct. at 1615 (dissenting opinion), especially when doing so is “in the face of reform measures recently adopted or currently under consideration in legislative arenas.” Id. at 1614. Since the Court’s decision, however, lower courts may be more likely to strike down large punitive awards on constitutional grounds. See, e.g., Lee v. Edwards, 101 F.3d 805 (2d Cir. 1996); Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927 (5th Cir. 1996).
bring about major changes in our civil litigation system.\textsuperscript{87} The House’s vision of legal reform was incorporated into three bills,\textsuperscript{88} one of which

87. During the 1994 congressional elections, more than 300 House candidates of the Republican Party promised to enact sweeping tax and social reform legislation if elected. Their \textit{Contract with America} included ten major provisions: (1) Balanced Budget, a constitutional amendment requiring a balanced federal budget within seven years of enactment; (2) Crime Control, adding new mandatory minimum sentences and tougher death penalty provisions; (3) Welfare Reform, cutting off AFDC payments after two years and banning aid to unwed mothers under the age of eighteen; (4) Education and Children, establishing school voucher programs, a tracking system to find “dead-beat” parents and strengthening of child pornography laws; (5) Middle-Class Tax Cut, creating a $500 tax credit for families that earn below $200,000 per year, a tax credit to offset the “marriage penalty” and IRA accounts that would provide for tax-free interest on withdrawal; (6) National Security, increasing defense spending and prohibiting U.S. armed forces from serving under U.N. command; (7) Senior Citizens, proposing tax cuts, tax-free withdrawal from IRA’s for long-term care and raising the Social Security earnings limit; (8) Capital Gains Tax Cut, cutting the capital gains tax and adjusting the purchase price for inflation; (9) Legal Reform, instituting civil reform to limit punitive damages and to impose a “loser pays” rule; (10) Congressional Term Limits, a constitutional amendment limiting terms or time served in Congress to 12 years. \textit{See} Michael Ross, \textit{GOP’s 10-Point Plan}, \textit{L.A. TIMES}, Nov. 23, 1994, at A-5. \textit{See generally NEWT GINGRICH ET AL., CONTRACT WITH AMERICA.} (Ed Gillespie & Bob Schellhas eds., 1994) (detailing Republican’s proposals for reform which they “contracted” to as a result of the 1994 elections).


During its consideration, many argued that the merits of imposing such reform were dubious at best.

Opponents fear this “loser pays” rule will skew the negotiating process dramatically in that small businesses or individual litigants will often be unable or unwilling to take the additional financial risk of trying the case. Proponents see the bill as a way to stem the rising tide of civil litigation, promote settlement, and reduce frivolous lawsuits. A recent Department of Justice study indicates that only 2% of all civil cases go to trial, so we leave you to draw your own conclusions.


This provision, which has the superficial appeal of a Betty Crocker recipe for fair play, would actually have the opposite effect of that intended.

Instead of promoting settlements and avoiding litigation, ‘loser pay’ would give little incentive to wealthy defendants to settle cases and would give them every reason to prolong pretrial proceedings and to take more and more cases to trial.

Janet T. Mills, \textit{Tort Reform Tangles with Victims’ Rights, PORTLAND PRESS HERALD,} Sept. 1, 1996, at 1C.

Ironically, England is considering abolishing application of the rule altogether and moving toward adopting a contingency fee system. One reason for the proposed change is that the rule is no longer widely used. Fee shifting is not applicable in cases where the plaintiff is covered by tax-subsidized legal aid, which is available to more than half the population in England. \textit{See id.} More compelling is the fact that the rule deters middle-class individuals and small businesses from
was the Common Sense Product Liability and Legal Reform Act of 1995.9 Among other provisions, the bill required “clear and convincing evidence” that the harm suffered by a plaintiff was caused by the defendant’s malicious conduct before punitive damage assessments could be imposed.20 It also limited punitive awards in all civil actions to three times the economic damages or $250,000, whichever was greater.91 Unlike the House bill, the Senate’s version was limited to the products liability area.92 Along with other aspects of the amendment that needed to be reconciled with the House measure, the Senate version limited punitive damages to two times the compensatory award (economic and

pursuing relatively good cases against large corporate defendants. Even a small risk of incurring a large attorney’s fee award and its financial consequences will lead to one-sided settlements that favor wealthy defendants. See Philip H. Corboy, Newt Is Cooking the Numbers, TEX. LAW., Apr. 17, 1995, at 28.

There are states that presently practice a modified English Rule, with the vast majority providing only one-way fee shifting to a winning plaintiff rather than allowing for fee shifting to a winning defendant as well. See John F. Vargo, The American Rule on Attorney Fee Allocation: The Injured Person’s Access to Justice, 42 AM. U. L. REV. 1567, 1629 (1993). In 1980, however, Florida adopted a two-way fee shifting English Rule, primarily because of lobbying efforts of the Florida Medical Association (“FMA”). See id. at 1620. Because it exempted insolvent plaintiffs, the FMA quickly realized that the statute resulted in larger awards when plaintiffs won and was of no benefit when defendants prevailed against insolvent plaintiffs. The FMA reversed its position soon after, and convinced the legislature to repeal the statute in 1985. See id. at 1620-22.

The second bill, the Private Securities Litigation Reform Act of 1995, H.R. 1058, 104th Cong. (1995), amended federal securities law, making it much more difficult to initiate securities fraud claims against publicly traded companies and stockbrokers. It was passed into law over President Clinton’s veto in December of 1995. See Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (amending 15 U.S.C. §§ 77-78). Plaintiffs must now meet a much higher level of specificity in alleging fraud. Furthermore, the law mandates: (1) plaintiffs’ certification that they did not purchase the security through their attorney, (2) a showing of specifically how an award is to be divided, (3) caps for attorney’s fees, and (4) required sanctions for violations of Rule 11, among other provisions that seek to decrease the number of securities fraud suits that are filed. See id. at 738, 740, 742.

90. See id. § 201(a). Perhaps recognizing that punitive damages are “quasi-criminal,” see supra text accompanying notes 14-16, and not purely civil or criminal in nature, a majority of states have already made the move to this standard. See Andrew Blum, Tort Reform: Camel’s Nose into State Law, NAT’L L.J., Mar. 20, 1995, at A1. The previous standard, a preponderance of the evidence, can be viewed as too loose, while the beyond a reasonable doubt standard can be understood as imposing too great a burden upon plaintiffs’ opportunities for recovery of what can easily be characterized as a “quasi-civil” damage.

91. See H.R. 1075 § 201(b). In addition, the bill would have limited pain and suffering awards in medical malpractice actions to $250,000, prohibited joint liability for noneconomic loss, established time limits and defenses for liability, and prohibited punitive damage awards against manufacturers of drugs or devices approved by the government. See id. §§ 107, 108, 301.
noneconomic damages) or $250,000, whichever was greater.93

Many commentators felt that the chances of reaching a compromise package were slight.94 But Congress, through joint committee, eventually agreed upon a version that reflected the Senate’s proposals;95 only to have it vetoed by President Clinton on May 2, 1996.96 On the day after Clinton’s inauguration for his second term in 1997, identical legislation was introduced in the Senate by Majority Leader Trent Lott.97 He stated that there were “‘some signals from the administration that they’re willing to work on legal reform proposals with us better than they did in the past.’”98 Others are not as optimistic in their assessment of the bill’s chances; although President Clinton voiced support for “‘real commonsense product liability reform,’”99 he did so while vetoing Congress’s similar measure in 1996.100

If, however, the bill eventually becomes law with its punitive damage cap provision in place, it would have a disproportionate and discriminatory impact upon the nation’s lower economic strata. Congress’s planned cap, based on a multiplier of compensatory damages, allows people with higher incomes to collect higher punitive awards.101

93. See id. § 8(b).
94. See, e.g., Greenhouse, supra note 68, at A18 (characterizing the attempts at compromise as “stalled”).
95. See Product Liability Fairness Act of 1995, H.R. 956, 104th Cong. (1995). Separate provisions apply to Title II of the amendment, the Biomaterials Access Assurance Act, which is a narrow products liability law reform; it is limited to protecting suppliers of component parts and raw materials used in medical devices.
96. See John F. Harris, Clinton Vetoes Product Liability Measure: Move Triggers Barrage of Accusations Between White House and Hill Republicans, WASH. POST, May 3, 1996, at A14. Clinton stated that he did “not believe that we have to have a legal system which shuts the door on the legitimate problems of ordinary people.” Id.
97. Unlike the Private Securities Litigation Reform Act, which became law over Clinton’s veto on December 22, 1995, the House failed to override the veto of the products liability measure, but only by 23 votes. See For the Record, WASH. POST, May 16, 1996, (Weekly-Maryland), at M5.
98. See Jost, supra note 1, at 18.
99. Id.
100. Representative Jim Ramstad (R-Minn.), an ardent supporter of tort reform, described the veto as “one of the most disappointing decisions from the White House of the past two years.” Ramstad, supra note 88, at A21.
101. Commenting on the negotiations between the House and Senate over provisions in the 1995 bill, Representative John Conyers (D-Mich.) recognized this disparity and asked that any compromise legislation include provisions that would “allow a retiree to recover as much as a similarly injured CEO, whose income would permit a higher punitive award.” Harvey Berkman, House Names Tort Conference Group, NAT’L L.J., Nov. 27, 1995, at A12. Although Conyers’s statement was limited to retirees, the same situation applies to any individual with lower earnings capacity. This concern remains as a valid criticism of the 1997 bill.
PUNITIVE DAMAGE CAPS

The initiation of a suit challenging the constitutionality of this type of punitive damage cap can be expected. Although the Supreme Court seems to have stated quite clearly that there is no constitutional right to punitive damages, constitutional challenges to punitive damage multipliers might arguably succeed. Moreover, when linked directly to economic or compensatory damages, punitive damages will work to the advantage of those with greater incomes and disparately impact those with a limited earning capacity.

C. Current State Tort Reform Legislation

State legislative efforts to control tort law is not entirely a recent development. However, there has been a recent flurry of tort reform on the state level since the 1994 elections, which not only gave a congressional majority to the Republicans, but also resulted in thirty Republican state governors and full control by Republicans of nineteen state legislatures. More than seventy new tort law bills were intro-

Others have echoed this shortcoming when commenting on caps that impose limits on noneconomic damages.

[I]f the person injured already had a good-paying job, that person could receive a great deal more in compensation than a minimum wage worker, an unemployed person or a housewife with no salaried position.

An arbitrary cap on damages would have favored the wealthy and would discriminate against children, seniors on fixed incomes and other low-income people who are victims of automobile accidents, dangerous products or the negligence of others.

See Mills, supra note 88, at 1C.


103. For example, a Tenth Amendment argument can easily be envisioned if Congress passes the proposed cap into law. The BMW decision had two dissenting opinions (Justice Scalia, joined by Justice Clarence Thomas, and Justice Ginsburg, joined by Chief Justice William Rehnquist), both arguing that review of punitive damages in tort law should be left to the states. See BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1610, 1614 (1996); see also supra note 80 and accompanying text. Other constitutional challenges may be successful as well. Consider Henderson v. Alabama Power Co., 627 So. 2d 878 (Ala. 1993), which invalidated a state tort reform statute that limited punitive damages because it violated the state constitutional right to a jury trial. See also infra text accompanying notes 124-26.


105. See Middleton, supra note 8, at 56-57.
duced following the 1994 elections and a few states have enacted substantive new tort reform laws as a result.

For example, new laws in Illinois, the Civil Justice Reform Amendments of 1995, are being viewed by tort reform advocates as the “most comprehensive changes in tort law adopted by a state legislature.” The statute includes provisions for limiting noneconomic damages in most tort cases to $500,000; abolishing joint and several liability; capping punitive damages at three times economic damages (except in medical malpractice cases, in which punitive damages are disallowed altogether); and requiring plaintiffs to file a “Product Liability Affidavit of Merit” when a suit is initiated to ensure, through an expert, that the action is not frivolous.

Many other states have imposed some sort of limitations on tort law as well; for example, either requiring or permitting bifurcated trials. Generally, bifurcated trials are designed to protect defendants from prejudicial determinations of punitive awards by first determining whether a plaintiff is entitled to punitive damages. Then, in a second proceeding, the jury determines the size of the award, if one was warranted.

Additionally, many states have enacted laws, when considering punitive damages, that raise the burden of proof from a preponderance

106. See id.
107. For example, Texas has enacted laws that adopt the English Rule for certain frivolous suits and defenses, cap punitive damages, and in medical malpractice actions, impose a $5,000 bond or an expert’s report for each health care provider named in a suit. In Wisconsin, laws that cap noneconomic awards in medical malpractice actions and limit joint and several liability have been enacted. Indiana has passed tort reform law that introduces comparative fault to products liability law and adopts an English Rule that imposes a shift of $1,000 in legal fees to a losing party that rejects a settlement offer. See Eleanor N. Bradley, Civil Liability: State Reform of Tort Laws Proceeds During Calls for Federal Preemption, Daily Rep. for Executives (BNA), at C-98 (May 22, 1995).
109. Middleton, supra note 8, at 57.
110. See 735 ILL. COMP. STAT. ANN. 5/2-1115.1(a) (West 1996). In response, three lawyers filed suit, claiming that the noneconomic damages cap violates a plaintiff’s right to a jury trial. See Pending Legislation, NAT’L L.J., Mar. 20, 1995, at A22.
111. See 735 ILL. COMP. STAT. ANN. 5/2-1117.
112. See id. 5/2-1115, -1115.05(a).
113. See id. 5/2-1115.03.
114. See Hurd & Zollers, supra note 60, at 205-12, app. A (listing 13 states that either require or permit bifurcated trials as of 1994).
115. See id. at 197.
of the evidence to a clear and convincing standard.\textsuperscript{116} Some states have passed laws which require plaintiffs to pay a percentage of any punitive damages received into either the general treasury of the state or into a specially earmarked fund,\textsuperscript{117} as well as enacting statutes that cap noneconomic damages, such as pain and suffering.\textsuperscript{118} Although few states have passed statutes that limit the amount of attorneys' fees,\textsuperscript{119} or provide for a collateral source rule, whereby damages are reduced by other forms of compensation (for example, workers compensation),\textsuperscript{120} these measures do exist and are indicative of how far-reaching tort reform legislation has become.

In all, twenty-seven states have some type of constraint on punitive damages;\textsuperscript{121} twelve have either a flat cap or multiplier;\textsuperscript{122} while four have prohibitions on punitive damages altogether.\textsuperscript{123} Although flat caps and multipliers have generally withstood constitutional challenge, this was not the case recently in Alabama.\textsuperscript{124} The Alabama Supreme Court, in \textit{Henderson v. Alabama Power Co.},\textsuperscript{125} held that a statute which imposed a flat cap of $250,000 on punitive damages was unconstitutional because it violated a plaintiff's right to a trial by jury.\textsuperscript{126} While consti-

\textsuperscript{116} \textit{See} \textit{id.} at 196-97. This seems appropriate, given the "quasi-criminal" nature of punitive damages. \textit{See supra} text accompanying notes 14-16. At least 33 states have already moved to a clear and convincing standard. Sixteen continue to use the lesser, preponderance of the evidence standard, with Colorado as the lone state that imposes the beyond a reasonable doubt level of proof. \textit{See} Blum, \textit{supra} note 90, at A1.

\textsuperscript{117} \textit{See} Hurd & Zollers, \textit{supra} note 60, at 196. Colorado, however, declared such a statute unconstitutional on grounds of an impermissible taking. \textit{See} Kirk \textit{v. Denver Publ'g Co.}, 818 P.2d 262, 264 (Colo. 1991) (en banc).

\textsuperscript{118} \textit{See} Middleton, \textit{supra} note 8, at 59.

\textsuperscript{119} \textit{See} Bradley, \textit{supra} note 107, at C-98.

\textsuperscript{120} \textit{See} id.


Ironically, plaintiffs in states that have already imposed various types of caps on punitive damages, or prohibited them altogether, may benefit from preemption by any successful congressional measure. Commentary about the 1995 federal products liability reform bill, recognized this as well. "Of the ten states that have passed punitive caps, at least six are stricter than the federal bill's . . . ." \textit{See} Blum, \textit{supra} note 90, at A1.


\textsuperscript{123} Massachusetts, Nebraska, New Hampshire, and Washington. \textit{See} id.

\textsuperscript{124} \textit{See} Hallahan, \textit{supra} note 102, at 430-34.

\textsuperscript{125} 627 So. 2d 878 (Ala. 1993).

\textsuperscript{126} \textit{See} id. at 893-94.
tutional challenges to tort reform measures rarely favor plaintiffs, it is unlikely that these actions will diminish as long as tort reform advocates continue to push through new legislation.\textsuperscript{127}

IV. IS THERE A TORT LITIGATION CRISIS?

Advocates for tort reform commonly assert that the tort system, and particularly products liability law, is in need of immediate attention and reform.\textsuperscript{128} Claiming massive increases in the number and amount of punitive damages awarded,\textsuperscript{129} and the associated burden that increased tort actions impose upon our courts,\textsuperscript{130} businesses point to the advent of the modern multi-million dollar award as a direct threat to their economic interests.\textsuperscript{131} These advocates also assert that, with the increased risk of disabling punitive damage awards, businesses are less likely to introduce innovative products or improve existing ones.\textsuperscript{132}

Furthermore, with the increased insurance coverage necessary to adequately safeguard against possible future losses or even bankruptcy, American businesses complain of rising costs.\textsuperscript{133} It is argued that these

\begin{itemize}
  \item \textsuperscript{127} See Hallahan, supra note 102, at 441.
  \item \textsuperscript{128} During the 1992 presidential campaign, for example, Vice President Dan Quayle issued a report indicating that the tort system cost nearly $300 billion yearly. That assertion was later proved to be fictitious. See Marc Galanter, Anti-lawyer Shibboleths Don't Stand Up, TEX. LAW., Feb. 17, 1992, at 14.
  \item \textsuperscript{129} See Hurd & Zollers, supra note 60, at 197-98.
  \item \textsuperscript{130} As support for this assertion, tort reform proponents claim that between 1960 and 1990 federal court cases nearly tripled to more than 250,000 each year. This claim is misleading, however, because of its inclusion of criminal cases, bankruptcy cases, Social Security actions, and suits by the government which "don't fit the 'litigious society' stereotype. In fact, only 36,978 of those cases were personal injury suits. Most significantly, the number of civil suits, the number of personal injury suits and the number of products liability suits in federal courts have all declined since the mid-1980s." Corboy, supra note 88, at 28.
  \item \textsuperscript{131} See Hurd & Zollers, supra note 60, at 191.
  \item \textsuperscript{133} Figures gathered by the Insurance Information Institute show a jump in general liability insurance premiums from $6 billion in 1981, to $11.5 billion in 1985. By 1987, premiums nearly doubled again, reaching $20.9 billion annually. See Casey Bukro, Victims of Liability: Corporate America Is Fighting Back, Saying the Legal System Has 'Run Amok,' Making Huge Punitive Damage Awards in Often Bizarre Cases, CHI. TRIB., Sept. 11, 1996, at 1. However, that number slid to $18.8 billion by 1994, the latest year for which figures are available. See id.

Many tort revisionists argue that the "insurance crisis" of the 1980s is directly linked to
increased costs, which must be passed on to consumers, in conjunction with an aversion to taking the risk of introducing new products, impose a serious constraint upon national corporate interests and their efforts to remain competitive with foreign imports. These constraints create a situation that hurts consumers' interests by limiting product choices and lowering spending power.

Commentators, however, have noted that the recent "insurance crisis" of the 1980s was the result of shaky investments by insurance companies during the period of high interest rates in the late 1970s and early 1980s, and was not attributable to any claimed increases in litigation risk. The insurers always find it convenient to blame, not their own previous investments or marketing strategy, but the courts and tort doctrine, for the need to raise premiums. Blaming the tort system for the increases became a convenient means of putting these rate increases through and covering for the shortsighted marketing strategies of the previous decade.

Additionally, data shows that in 1993, for every $100 in retail sales, products liability insurance premiums cost businesses only 19.9 cents.

The root of rapid increases in insurance premiums, in the insurer view, has been the unbalanced, reflexively pro-plaintiff development of tort law during the relevant period, driven by the inherently "deep-pocket" orientation of the insurance rationale. Thus the only way to restore equilibrium is to eliminate the insurance rationale from tort doctrine and to revise the unwholesome liability rules it has produced.


134. See Rustad & Koenig, supra note 132, at 85; see also George L. Priest, The New Legal Structure of Risk Control, 119 DAEDALUS 207, 223 (1990) (reporting that 25% of U.S. manufacturers have discontinued new product research for liability reasons). However, other commentators attack the assumption that the legal system is responsible for inhibiting economic growth. See, e.g., Frank B. Cross, The First Thing We Do, Let's Kill All the Economists: An Empirical Evaluation of the Effect of Lawyers on the United States Economy and Political System, 70 TEX. L. REV. 645, 649 (1992) (arguing that studies claiming to show that lawyers have a negative effect on the economy are "flawed by unrealistic theoretical assumptions"); Charles R. Epp, Do Lawyers Impair Economic Growth?, 17 L. & SOC. INQUIRY 585 (1992).

135. The suggestion is that if a business cannot pass along the increased cost of its liability insurance to consumers, because of their unwillingness to pay more for products, the practical effect is removal of products from the market. See George L. Priest, PUZZLES OF THE TORT CRISIS, 48 OHIO ST. L.J. 497, 500 (1987).

136. See Mills, supra note 88, at 1C.

137. RAHDER, supra note 133, at 113-14.

138. See NADER & SMITH, supra note 19, at 279 (discussing studies conducted by the Consumer Federation of America). Figures for 1994 show that insurance for products liability, employment
Many economists, politicians, and commentators do not believe or even mention punitive damage awards as having an adverse affect on national corporate interests by creating competitive disadvantages for American compared to foreign businesses.\textsuperscript{139} Foreign corporations can be subjected to the same laws as American corporations when doing business in the United States.\textsuperscript{140} This fact alone should raise serious doubts concerning the reliability of claims that American business interests are jeopardized because of runaway punitive awards. Furthermore, relying on empirical data rather than rhetoric, a recent federal study assessed the factors that are truly affecting American business competitiveness as capital costs, the quality of human resources, and technology-transfer diffusion, not the tort liability system.\textsuperscript{141}

Despite these findings, however, the debate over whether consumer interests are adversely affected by punitive damage awards continues. Even assuming that assertions by businesses and tort reform proponents are true, if consumers are unwilling to pay for products that cannot be made safe without prohibitive price increases to cover growing costs, one can easily characterize this situation as furthering social utility rather than producing an unacceptable economic constraint. "In other words, products liability benefits not only the injured worker or consumer. It discrimination, shareholder suits, and other claims amounted to only 25.5 cents for every $100 in revenue. See id. Insurance companies seem to admit that these figures are indeed correct, with the industry reporting that "products liability adds less than 1 percent to the price of most products—often far less." Corboy, supra note 88, at 28.


140. In fact, some commentators recognize that Congress's proposed products liability legislation would have the reverse effect of favoring foreign manufacturers over their American counterparts.

Although the German or Japanese manufacturer is likely to have an agent in the United States for service of process, suing a foreign manufacturer is a difficult and expensive proposition. Ironically, one unintended consequence of this provision would be to give foreign manufacturers an advantage over U.S. companies in avoiding liability. Corboy, supra note 88, at 28. Compare \textit{Asahi Metal Industries v. Superior Court}, 480 U.S. 102 (1987), in which the Court held that the federal government's interest in foreign relations may be best served by inquiring into the reasonableness of an assertion of jurisdiction when bringing a foreigner into court, leading to the Court's unwillingness to find an alien's substantial burden outweighed when the interests at stake are minimal.

makes society safer for all Americans."  

This characterization is reinforced by one of the most inclusive empirical studies to date, in which Professor Michael Rustad found that continuing complaints about dangerous products went largely unheeded by businesses until they were hit with large punitive damage penalties. In approximately 80% of products liability cases that resulted in punitive damage awards, however, manufacturers took remedial steps to improve product safety measures in order to avoid future lawsuits. This should come as no surprise, given the deterrence goal of tort law in general and punitive damages in particular.

Much of the empirical data available further suggests that the characterization of a tort system out of control is largely inaccurate. Most systematic empirical studies, including one conducted by the General Accounting Office, have found that there is every indication that punitive damage awards are very rare and are not typically excessive. This evidence runs counter to tort reformers' claims that juries are biased in favor of plaintiffs and against large corporate defendants.

142. Corboy, supra note 88, at 28; see also Mills, supra note 88, at 1C. One commentator appropriately noted the following:

Without the civil justice system . . . , punch presses would still lack guards and two-handed controls, fork-lift trucks would still lack seatbelts and wrap-around seats, Pinto gasoline tanks would still explode, Dalkon Shield IUDs would still render women sterile, silicone breast implants would still cause crippling disease, children's pajamas would still be made of flammable fabrics, and unsafe consumer and industrial goods of every description would still be manufactured and sold in America.


144. See id.


146. See id. at 31; see also Andrew Blum, Study Finds Punitives Are Small, Rare, NAT'L L.J., July 1, 1996, at A6 (reporting on a recent study by Cornell Law School Professor Theodore Eisenberg which "confirmed previous findings that [punitive damage] awards are not as frequent or as big as tort reformers claim"); Stephen Daniels & Joanne Martin, Myth and Reality in Punitive Damages, 75 MINN. L. REV. 1, 43 (1990) (finding that "[j]uries awarded punitive damages infrequently, and when they were awarded, the amount was generally modest"); Saks, supra note 33, at 1254 (noting that empirical studies "fail to support" the claim that "punitive damages [have increased] both in frequency and size").

147. See generally STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM (1995) (finding no basis to conclude that there is any recent national pattern that exhibits more frequent or larger jury awards); Valerie P. Hans & William S. Loquist, Juror's Judgements of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate, 26 L. & SOC'Y REV. 85 (1992) (revealing that jurors are skeptical of plaintiffs' tort claims against businesses and
Rustad's study found that there have only been 355 punitive damage awards in products liability actions over the twenty-five year period from 1965 to 1990, even though consumer products account for "the deaths of an estimated 29,000 and injuries to an estimated 30 million others" yearly. This translates to less than fifteen cases per year nationwide. The median punitive award was $565,000, with only about 13% of the cases resulting in amounts that either equaled or exceeded four times the compensatory award.

Department of Justice figures released in 1995 also indicate that products liability cases amounted to less than 2% of overall civil cases filed in the busiest state courts, and only .004% of the cases which eventually came to trial. Moreover, "[e]ven smaller were the very minuscule number of cases in which juries awarded punitive damages." It is, therefore, difficult to find any rationale for the assertion that courts are clogged with products liability actions or that punitive damages are compromising American business interests as proponents for tort reform claim.

Unlike these empirical studies of our tort system, much of the clamor for tort reform relies on mere anecdotal evidence to support its advocates' claims of a system out of control. Even more disturbing is their apparent lack of concern for the facts underlying the "evidence." A glaring example is the well-known, but misunderstood, McDonald's coffee case which was endlessly repeated by tort reform supporters.

Stella Liebeck, an eighty-one year old resident of Albuquerque, New Mexico, spilled scalding coffee on her lap after leaving a McDonald's take-out window. She later sued McDonald's and was awarded $2.7 million in punitive damages. Looked at by many as a get-rich-quick concern over the litigation crisis and the need for limiting the size of awards).

148. See Rustad, supra note 143, at 37, 38 tbl.3.
149. Id. at 43.
150. See id. at 50.
151. See Mills, supra note 88, at 1C (commenting on the Department of Justice figures).
152. Id.
153. See generally Stephen Daniels & Joanne Martin, Empirical Patterns in Punitive Damage Cases: A Description of Incidence Rates and Awards 1, 8 (American Bar Found. Working Paper No. 8705, 1988) (finding that the typical punitive damages assessment was awarded less frequently and was usually smaller than reformers claim after studying 42 counties in 10 states).
154. See Mary Voboril, Out of Control?: Gop Wants to Limit Liability Suits, but Others See Erosion of Rights, NEWSDAY (New York City), Feb. 26, 1995, (Money and Careers Section), at 1.
scheme, created by a cagey lawyer and a clumsy plaintiff who suffered little substantial injury, the facts reveal a different situation.

Liebeck's injury was far from insubstantial; she spent eight days in a hospital with third-degree burns over 6% of her body. McDonald's was serving its coffee at 180°F to 190°F, which was considerably hotter than other fast-food establishments. In addition, and of particular interest, McDonald's had faced over 700 claims from individuals who had been scalded by coffee by the time Liebeck was injured. Far from forwarding a get-rich-quick scheme, Liebeck had initially tried to settle her claim with McDonald's for $20,000, but her offer was rejected. Finally, the trial court, upon reviewing the award, reduced the amount of punitive damages to $480,000; Liebeck eventually settled the case for an undisclosed amount. It is readily apparent that such anecdotal accounts and misinformation, cited by tort reform proponents as evidence of a tort system run amok, should be viewed not only with healthy skepticism, but also with justifiable disdain.

V. PROPOSALS THAT ARE NONDISCRIMINATORY

The only reliable information concerning the effects of punitive damages is contained in empirical studies, rather than in "horror stories" about the tort law system. Enacting reform measures based upon speculative advances of social utility should not be considered when they exact a heavy toll on society's economically disadvantaged. If punitive damage caps in products liability actions are imposed, the poor will undoubtedly experience restricted court access. Lawyers will become increasingly unwilling to represent plaintiffs in lawsuits that have little or no prospect of yielding adequate compensation for the large amount of time and money invested—a necessary component of any successful litigation waged against large business interests.

Additionally, even if lawyers choose to file products liability actions on behalf of poor claimants, the quality level of the representation will assuredly fall. First, as prospective awards shrink, more qualified attorneys may decide to become more discriminating in the types of cases they choose to bring. Second, lesser financial returns for lawyers, because of smaller contingency fees, translates into greater workloads and the increasing inability of attorneys to devote the same attention to cases that they once could. Thus, poor plaintiffs will ultimately encounter a

156. The following account can be found in Is Lawsuit Reform Good for Consumers?, 60 CONSUMER REP. 305, 312 (May 1995).
civil litigation system that either belittles their claims, or worse, ignores their claims altogether.

Moreover, the twin goals of punitive damages, retribution and deterrence, will be frustrated by such caps. Flat caps on punitive damages will result in businesses merely computing the cost effectiveness of ignoring consumer safety once they discover product defects. And given the relatively low monetary amount caps impose on punitive awards, the obvious result is a gross inability for the economically disadvantaged to punish or deter egregious conduct by multi-billion dollar businesses.

Caps that are based on some multiple of compensatory damages fare no better. In instances where the plaintiff is on the lower end of the economic scale, how can a low punitive award be justified when the same misconduct on the part of a defendant leads to a greater award for a more financially successful plaintiff? Multiplier caps lead to this odd result: rich plaintiffs are somehow more deserving of retribution for egregious conduct and are somehow in a better position to deter. Products liability litigation with punitive damage caps in place will eventually lead to the imposition of punitive awards which help to ensure that the rich get richer and the poor are left out of the courtroom.

Even if one believes that the scenario of runaway juries truly exists, thereby indicating a need for some sort of tort reform, viable alternatives to punitive damage caps are available. Although it is nearly impossible to gather empirical data that would be broad enough to study the likely effects of punitive damage caps on individuals with lower earning capacity, the alternative—simply ignoring the problem and imposing punitive caps—is unacceptable and unwise. Legislatures should attempt to protect individuals who cannot protect themselves, rather than rushing into reforms which raise serious questions regarding their necessity or effectiveness. For legislatures concerned with jury indiscretion, many reform measures are available which do not have a discriminatory impact on the poor. Instead of limiting the poor’s access to our courts, and therefore limiting the availability of compensation for injuries received by deserving plaintiffs, statutes targeting the perceived tort litigation crisis should be designed to avoid unjust results.

One alternative to punitive caps is the adoption of a clear and convincing standard of proof, which has already been enacted by many states, either by common law or statute.157 Reflecting the “quasi-
criminal" nature of punitive damages,\textsuperscript{158} this standard will not severely affect representation of poor plaintiffs, because these damages are normally only available in cases where the defendants have acted egregiously. Furthermore, a clear and convincing standard, although possibly affecting the availability of punitive damages in any given case, does not alter the size of any potential punitive award. It is this latter concern, which presents itself when statutory caps are imposed, that proves problematic when claims by poor plaintiffs are initially brought to lawyers: Are the costs of a complicated and lengthy litigation outweighed by the available potential returns?

A second recommendation is that punitive damages should be limited to a one-time assessment for a particular instance of misconduct. The initial plaintiff may recover a reasonable percentage after expenses (perhaps 25\%), with the remainder being set aside in a fund from which future plaintiffs who have been awarded punitive damages, because of injuries received from the same product, may also recover a set percentage. This may effectively quiet the tort reformers’ criticism of punitive damages as a windfall for plaintiffs.\textsuperscript{159} Of course, in situations where the prospect of future injury to other persons is remote, the state’s percentage can be allocated to a fund that is reasonably related to products liability law. Possible examples include: safety programs, which can be created to inform the public about other products that are under recall because they are already acknowledged as unsafe; and increased governmental inspection procedures, which can help to ensure compliance with existing or future regulations that target manufacturing procedures, with a primary focus on resolving problems that result in manufacturing defects.\textsuperscript{160}

On the other hand, when numerous injuries occur on a nationwide scale, any effort by a particular state to limit recovery of punitive damages to a one-time assessment cannot serve to restrict another state’s right to impose a punitive damage award to a plaintiff in an action brought within its jurisdiction. Current legislation in Congress, the Multiple Punitive Damages Fairness Act of 1997,\textsuperscript{161} introduced by

\begin{itemize}
  \item \textsuperscript{158} See supra text accompanying notes 14-16.
  \item \textsuperscript{159} See supra text accompanying notes 26-27.
  \item \textsuperscript{160} Legislatures must be careful when drafting such provisions. The Colorado Supreme Court struck down as unconstitutional a statute that reserved a percentage of punitive damage awards to the state, holding that it was violative of the Takings Clause. See Kirk v. Denver Publ’g Co., 818 P.2d 262 (Colo. 1991) (en bane).
  \item \textsuperscript{161} S. 78, 105th Cong. (1997).
\end{itemize}
Senator Oren Hatch (R-Utah), attempts to solve this problem. It seeks to prohibit the imposition of punitive damages "against a defendant based on the same act or course of conduct for which punitive damages have already been sought or awarded," unless "the claimant will offer new and substantial evidence of previously undiscovered, additional wrongful behavior on the part of the defendant." The Act, however, contains two major weaknesses that merit serious consideration by Congress. First, it is constitutionally questionable. Any attempt to prohibit a state from protecting its own citizens from unsafe products, by deterring and punishing the egregious conduct of a defendant through punitive damages, is susceptible to constitutional attack via commonly established principles of federalism and on the ground that it denies individuals the right to a jury trial. Second, prohibiting punitive damages merely because they "have already been sought" by previous unsuccessful plaintiffs is simply too great of a restraint upon deserving future claimants. Not only does this provision ignore the vagaries that naturally occur in any jury verdict, it also bars a claimant from seeking punitive damages in situations where a previous plaintiff has produced evidence of the defendant's misconduct, but has settled the case prior to reaching a verdict.

Furthermore, when considered with the opinion in the BMW case, which implies that punitive damages could be limited by misconduct that occurs only within the state, the Act would effectively create an atmosphere where businesses would be immune from the sting levied by punitive damage awards. If businesses do not recognize a loss of profits after engaging in fraudulent behavior or after knowingly marketing dangerous products, the deterrent factor of punitive damages will become an empty promise.

Instead, class actions should be encouraged as a viable alternative. Although operating imperfectly in situations where a company

162. Id. § 3(b) (emphasis added).
163. Id. § 3(g).
164. "Given that the verdict was based on out-of-state conduct that was lawful where it occurred, we need not consider whether one State may properly attempt to change a tortfeasor's unlawful conduct in another State." BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1598 n.20 (1996).
165. Following this same reasoning, legislatures should be encouraged to pass statutes prohibiting businesses from satisfying punitive damage awards through insurance.

Courts must be careful in how they approach this issue, however. Otherwise, disadvantaged
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has nationwide sales of a defective product, this alternative to punitive caps (and the strict guidelines imposed by the Multiple Punitive Damages Fairness Act) offers greater protection from multiple assessments of punitive damages against defendants. It also allows poor plaintiffs access to punitive damage awards, either in the form of participation in a class action or by disbursement from a punitive damages “fund.” The fund can reasonably ensure that poor plaintiffs will be able to acquire legal representation from risk-averse plaintiffs’ attorneys, thereby satisfying the “compensatory” function of not only punitive damages, but also the compensatory goal of tort law as well.

Another possible measure is to require the judiciary to issue a detailed written opinion outlining the reasons for either upholding or reducing a punitive damage award. This suggestion is in response to possible problems arising from the TXO decision. How can plaintiffs, or defendants for that matter, who wish to contest a trial judge’s review of a punitive damage award, have any meaningful appeals process without some reasoning from the trial judge appearing in the record? Presumably, this measure merely ensures a right to which all litigants should be entitled and will not, therefore, adversely affect poor litigants.

Similarly, trial judges should give more detailed and precise jury instructions for the initial determination of any punitive award. This recognizes a situation that juries can often confront: confusion about how to accurately assess the correct amount of a punitive damage award.

Plaintiffs may find themselves severely undercompensated. For example, in Flanaghan v. Ahearn (In re Asbestos Litigation), 90 F.3d 963 (5th Cir. 1996), the dissent scathingly criticized the court’s approval of a class action settlement, describing it as “the first no-opt-out, mass tort, settlement-only, futures-only class action settlement ever attempted or approved.” Id. at 993. One commentator opined that “Ahearn illustrates the ways in which the class action, originally designed to create a remedy for small, powerless claimants, can instead be used to cram down a defendants’ [sic] solution upon them.” John C. Coffee, Jr., Class Actions, NAT’L L.J., Sept. 16, 1996, at B4.

167. See supra text accompanying notes 30-33. It should also be noted that large punitive awards grab headlines in the news media. This helps forward the “education” function of punitive damages. See supra text accompanying notes 17-23. Arguably, the large punitive damages levied against the Ford Motor Company, resulting from its faulty design of the Pinto, had little affect on the multi-billion dollar company’s decision to cancel production. More compelling is the mere fact that people, once aware of the defect, stopped purchasing the automobile.


170. See, e.g., BMW of N. Am., Inc. v. Gore, 646 So. 2d 619 (1994) (acknowledging the inappropriateness of a jury award which mechanically computed punitive damages).
One possible avenue is to adopt and amend the Haslip factors, using them as a template to create detailed jury instructions which can help guide the factfinder in determining a punitive award that is "reasonably related to the goals of deterrence and retribution." Unlike the Court's recent BMW decision, which set forth a "guidepost" that considers the ratio of punitive damages to compensatory damages, Haslip recognized that it is proper for juries to consider "the 'financial position' of the defendant," as well as "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."

If BMW's ratio "guidepost" is followed, the result may be court-imposed punitive damage caps in the form of a multiplier. This is not such an improbable outcome. In the BMW case, on remand from the Supreme Court to determine the proper amount of the punitive award, three concurring justices on the Alabama Supreme Court indicated that in the future a three to one ratio of punitive damages to compensatory damages should be the limit in all but the most egregious cases. Thus, courts that rely on BMW rather than Haslip in formulating potential jury instructions risk shutting poor litigants out of the courtroom. Moreover, plaintiffs that have low compensatory damages, frequently those individuals with a lower earning capacity, will be adversely affected by any large punitive award assessed against a deserving corporate tortfeasor that is later reduced in this manner.

VI. CONCLUSION

Current punitive damage cap legislation in products liability actions, whether in the form of a multiplier, flat rate, or absolute prohibition, should be repealed. The possibility that they disparately impact economically disadvantaged plaintiffs far outweighs any perceived benefits. Moreover, in some respects their constitutionality is question-
able, particularly in the case of caps that are in the form of multipliers. Because there are numerous alternatives for proponents of tort reform, any future efforts to place limits on punitive damages should also be reconsidered. Until there is an equitable and fair method for limiting punitive damages—one that neither inhibits access to the courts, and thus recovery for injuries innocently received, nor subjects poor plaintiffs to grossly inferior awards—any restrictions on punitive awards should be abandoned.

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