

**TESTIMONY**

**of**

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**HEARING**

**on**

**CHECKING AND BALANCING PUNITIVE DAMAGES**

Committee on the Judiciary  
Subcommittee on the Constitution  
U.S. House of Representatives

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**INTRODUCTION**

Mr. Chairman, Members of the Committee, thank you for inviting me to offer some thoughts on whether and how Congress might reform the law of punitive damages, a topic I have studied in depth over the last thirty years of teaching, writing, and consulting (with counsel for plaintiffs and defendants) on the role of punitive damages in American jurisprudence. Since the Committee is now just beginning to investigate this rich topic, my materials first outline the subject and then provide a background describing various aspects of punitive damages law and its reform by judiciary, state legislatures, and the Supreme Court.

I conclude that punitive damages serve a variety of important goals; that abuses in their use suggest the propriety of some reforms; that reform proposals vary widely in their logic, fairness, and practicality; that state legislatures and the courts, particularly the United States Supreme Court, already are substantially reforming this area of the law; and that Congress should proceed with utmost caution in legislating in this complex area of the law.<sup>1</sup>

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<sup>1</sup> This statement draws from D. Owen, Products Liability Law (Thompson/Westgroup 2004, forthcoming) © 2003 David G. Owen and Westgroup, which itself draws from D. Owen, M. S. Madden, & M. Davis, Products Liability ch. 18 (2000); Owen, A Punitive Damages Overview: Functions, Problems and Reform, 39 Villanova L. Rev. 363 (1994); Owen, Civil Punishment and the Public Good,

## OUTLINE OF TESTIMONY

### **I. Nature of Punitive Damages**

### **II. Problems with Punitive Damages**

### **III. Various Reforms**

1. Refining the Standards of Liability and Measurement
2. Prima Facie Case and Other Pretrial Showings; Evidentiary Rulings
3. Judgments on the Merits
4. Standard of Proof – “clear and convincing evidence”
5. Compliance with Government Standards
6. Remittitur
7. Caps – Absolute; Multipliers; Etc.
8. Single Award
9. Splitting Awards With the State
10. Bifurcation of Trials
11. Judicial Determination of Amount of Punitive Damages Awards
12. Written Explanations
13. Prohibition, or Severe Restrictions, in Class Actions
14. Supreme Court Reforms – Jury Instructions; Studied Judicial Review; etc.

### **IV. Whether Congress Should Enact Selected Reforms**

1. In General

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56 So. Cal. L. Rev. 103 (1982); Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1 (1982); Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1257 (1976).

## 2. The Most Promising Types of Reforms

### **Nature of Punitive Damages**

“Punitive” or “exemplary” damages are money damages awarded to a plaintiff in a private civil action, in addition to and apart from compensatory damages, assessed against a defendant guilty of flagrantly violating the plaintiff’s rights. The principal purposes of such damages are usually said to be (1) to punish a defendant for outrageous conduct, and (2) to deter the defendant and others from similarly misbehaving in the future. The law and commentary on punitive damages is vast, rich, and expanding exponentially.

A jury (or judge, in the absence of a jury) may, in its discretion, render such an award in cases in which the defendant is found to have injured the plaintiff maliciously, intentionally, or with a “conscious,” “reckless,” “willful,” “wanton,” or “oppressive” disregard of the plaintiff’s rights. Punitive damages may be assessed against an employer vicariously for the misconduct of its employees, although some states restrict such awards to instances where a managing officer of the enterprise ordered, participated in, or consented to the misconduct. The damage to the plaintiff may involve physical, emotional, property, or financial harm. The amount of the award is determined by the jury upon consideration of the seriousness of the wrong, the seriousness of the plaintiff’s injury, and the extent of the defendant’s wealth.

Straddling the civil and the criminal law, punitive damages are a form of “quasi-criminal” penalty: they are “awarded” as “damages” to a plaintiff against a defendant in a private lawsuit; yet their purpose in most jurisdictions is explicitly held to be noncompensatory and in the nature of a penal fine. Because the gravamen of such damages is considered civil, the procedural safeguards of the criminal law (such as the beyond-a-reasonable-doubt burden of proof and prohibitions against double jeopardy, excessive fines, and compulsory self-incrimination) have generally been held not to apply. This strange mixture of criminal and civil law objectives and effects -- creating a form of penal remedy inhabiting (some would say “invading”) the civil-law domain -- is perhaps the principal source of the widespread controversy that has always surrounded the allowance of punitive damages awards.

The punitive damages doctrine is mixed as well in terms of its institutional derivation, which is partly judicial and partly legislative. While the doctrine is fundamentally a creature of the common law, both its historical roots and many current sources are found in statutory, and even constitutional, provisions. Many western states, whose legal systems are codified to a large extent, have express legislative provisions which generally authorize punitive damages in appropriate cases involving aggravated misconduct. In addition, a large miscellany of statutes, both federal and state, expressly provide for punitive or multiple damages in a great variety of particular situations, including products liability cases. By contrast, many states, either statutorily or constitutionally, prohibit punitive damages in a vast array of contexts, including

commercial transactions under the Uniform Commercial Code. More broadly, five states prohibit all awards of punitive damages unless specifically authorized by statute.<sup>2</sup> Since the 1980s, punitive damages have been a favorite target of tort reformers, so that most states now have some form of tort reform legislation limiting punitive damages in a variety of ways. And, beginning largely with the Supreme Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*<sup>3</sup> in 1991, punitive damages awards have been increasingly subjected to federal constitutional review and control.

## **Functions of Punitive Damages**

In order to determine whether punitive damages are appropriate in particular cases, it is necessary to understand the objectives of such damages that may justify their award. Although courts typically refer only to “punishment” and “deterrence” as the purposes of such damages,<sup>4</sup> this commonly stated duality of goals masks the nuanced variety of specific functions served by punitive damages. While the various overlapping functions may be formulated and subdivided in any number of ways, five separate objectives may usefully be identified: (1) retribution, (2) education, (3) deterrence, (4) compensation, and (5) law enforcement.

## **Problems and Recurring Criticisms**

Punitive damages suffer from a variety of problems, and such awards are subject to a number of criticisms, some with merit and some without. Some of the most basic criticisms are: (1) that punitive damages result in a confusion of tort and criminal law; (2) that manufacturers and innocent shareholders are unfairly subjected to vicarious liability for punitive damages; (3) that insurance against punitive damages destroys their punitive effect; (4) that the legal standards for determining punitive damages liability are hopelessly vague; and (5) that the methods for determining and controlling the amounts of punitive damages awards are unfair.

### **1. Confusion of Tort and Criminal Law**

Because punitive damages are designed to punish a defendant and deter gross misbehavior rather than to provide a plaintiff with compensation, one of the oldest criticisms of such assessments is that they intrude into the realm of criminal law and thus may be seen as

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<sup>2</sup> Louisiana, Massachusetts, Nebraska, New Hampshire, and Washington.

<sup>3</sup> 499 U.S. 1 (1991).

<sup>4</sup> See, e.g., *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 611 (1996); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); Restatement (Second) of Torts § 908(1).

deforming the symmetry of the law.

## **2. Vicarious Liability and the Innocent Shareholder**

The logic and fairness of assessing punitive damages against a corporation for the misconduct of its employees has long been questioned by both courts and commentators.

## **3. Punitive Damages Insurance as Against Public Policy**

To the extent that liability for a punitive damages award is insured, the impact of such an award is transferred to the insurer and thereby avoided by the wrongdoer, which undercuts the supposed punitive and deterrent effects of such awards.

## **4. Vagueness in Liability Standards for Punitive Damages**

The typical liability standards for punitive damages – such as “malicious,” “oppressive” or “outrageous” behavior, or a “conscious,” “willful,” “wanton,” or “reckless” disregard of safety– are such broadly pejorative characterizations of misbehavior that they contain little descriptive power for determining whether punitive damages are appropriate in particular cases.

### **5a. Amount – Standards of Measurement**

One of the most perplexing problems for courts and juries has been how to determine an appropriate *amount* for a punitive damages award. Under the *Restatement (Second) of Torts*, followed in most jurisdictions, the trier of fact determines the amount of a punitive damages award based upon a consideration of “the character of the defendant's act, the nature and extent of the harm to the plaintiff which the defendant caused or intended to cause, and the wealth of the defendant.”<sup>5</sup> As with the standards of *liability* for punitive damages just discussed, courts and commentators long have criticized the vague standards governing the *amount* of such awards. As with the liability standards defining when punitive damages are appropriate, there really is no entirely satisfactory answer to the vagueness problem in determining the amount of such damages.

Precise measurement of a punitive damages award simply is not possible because of the indeterminate nature of the disparate goals it serves. Yet a number of courts, legislatures, commentators, the Commerce Department's Model Uniform Products Liability Act, and the Model Punitive Damages Act all agree that the careful use of factors such as those below should

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<sup>5</sup> Restatement (Second) of Torts § 908(2). See Pace, *Recalibrating the Scales of Justice Through National Punitive Damage Reform*, 46 Am. U. L. Rev. 1573, 1583 (1997) (“The many factors that legislators and judges have created can be reduced to three basic considerations: (1) the character of the defendant's act; (2) the nature and extent of the plaintiff's injuries; and (3) the defendant's wealth.”).

help considerably to reduce the risk of capriciously determined awards and to assure that punitive damages awards assessed in products liability cases are more consistent with their underlying objectives. These factors are:

- (1) the amount of the plaintiff's litigation expenses;
- (2) the seriousness of the hazard to the public;
- (3) the profitability of the marketing misconduct (increased by an appropriate multiple);
- (4) the attitude and conduct of the enterprise upon discovery of the misconduct;
- (5) the degree of the manufacturer's awareness of the hazard and of its excessiveness;
- (6) the number and level of employees involved in causing or covering up the marketing misconduct;
- (7) the duration of both the improper marketing behavior and its cover-up;
- (8) the financial condition of the enterprise and the probable effect thereon of a particular judgment; and
- (9) the total punishment the enterprise probably will receive from other sources.

#### **5b. Amount – Risk of Over-Punishment in Mass-Disaster Litigation**

One of the most troublesome aspects of punitive damages awards in products liability litigation is their potential not only to punish an offending enterprise but also to impair its finances severely or even to bankrupt it. If a product is dangerously defective because of inadequate warnings or design, or because of a recurring flaw in manufacture, hundreds or thousands of similar injuries may result from a single defect in the product line. Such a result can be a “mass disaster” for both the consuming public and the manufacturer. In such situations, as presently in the asbestos industry, the manufacturer may be overwhelmed by the resulting liability for compensatory damages alone; massive additional awards of punitive damages to each plaintiff may virtually ensure the manufacturer's bankruptcy, destroying the enterprise and depriving plaintiffs of corporate funds to cover even their actual damages. Since the purpose of punitive damages is to punish a defendant, not to bankrupt it, and since the law's first objective should be to compensate victims for their losses before punishing the offending enterprise, fashioning a proper role for punitive damages in mass-disaster litigation is an especially sensitive problem that merits serious consideration.

#### **Defining the Standard of Misconduct**

A liability standard for punitive damages in products liability cases should be broad enough to cover the variety of ways in which a manufacturer may deliberately or recklessly disregard consumer safety. Most of the products liability decisions addressing punitive damages have applied the traditional common-law and statutory general standards for punitive damages liability, such as “willful and wanton,” “malice, oppression, or gross negligence,” or “ill will, . . . actual malice, or . . . under circumstances amounting to fraud or oppression.” But these traditional liability standards were originally formulated to cover interpersonal intentional torts or oppressive misconduct by government officials exhibiting personal hostility or a callous abuse of power. In cases where a manufacturer's marketing misconduct is sufficiently culpable to deserve the sanction of punitive damages, the particular misconduct may fairly be characterized as “wanton” or “oppressive.” Such phrases, however, are at best vague and imprecise, and they do little to help a manufacturer conform to the law or to help a court or jury apply the standard to concrete cases.

Courts often define the proscribed behavior as conduct that is in “conscious” or “reckless” disregard of the victim’s rights or safety. The formulation of a liability standard in forms like these lies close to the mark, but the precise wording is important to avoid ambiguity. One way to improve the punitive damages standard of liability is to define it in terms of whether the defendant “flagrantly” violated the victim’s rights. Adding “flagrancy” to a punitive damages standard in any type of case helpfully emphasizes that the defendant's conduct ordinarily must be proven to have deviated substantially from acceptable behavior before it fairly may be punished.<sup>6</sup> By emphasizing to judges and juries that punitive damages are available only for extreme departures from the norm, a flagrant disregard test provides fair breathing space for defendants to make good faith mistakes. Recognizing the advantages of this conception, a number of courts have adopted some form of flagrant disregard formulation.<sup>7</sup> Yet there is

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<sup>6</sup> Serving to limit the standard's scope, the word “flagrant” connotes misconduct significantly more serious than inadvertent negligence and thus assures that only the most egregious misbehavior is punished. Yet it does not call for proof of a subjective awareness of wrongdoing that the word “conscious” implicitly requires. Instead, the word imputes such awareness to the manufacturer when its conduct is obviously and seriously wrong; it suggests that punitive damages are appropriate only in cases of extreme departure from accepted safety norms, that is, only if a product was very defective, and plainly so, at the time it was sold. Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1, 27, 38 (1982). “A plaintiff usually should be entitled to a directed verdict on defectiveness, or close thereto, before the punitive damages issue is properly before the jury at all.” Id. at 38.

<sup>7</sup> See, e.g., *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 412 (Ky. 1998) (“flagrant indifference to the rights of the Plaintiff”); *Leichtamer v. American Motors Corp.*, 424 N.E.2d 568, 580 (Ohio 1981) (quality control “so inadequate as to manifest a flagrant indifference to the possibility that the product might expose consumers to unreasonable risks of harm”); *Palmer v. A.H. Robins Co.*, 684

nothing magical in the word “flagrant,” and a court may achieve the same beneficial results by enhancing the more conventional liability formulations to stress that a manufacturer's conduct should be found to have extended far outside the bounds of normal and proper conduct in order to be branded quasi-criminal. For example, such a standard might frame the prohibited misconduct as the conscious or reckless disregard of consumer safety which constituted an extreme departure from proper conduct,<sup>8</sup> or something similar.<sup>9</sup>

## **Reforms – Judicial and Legislative**

The various problems with punitive damages explored in the previous section, some only imagined but others very real, suggest a rather compelling need to reform the law of punitive damages in a variety of ways. A number of “reform” proposals are indeed afoot, all designed to improve the logic and fairness of punitive damages law. It is important to note at the outset, however, that the purpose of the various reforms is to adjust various aspects of how the law of punitive damages is administered, not to eliminate it as a remedy available in appropriate cases. With few exceptions, neither the courts nor the community of scholars has urged that the institution of punitive damages be abolished. In this nation, most people still view punitive damages as an important remedy that checks, rectifies, and helps prevent extreme misconduct. In recent decades, however, both courts and legislatures have initiated a series of reforms in an effort to reduce as much as possible the most serious problems with the law and administration of punitive damages.

Following are the major types of punitive damages reforms and controls that courts and legislatures have adopted in recent years.<sup>10</sup> The focus here is on common-law and statutory

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P.2d 187, 218 (Colo. 1984) (referring to “marketing of a product in flagrant disregard of consumer safety,” but applying statutory standard of conduct that was “attended by circumstances of fraud' or a 'wanton and reckless disregard of the injured party's rights and feelings”); *Moore v. Remington Arms Co.*, 427 N.E.2d 608, 617 (Ill. App. Ct. 1981) (adopting standard of “conduct that reflects a flagrant indifference to the public safety” for products liability cases); *Loitz v. Remington Arms Co.*, 563 N.E.2d 397, 407 (Ill. 1990) (recognizing both “flagrant indifference' to public safety” standard used in products liability cases and “the more traditional phrasing of willful and wanton misconduct”).

<sup>8</sup> For discussions of the extreme departure notion, see Owen, *The Moral Foundations of Punitive Damages*, 40 Ala. L. Rev. 705, 730 (1989); Owen, *Problems In Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 27-28 (1982); Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 Vill. L. Rev. 363, 407 (1994).

<sup>9</sup> See, e.g., *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 557 (Ind. Ct. App. 1999) (“[r]ecklessness is characterized by . . . a gross departure from ordinary care, in a situation where a high degree of danger is apparent”), cert. denied, 120 S.Ct. 1424 (2000).

<sup>10</sup> See generally V. Schwartz & Behrens, *Punitive Damages Reform – State Legislatures Can and Should*

reform; constitutional reform of punitive damages, under the due process clause in particular, is examined later.

### **1. Refining the Standards of Liability and Measurement**

One of the first and most important reforms that some courts and legislatures have taken is to narrow and refine the standard of liability for punitive damages, sometimes specifying the forms of flagrant misbehavior deserving punishment and the culpability factors that a trier of fact might consider in a products liability case, as discussed above. In similar fashion, to assist triers of fact assess particular amounts of punitive damage awards, a number of jurisdictions have specified the factors relevant to the proper measurement of such awards. Both the definitions of the proscribed misconduct and the standards for determining amounts for such awards may be improved by expressly tying them to the goals of punitive damages applicable to the products liability context.

### **2. Prima Facie Case and Other Pretrial Showings; Evidentiary Rulings**

Although all courts do not have the power to do so without legislative authorization, California and several other states have legislation requiring a plaintiff to make a prima facie showing of the defendant's liability for punitive damages before punitive damages may be pleaded, pretrial discovery of wealth may proceed, evidence of wealth may be admitted, a provisional cap on the amount of a punitive damages award may be removed, or the amount of punitive damages may be argued to the jury.

### **3. Judgments on the Merits**

Many trial courts generally are reluctant to exercise their powers to grant summary judgment, directed verdicts, judgments notwithstanding verdicts, and new trials; such powers, being in derogation of the judgment of the jury, are properly exercised only with studied care. Yet to avoid the special risks of erroneous jury awards of punitive damages in products liability cases, trial courts should give especially careful consideration to motions of this type. Courts should make every effort to cut through the morass of proof, the semantics of the rules of liability, and the rhetoric of counsel to pass judgment at the earliest reasonable time on whether a fair case really has been made that the manufacturer's conduct was flagrant. If such a fair case

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Meet the Challenge Issued by the Supreme Court of the United States in *Haslip*, 42 Am. U. L. Rev. 1365 (1993); Rustad & Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 Am. U. L. Rev. 1269 (1993) (arguing that punitive damages reform is unnecessary).

has not been made, the court should relieve the jury of the temptation to base its decision on passion and prejudice, or it should correct the error if the jury in its verdict succumbed to such emotions. In recent years, trial courts increasingly have rendered summary judgement, directed verdicts, and rendered judgments notwithstanding the verdict on punitive damages claims.

Particularly since the inception of the review of punitive damages awards on constitutional grounds during the 1990s, but also earlier, appellate courts have been showing an increasing sense of obligation to subject punitive damage awards to close scrutiny and to reverse them when unwarranted on the record. Scrupulous appellate review is especially important because it is a defendant's final protection against the infliction of punishment that may be very large and unfairly imposed. On the appeal of such awards, the trial record should be scrutinized with special care for improper evidence, for argument that might have inflamed the jury, and for the sufficiency of the evidence on the whole.

#### **4. Standard of Proof – “clear and convincing evidence”**

“Because punitive damages are extraordinary and harsh,”<sup>11</sup> many courts and legislatures in recent years have raised the standard of proof from the “preponderance of the evidence” standard, the ordinary standard used in civil law litigation, to a “clear and convincing” standard of proof. This is an important reform that reflects the intermediate position of punitive damages, a “quasi-criminal” remedy, between the civil and criminal law. This salutary adjustment of the standard of proof should serve to focus the decision-maker on the importance of careful deliberation on the merits of the case, and it appears to provide courts with both the authority and obligation to review carefully the sufficiency of the evidence for such awards.

#### **5. Compliance with Government Standards**

Some states have enacted legislation providing an absolute defense for manufacturers of pharmaceutical drugs to punitive damages for selling drugs that comply with applicable regulations of the Food and Drug Administration. Some states have broader statutes that shield manufacturers from liability generally, and that apply to all manufacturers and products, but these statutes merely raise a rebuttable presumption that a manufacturer complying with an applicable governmental safety standard is not negligent, or that a product meeting such standards is not defective. Assuming that such a presumption is applicable to the manufacturer, and that it is not rebutted, such a statute should serve to bar punitive as well as compensatory damages.

#### **6. Remittitur**

Another common mechanism of judicial control is the remittitur of excessive awards, that is, granting a defendant's request for a new trial (or reversing and remanding for a new trial, in

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<sup>11</sup> Rodriguez v. Suzuki Motor Corp., 936 S.W.2d 104, 111 (Mo. 1996) (en banc).

the case of an appellate court) conditioned on the plaintiff's failure to accept a reduction in the punitive damages award to some specified amount.

## **7. Caps – Absolute; Multipliers; Etc.**

In an effort to bridle jury discretion so as to prevent runaway punitive damages awards, some jurisdictions have adopted various arbitrary types of measurement approaches that reduce or remove discretion from the trier of fact. The most common form of limitation is to cap punitive damages at some multiple of the plaintiff's compensatory award, at one, two, three, four, or five times compensatory damages. Some jurisdictions use other measures to cap punitive awards, such as absolute dollar amounts, the defendant's gross income, a percentage of the defendant's net worth,<sup>12</sup> or the amount (or some multiple thereof) by which the defendant profited from the misconduct.<sup>13</sup> Most statutes include more than one limitation. While the most common form of combined-cap provision limits such damages to the greater of some dollar amount, such as \$250,000, or to some multiple of the compensatory damages, such as three times that award, the statutes vary considerably in their complexity and ingenuity in combining various caps for different situations. At least a couple of the caps build in an exception for especially egregious or profit-motivated behavior, but even these provisions fail to fully implement deterrence theory by failing to multiply the defendant's expected profit by the defendant's expected probability of getting caught and punished for the wrongful behavior.

In all but three or four states, punitive damages are awarded solely within the discretion of the fact finder, such that there is no right or entitlement to punitive damages, as previously discussed. For this reason, legislative caps on the amounts of punitive damages would seem to be constitutional in most jurisdictions. Indeed, caps quite clearly reduce the due process threat of unbridled jury discretion. But caps by their nature do deprive juries of authority to fix an amount of punitive damages they deem appropriate in particular cases, so that there may be some fair question of whether this form of legislative control may abridge a defendant's state constitutional right to jury trial. However, it seems more logical to conclude that a legislature generally should have the power to limit or even eliminate an extra-compensatory remedy to which plaintiffs have no entitlement. Thus, except in the very few states in which plaintiffs have a right or entitlement to punitive damages, such as Alabama, caps on punitive damages awards should not be constitutionally objectionable.

Some combination of arbitrary limitations on punitive damages awards are a partial

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<sup>12</sup> See Kans. Stat. Ann. § 60-3702(e) (the lesser of 50% of defendant's net worth, if necessary to penalize defendant, otherwise highest annual gross income over five years preceding punishable act, or \$5 million).

<sup>13</sup> See Okla. Stat. Ann. tit. 23, § 9.1(C); Kans. Stat. Ann. s 60-3702(f) (1 ½ times amount of profit defendant gained or is expected to gain).

solution to the risk of over-punishment, if an imperfect one. As in a number of state statutes, exceptions to caps probably should provide at least for particularly reprehensible misconduct, and for cases in which the defendant has continued the misconduct after getting caught and appears likely to continue it in the future.

There is virtue as well as vice in the vagueness of the standards for determining the size of punitive damage assessments; the very vagueness that permits their abuse permits as well their enlightened use to achieve individualized justice tailored to the parties and the circumstances of the case. Legislatures thus should adopt arbitrary measurement-control rules with caution to avoid over-mechanizing the administration of justice in cases involving flagrant misconduct.<sup>14</sup>

## **8. Single Award**

A recurring problem with punitive damages awards in products liability litigation is that a defendant may be subject to punishment over and over again for a single design or warning defect. While punitive damages awards in some amount are justifiable in every case of flagrant misconduct on retribution and restitution grounds, very large, repetitive awards are more difficult to justify. Accordingly, a small number of states, at least Georgia and Florida, have enacted “one-bite” reform legislation that limits punitive damages to one punishment for a single act or course of conduct.<sup>15</sup> Georgia's statute limits punitive damages awards in products liability litigation to one award without exception, whereas Florida's statute allows subsequent awards “if the court determines by clear and convincing evidence that the amount of prior punitive damages awarded was insufficient to punish that defendant's behavior.” In such a case, the court must reduce the amount of any such subsequent award by the amount of any earlier awards, so that the defendant is still ultimately liable only for a single, ultimate punishment for the same act or course of conduct.

Although limiting punitive damages to a single assessment may superficially appear logical and fair, this approach too easily may be manipulated by defendants and otherwise is likely to work poorly in mass products liability litigations in which claims mount over time. Even assuming the feasibility of establishing a proper aggregate amount for a single punitive damages award, a quite unlikely possibility, the “one-bite” or “single-shot” approach denies the importance of the functions of compensation and restitutionary retribution to plaintiffs not

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<sup>14</sup> “Overall, statutory caps provide a certain and administratively easy solution to the perceived problem of excess in punitive damages awards, but they may prove to be too crude a reform measure, sacrificing flexibility and precision in the imposition of punishment and deterrence for the sake of greater control over the size of awards.” *Development in the Law – The Civil Jury*, 110 Harv. L. Rev. 1408, 1534 (1997).

<sup>15</sup> See Annot., 11 A.L.R.4th 1261 (1993).

included in the single punitive damages recovery. Thus, courts have uniformly and properly refused to adopt a common-law one-bite approach to mass liability ongoing-claim situations, on grounds of both principle and practicality.<sup>16</sup> Yet, the single-shot approach appears desirable in single-event disasters, such as airplane or train crashes and hotel fires, where a defendant's aggregate liability is reasonably determinable within a finite period of time, especially if it is determinable in a single proceeding. In such a context, the adjudication of a single judgment for punitive damages would seem feasible and efficient, and the court could assure that each victim received a fair share of the aggregate award.

## **9. Splitting Awards With the State**

A reform adopted in some states, designed to capture the supposed “windfall” aspect of punitive damages awards from plaintiffs and in recognition of the public policy purposes of punitive damages, is to provide that some portion of punitive damages assessments go to the state. The statutes, variously called “split-recovery” or “state-extraction” statutes, have varied in the amount of the award provided to the state: 35 percent of a punitive damages award goes to the state in Florida; 50 percent in Alaska, Kansas, Missouri, and Utah; 60 percent in Oregon; 75 percent in Georgia and Iowa; and a percentage within the court's discretion in Illinois. Some of the statutes deduct attorneys' fees and other litigation costs prior to calculating the amount to go to the state, and the statutes vary on whether particular state agencies are designated as the recipients of such recoveries or whether the state's share simply goes into its general treasury. This kind of statutory division of punitive damages awards has been successfully attacked on state constitutional grounds in Colorado, but split-recovery punitive damages statutes have been upheld against a variety of state and federal constitutional attacks in a number of other states. Because this reform provides that the state shares in the punitive damages award, very large awards may violate the excessive fines clause of the eighth amendment, an issue left open by the Supreme Court.<sup>17</sup>

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<sup>16</sup> A multiplier approach, perhaps determined once and for all in an aggregate claims proceeding, appears to be a preferable approach in such ongoing mass tort situations. See § 18:5, above.

<sup>17</sup> See *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.21 (1989). Although the matter was left undecided, Justice O'Connor expressed little doubt that the Excessive Fines Clause would indeed apply to punitive damages assessments paid to the government. See *id.* at 298-99 (O'Connor, J., concurring in part and dissenting in part). See generally McAllister, *A Pragmatic Approach to the Eighth Amendment and Punitive Damages*, 43 U. Kan. L. Rev. 761 (1995); Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 Vand. L. Rev. 1233 (1987).

One commentator has argued that state extraction statutes as drawn generally violate the takings clause of the fifth and fourteenth amendments. Burrows, *Apportioning a Piece of a Punitive Damage Award to the State: Can State Extraction Statutes Be Reconciled With Punitive Damages Goals and the Takings Clause*, 47 U. Miami L. Rev. 437 (1992).

Whether this reform is desirable depends to a large extent on the absolute size of particular compensatory and punitive awards. While requiring that such awards be split between the plaintiff and the state may reduce somewhat a plaintiff's incentive to pursue such claims, this reform otherwise appears sensible in cases involving very large punitive assessments. Awards of punitive damages, being "quasi-criminal," are by their nature "quasi-public"; therefore, the public logically should share in very large awards. But split-recovery statutes do suffer from a number of theoretical and practical problems,<sup>18</sup> including the infection of the jury's deliberations with extraneous information if it is improperly informed that the public will share in the award. The first and foremost office of punitive damages should be to achieve justice between the parties in the "private" lawsuit, such that the victim ought to be truly fully compensated – both in terms of actual losses and retribution – before the public should have a claim at all. Thus, in cases where the amount of such damages is relatively modest, a plaintiff fairly should have a prior, exclusive claim to the total award.

## 10. Bifurcation

Some courts and legislatures require or permit, upon the defendant's (or any party's) motion, that the punitive damages issue be bifurcated at trial, so that the jury's decision on liability and compensatory damages will not be contaminated by the plaintiff's evidence of the defendant's wealth, and possibly by other punitive damages evidence and argument. Some jurisdictions bifurcate all punitive damages issues from the basic liability and compensatory damages issues; others segregate only the determination of the *amount* of punitive damages, leaving the issue of liability for punitive damages to be decided in the preliminary proceeding along with liability for and the amount of compensatory damages. The Federal Rules of Civil Procedure accommodate bifurcation of punitive damages in its rule permitting federal courts to order separate trials of claims and issues in the interests of convenience, expedition, economy, or to avoid prejudice.<sup>19</sup>

For many years, conventional wisdom held that bifurcation, by fractionizing the issues in the case, benefits defendants. Consequently, during the late twentieth century, permitting or requiring bifurcation of some or all aspects of punitive damages from liability for compensatory damages was a central feature of both state and federal products liability legislative reform initiatives. But experience and recent studies suggest that the blessings of bifurcation may be mixed. The bifurcated Florida smokers class action trial against the tobacco industry, which ended in a punitive damages verdict of \$145 billion, is the most dramatic illustration of the risks to defendants of bifurcating punitive damages liability. In any products liability litigation, restricting the issues at a second, independent trial to liability for and the amount of a punitive

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<sup>18</sup> See generally Development in the Law – The Civil Jury, 110 Harv. L. Rev. 1408, 1535-36 (1997).

<sup>19</sup> See Fed. R. Civ. P. 42(b).

damages award (or, what may be even more difficult for defendants, solely to how large a punitive damages award should be) may provide a jury solely concerned with a manufacturer's culpability with an inquisitorial frame of mind. Moreover, in a second, punitive damages phase of a protracted trial, the jury will be asked to examine an artificially narrow slice of the manufacturer's marketing decisions which are drained of the broad real-world range of considerations contextually at play in institutional decisionmaking over time. While the courts may no longer question whether bifurcation unconstitutionally deprives a non-consenting party of the right to jury trial, this procedure does substantially restrict the freedom of the parties in deciding how to present their claims and defenses.

Recent empirical studies suggest that bifurcating compensatory and punitive damages liability is likely to produce two important effects in jury trials: (1) the defendant is indeed more likely to prevail in the preliminary, compensatory damages stage of the litigation; but (2) in the second phase, a punitive damages award is both more likely to be rendered and likely to be considerably higher than in a unitary trial.<sup>20</sup> In short, "if the defendant has lost at the stage of compensatory liability, the chance becomes very great that the defendant will lose at the punitive liability stage."<sup>21</sup> Thus, not only is the bifurcation device procedurally awkward, but it presents defendants with a significant strategic dilemma of whether to gamble with a higher chance of success in the compensatory damages phase in exchange for a higher risk of disaster in the punitive damages phase.

### **11. Judicial Determination of Amount of Punitive Damages Awards**

At least three states, Connecticut, Kansas, and Ohio, have enacted legislation allowing juries to determine whether a defendant should be liable for punitive damages but transferring to the court responsibility for determining the *amount* of such awards.<sup>22</sup> This shift of responsibility is designed to prevent the perceived risk of biased juries rendering run-away punitive damage awards. Challenges to these statutes in two of the three states on grounds that they violated the state constitutional right to a jury trial met with mixed results: the Ohio Supreme Court struck down its statute,<sup>23</sup> while the Kansas Supreme Court upheld the constitutionality of its statute, reasoning that punitive damages were merely a discretionary remedy of the common law not subject to the right to jury trial.<sup>24</sup>

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<sup>20</sup> See Landsman, Diamond, Dimitropoulos, & Saks, *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 *Wis. L. Rev.* 297, 335.

<sup>21</sup> *Id.* at 330.

<sup>22</sup> See generally *Development in the Law – The Civil Jury*, 110 *Harv. L. Rev.* 1408, 1527 (1997).

<sup>23</sup> See *Zoppo v. Homestead Ins. Co.*, 644 N.E.2d 397, 401 (Ohio 1994).

<sup>24</sup> See *Smith v. Printup*, 866 P.2d 985, 997-98 (Kan. 1993).

In some ways it makes good sense to shift decisions on the amounts of punitive damages to the courts, for such determinations are in the nature of quasi-criminal sentencing, and judges are generally more qualified than jurors -- in training, temperament, and experience -- to fix the amounts of punitive sanctions. This reform, which has been advocated for many years, offers several advantages over the traditional method of allowing the jury to determine the amounts of such awards. First, it reduces the probability that punitive damages awards are unduly influenced by emotion, since most judges are more detached in their deliberations and therefore more likely to render objective damages assessments. Additionally, evidence of the defendant's wealth that could prejudice the jury on the issue of liability could then be excluded from jury consideration without bifurcating the jury trial. Further, judges would be able to call upon their experience in criminal sentencing, unavailable to jurors, in evaluating the need for particular levels of punishment and deterrence in particular cases. Finally, trial judges usually have a more sophisticated appreciation than jurors of the often far-reaching effects that punitive damages awards may have on the operations of particular corporate defendants. On the other hand, even judges may be biased and ideologically committed, one way or the other, and the institution of the jury at least requires a compromise among extremes. Instead of relieving the jury of its historic task of determining the amount of punitive damage awards, the most practical, second-best solution to the measurement problem may lie in formulating a combination of procedural and arbitrary measurement devices of the sort considered above.

## 12. Written Explanations

Many punitive damages problems may be minimized if courts are required to provide explicit justifications – in the record or by opinion – for allowing, upsetting, or remitting punitive damage assessments. Such justifications, tying the evidence to the facts and the principles of punitive damages, should assure that the courts work through the smoke of rhetoric and emotion at the trial to determine if such damages truly are deserved on the evidence, and, if they are, whether the amounts of such awards are truly warranted. In response to the Supreme Court's insistence that punitive damages be based on fair procedures,<sup>25</sup> a number of jurisdictions now require judicial explanations of punitive damages rulings, some requiring appellate courts<sup>26</sup> and others requiring trial courts<sup>27</sup> to explain their rulings. The importance of this reform should not

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<sup>25</sup> See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). See generally § 18:7, below.

<sup>26</sup> See, e.g., *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994). In order for an appellate court to provide the type of post-trial scrutiny of punitive damages awards required by *Haslip*, a fair reading of that case might well lead to the conclusion that appellate courts must provide written explanations for upholding punitive damages awards in every case.

<sup>27</sup> Although, in *Moriel* 879 S.W.2d at 32-33, the Texas Supreme Court concluded that it could not require its already overburdened and understaffed trial courts to provide a written explanation on punitive damages rulings in every case, that court did urge its trial courts to do so to the extent feasible, indicating

be underestimated, and it would seem to be a necessary procedural bedrock for substantive fairness in the administration of the law of punitive damages.

### **Reform – Constitutional**

Courts and commentators long have questioned the fairness of assessing civil penalties for conduct described so vaguely as “malicious,” “reckless,” or “willful and wanton,” with no real ceiling on the size of the assessments, and without the procedural safeguards used in criminal cases to assure the propriety of punishment. Yet, until quite recently, due process and other constitutional challenges to punitive damages fared poorly in the courts. Toward the end of the twentieth century, in a string of cases which constitutionalized the law of punitive damages, the United States Supreme Court began to address concerns over the increase in multi-million dollar awards of punitive damages and the widespread perception that such damages are too often assessed arbitrarily and unfairly.<sup>28</sup>

#### ***State Farm Mutual Automobile Insurance Co. v. Campbell***

The Court’s most recent treatment of the constitutional aspects of punitive damages law is *State Farm Mutual Automobile Insurance Co. v. Campbell*.<sup>29</sup> This was a bad faith failure to settle case in which the plaintiff’s insurance company, State Farm, failed to settle within the policy limits tort claims against the plaintiff for causing a serious car accident. Although there was no doubt of the plaintiff’s negligence in causing the accident in which one driver died and another was disabled, State Farm told him that he did not need independent representation, assured him that his personal assets were safe, and refused to settle the case for the policy limits of \$50,000. The jury returned a verdict for more than \$185,000, leaving the plaintiff with excess liability of more than \$135,000.

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that “at least eight jurisdictions now expressly require the trial court to articulate its reasons for refusing to disturb a punitive damage award.”

<sup>28</sup> See *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Oberg v. Honda Motor Co.*, 512 U.S. 415 (1994); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. \_\_\_, 123 S.Ct. 1513 (2003).

<sup>29</sup> 538 U.S. \_\_\_ (2003).

Initially, State Farm refused to cover the plaintiff's excess liability or even to post bond to permit the plaintiff to appeal. Thereafter, plaintiff and his wife sued the company for bad faith failure to settle, fraud, and intentional infliction of emotional distress. At the trial of these claims, plaintiff introduced evidence that State Farm's denial of the plaintiff's claim was part of the company's nation-wide scheme over 20 years to limit claim payouts improperly in order to improve profitability. On this evidence, the jury returned verdicts of \$2.6 million in compensatory damages and \$145 million in punitive damages which the trial judge remitted, respectively, to \$1 million and \$25 million. Reinstating the full \$145 million punitive damages verdict, the Utah Supreme Court concluded that it was warranted under the three *Gore*<sup>30</sup> measurement guideposts because the defendant's nation-wide scheme to cheat its policyholders was reprehensible, coupled with the company's "massive wealth" and the improbability of its being caught and punished due to the clandestine nature of its activities.

State Farm appealed the case to the Supreme Court, arguing that the \$145 million punitive damages assessment was excessive and violative of due process because the Utah courts had improperly considered conduct outside the state and otherwise violated the due process principles set forth in *Gore*. Agreeing, the Supreme Court reversed and remanded, stating that the case was "neither close nor difficult" under *Gore*'s guideposts for avoiding constitutionally excessive punitive damages awards.<sup>31</sup> As for reprehensibility, the first and most important guidepost, the court acknowledged the impropriety of the defendant's scheme but explained that due process precluded courts from basing punitive awards on misconduct, especially conduct outside the state, unrelated to the plaintiff's harm.<sup>32</sup> So long as a defendant's misconduct to

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30 *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

31 *Id.* at \_\_\_\_\_. The majority decision was authored by Kennedy, J. Scalia, Thomas, and Ginsburg, JJ., in separate dissents, reasoned that the Supreme Court should not review state court punitive damages judgments.

32 "Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff." *Id.* at \_\_\_\_\_. Nor did the Court think that a punitive damages award could be supported by substantially dissimilar conduct by the defendant that harmed persons other than the plaintiffs:

A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . . . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct . .

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other persons is similar to the conduct that harmed the plaintiff, courts and juries may properly consider it as showing that the defendant is a repeat offender and hence deserving of greater punishment, but the majority concluded that the record in this case revealed scant evidence of repeated misconduct of the kind that injured the plaintiff – the denial of third-party liability claims. Noting that a much lower award would have adequately protected Utah’s interest in punishing and deterring State Farm’s relevant misconduct that occurred in Utah, the Court observed that the case was improperly “used as a platform to expose, and punish, the perceived deficiencies of State Farm’s operations throughout the country.”<sup>33</sup> Unfortunately, the majority ignores considerable reprehensibility evidence of serious State Farm misconduct, much of which was directly relevant to the company’s abusive practices in this case.<sup>34</sup>

As for the second guidepost, the ratio between punitive and compensatory damages, the Court “decline[d] again to impose a bright-line ratio which a punitive damages award cannot

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Id. at \_\_\_\_.

33 Id. at \_\_\_\_ . The court concluded its analysis of reprehensibility:

The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20-year period. In this case, because the Campbell’s have shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis.

Id. at \_\_\_\_ . As pointed out in Justice Ginsburg’s dissent, discussed in the following footnote, the majority’s last assertion is simply wrong.

34 In dissent, Justice Ginsburg summarized evidence, conveniently ignored by the majority, of the defendant’s truly intolerable business practices, some of which the company employed in this case, that were in fact highly relevant to an assessment of the defendant’s reprehensibility. See id. at \_\_\_\_ - \_\_\_\_ . “[O]n the key criterion ‘reprehensibility,’ there is a good deal more to the story than the Court’s abbreviated account tells.” Id. at \_\_\_\_ . The evidence revealed an ongoing, company-wide scheme to falsify records and use trickery and other dishonest techniques – such as unjustly attacking a claimant’s character, reputation, and credibility by making false and prejudicial notations in the file – to pay less both first-party and third-party claims at less than fair value. Two of the defendant’s Utah employees testified to “intolerable” and “recurrent” pressure to reduce payouts below fair value, id. at \_\_\_\_ , and the local manager ordered the adjuster for the Campbell case to falsify company records by inventing a story that the driver who died in the accident was speeding to see a pregnant girlfriend who did not exist. Several former State Farm employees testified “that they were trained to target ‘the weakest of the herd’ – ‘the elderly, the poor, and other consumers who are least knowledgeable about their rights and thus most vulnerable to trickery or deceit, or who have little money and hence have no real alternative but to accept an inadequate offer to settle a claim at much less than fair value.’” The plaintiffs fell into this vulnerable claimant category – economically, emotionally, and physically, Mr. Campbell (since deceased) having suffered from a stroke and Parkinson’s disease. Id. at \_\_\_\_ .

exceed.” While signaling that “few awards exceeding a single-digit ratio . . . will satisfy due process,” the Court observed that due process may permit greater ratios in certain circumstances – for particularly egregious misconduct resulting in small economic damages,<sup>35</sup> where the injury is hard to detect, or where the misconduct causes physical injuries. In all cases, however, “courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.” Because State Farm eventually paid the plaintiffs’ excess liability, their losses were mostly emotional, leading the Court to determine that the generous \$1 million compensatory damages award contained a substantial punitive component such that a large punitive award would be constitutionally inappropriate.<sup>36</sup> Finally, the Court explained that the very large punitive damages award was unjustified by the third and final *Gore* guidepost which compares the punitive award to other civil and criminal penalties that may also apply to the defendant’s misconduct which, in Utah, was a mere \$10,000 fine for fraud. For these reasons, the Court concluded that the \$145 million punitive damages assessment in this case was “neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant.”

### **Applying Constitutional Doctrine to the Products Liability Context**

One must question how meaningfully the due process excessiveness principles of *Gore* and its progeny may be applied to products liability cases involving personal injury or death. In *Gore*, the Supreme Court noted that the reprehensibility of misconduct is affected by certain “aggravating factors,” including whether the conduct threatened merely economic interests or health and safety,<sup>37</sup> and whether the defendant acted with “trickery and deceit” – with “deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive.” In *TXO*,<sup>38</sup> trickery was the only aggravating factor, and the Court there upheld a \$10 million punitive award that was ten times the amount of potential harm and 527 times the actual harm. Products liability cases ordinarily involve a significant threat to human safety, and trickery and concealment frequently pervade those products liability cases in which punitive damages are fairly implicated. Another of *Gore*’s aggravating factors is whether the defendant

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35 Conversely, “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” *Id.* at \_\_\_\_.

36 “When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” *Id.* at \_\_\_\_.

<sup>37</sup> See *id.* at 575-76. “The harm BMW inflicted on Dr. Gore was purely economic in nature. . . . BMW’s conduct evinced no indifference to or reckless disregard for the health and safety of others.” *Id.* at 576. See also *Campbell*, 538 U.S. at \_\_\_\_ (discussing *Gore*’s second guidepost).

38 *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993).

had engaged in repetitive misbehavior, whether it was a repeat offender.<sup>39</sup> Products liability cases in which the manufacturer continues to market a product despite increasing proof that it is dangerously defective, particularly if it also continues to tout the product's safety, implicate precisely this form of aggravating misbehavior.

The fact that each of *Gore's* aggravating factors commonly exists in products liability cases involving large punitive damages awards – cases in which multi-million dollar punitive damages awards are assessed against multi-billion dollar, multi-national manufacturers of defective products – frustrates their usefulness in this context. Stated otherwise, *Gore's* excessiveness guideposts provide manufacturers and the courts with little useful guidance on the constitutional limitations on the size of punitive damage awards.<sup>40</sup> The only really helpful lesson from *Gore* is its central theme, underscored by the Court's shift to a standard of *de novo* review in *Cooper Industries*,<sup>41</sup> that reviewing courts must closely examine the culpability and other punitive damages evidence in relation to the rules and goals of punitive damages law, particularly if the size of a particular award raises “a suspicious judicial eyebrow,”<sup>42</sup> which may indeed be all that due process truly should require.<sup>43</sup> One should not minimize the importance of this due process requirement, commenced in *Haslip*<sup>44</sup> and continued in *Gore*, *Cooper Industries*, and *State Farm*, that courts scrutinize the evidence closely to assure that the procedures by which punitive damages are assessed are fair to the defendant. But conspicuously absent from the Court's listing of due process excessiveness guideposts in *Gore* and its progeny is the matter of the defendant's financial condition or “wealth.” While defendants and economic theorists vigorously challenge the relevance of such evidence to punitive damages determinations,<sup>45</sup>

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<sup>39</sup> “Certainly, evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law. . . . Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance.” *Gore*, 517 U.S. at 576-77.

<sup>40</sup> See Justice Scalia's observation that “the 'guideposts' mark a road to nowhere; they provide no real guidance at all.” *Gore*, 517 U.S. at 605 (Scalia, J., dissenting).

<sup>41</sup> *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).

<sup>42</sup> *Id.* at 583.

<sup>43</sup> See Scalia, J., dissenting, *id.* at 598.

<sup>44</sup> See *Haslip*, 499 U.S. at 9-10.

<sup>45</sup> See, e.g., Polinsky & Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 910 (1998) (irrelevant to deterrence in case of economic harms); Abraham & Jeffries, *Punitive Damages and*

common law courts long have considered it to be an important guidepost for establishing the proper size of punitive damages assessments, which has been acknowledged by the Court.<sup>46</sup> The point simply is that a \$1 million punitive damages award that may be trivial for General Motors may bankrupt a small automotive parts company.<sup>47</sup> For this reason, some courts actually *require* proof of a defendant's wealth before a punitive damages award properly may be assessed.<sup>48</sup> In its latest pronouncement, *State Farm*, the majority seems to shift from a recognition of the states' conventional and legitimate use of wealth for helping to ascertain an appropriate amount of a punitive damages assessment into viewing evidence of the defendant's wealth almost as perverse.

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the Rule of Law: The Role of Defendant's Wealth, 18 J. Legal Stud. 415 (1989).

<sup>46</sup> See, e.g., *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462 & n.28 (1993), specifying the "petitioner's wealth" as one basis for upholding large punitive damages award, and recognizing that reliance on evidence of a defendant's wealth is "typically considered" and allowable under "well-settled law." See also *id.* at 464; *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991) (finding defendant's "financial position" a legitimate factor). But see *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994) ("evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses").

<sup>47</sup> See, e.g., *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 586, 591 (1996) (Breyer, J., concurring) ("Since a fixed dollar award will punish a poor person more than a wealthy one, one can understand the relevance of this factor to the state's interest in retribution (though not necessarily to its interest in deterrence, given the more distant relation between a defendant's wealth and its responses to economic incentives).") (citations omitted).

<sup>48</sup> See, e.g., *Adams v. Murakami*, 813 P.2d 1348, 1351 (Cal. 1991) (information on defendant's wealth is necessary for appellate review of alleged excessiveness of punitive award; trial court should instruct jury to consider defendant's financial condition); *Herman v. Sunshine Chemical Specialties, Inc.*, 627 A.2d 1081, 1087 (N.J. 1993) (holding in a non-products liability case that "a jury must consider evidence of a defendant's financial condition in determining the amount of punitive damages" and noting state statute mandating such evidence in products liability actions).

If a guidepost list for determining the excessiveness of punitive damages awards is to be limited to three indicia, as it most assuredly need not,<sup>49</sup> it would be much improved if the Court were to substitute the defendant's *wealth* for a comparison of the punitive award with other sanctions.<sup>50</sup> Just as due process fairly requires that punitive damages awards be tied to the overall objectives of such assessments, the ultimate due process fairness question pertaining to the size of an award is the overall *appropriateness* of any given award on all the facts of the particular case. Unlike the concept of “excessiveness,” which seems more narrowly to focus on the size of an award in numerical terms, the concept of appropriateness more embracingly includes all aspects of a defendant's and plaintiff's situations relevant to the amount of punishment proper in any given case. Particularly in the products liability context, there may be as many as *nine* separate considerations (“guideposts”) that properly bear on the measurement issue.<sup>51</sup> Confining the measurement criteria to only three of the many relevant factors forces the underlying fairness inquiry awkwardly into an incomplete and rigid mold. If substantive due process is to be revived, as it now appears that it surely has, it should not be used to make the states recraft their law according to a structure that is flawed. At least in products liability cases, the marked deficiencies in *Gore*'s guidepost list robs it of usefulness and validity for testing the

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<sup>49</sup> Although Justice Stevens' majority opinion in *Gore* does not address this point directly, Justice Scalia observes that “the Court nowhere says that these three 'guideposts' are the only guideposts; indeed, it makes very clear that they are not . . . .” *Gore*, 517 U.S. at 606. See, e.g., *Barnett v. La Societe Anonyme Turbomeca France*, 963 S.W.2d 639, 666 (Mo. Ct. App. 1997); *Patton v. TIC United Corp.*, 859 F. Supp. 509 (D. Kan. 1994).

<sup>50</sup> See, e.g., Note, *The Shadow of BMW of North America, Inc. v. Gore*, 1998 Wis. L. Rev. 427, 460 (“While a comparison to legislative sanctions may be quite objective, and thus desirable from a defendant's point of view, a small legislative sanction often warrants a higher punitive award when the conduct is fairly egregious. Thus, the defendant's wealth would have provided a better guidepost than legislative sanctions for excessiveness review.”). Justice Breyer's attempt in *Gore* to explain why wealth is not included on the excessiveness constraint list, 517 U.S. at 591, betrays a failure to perceive that the concept of excessiveness is but a part of the broader concept of appropriateness: if for some reason (the defendant's wealth or other factual indicium omitted from *Gore*'s short list) a “large” punitive award is warranted, it can hardly be “excessive.”

<sup>51</sup> In *Gore*, Justice Breyer criticized Alabama's “*Green Oil*” list of seven such factors on the ground that the Alabama courts in practice had not used the factors to restrain excessive punitive awards. See *Gore*, 517 U.S. at 586 & 592 (Breyer, J., concurring) (“the state courts neither referred to, nor made any effort to find, nor enunciated any other standard that either directly, or indirectly as background, might have supplied the constraining legal force that the [seven factors] lack”). While the Alabama courts may well not have applied their seven factors with sufficient vigor, drastically cutting the list to the bone, and including in it the most arbitrary factors (guideposts 2 & 3), would seem to exacerbate the problem rather than to help resolve it.

fairness of a punitive damages award of a given size.

The extraterritoriality aspect of *Gore*,<sup>52</sup> underscored in *State Farm*, is important in products liability litigation where a manufacturer's sale of thousands or even millions of similarly defective products across the nation (or throughout the world) is often argued by plaintiff's counsel as aggravating the misconduct and as so providing in the aggregate a proper foundation for calculating an appropriate punitive assessment proportionate to the wrong. But the *Gore* majority's analysis of the extraterritorial punishment issue translates poorly into products liability cases where the sale of a seriously defective product is patently unlawful and contrary to the public policy of every state in the nation. While the purpose of a punitive damages award in an individual case should not be to provide an optimal punitive assessment for a manufacturer's entire marketing misconduct across the entire nation, rarely can a manufacturer's marketing behavior be evaluated intelligently solely from a narrow state-oriented perspective. Many products (especially automobiles) first sold into one state are later transported into others, and major manufacturers make engineering, safety, marketing, and profitability decisions on a national (or international) basis. At the time of making decisions of this type that may improperly expose consumers across the nation (or globe) to an excessive risk of harm, a manufacturer has no idea which consumers in which states its products will likely injure. Accordingly, in judging the flagrancy of a defendant's misconduct that eventually injures a particular plaintiff in a particular state, and in ascertaining the proper level of retribution and deterrence for that misconduct, it would seem that punitive damages fact finders would necessarily have to consider the manufacturer's entire misconduct and decisionmaking as it extended nation-wide.

Additional due process (and other constitutional) questions remain unresolved that the Supreme Court may one day choose to answer. Probably the most significant unresolved issue is whether the Constitution imposes any restraints on the repetitive imposition of punitive damages in mass disaster cases, such as the litigation that has confronted the asbestos industry for many years. Indeed, it is difficult to understand why the Court has failed to review this most important matter when presented with what appeared to be the perfect opportunity.<sup>53</sup> Many other fairness

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<sup>52</sup> See *Gore*, 517 U.S. at 568-74.

<sup>53</sup> In *Dunn v. HOVIC*, 13 F.3d 137 (3d Cir.) (en banc), modified in part, 13 F.3d 58 (3d Cir.), cert. denied sub nom. *Owens-Corning Fiberglas Corp. v. Dunn*, 510 U.S. 1031 (1993). Collecting the state and federal cases to that date, the court in *Dunn* observed that virtually every court to address the issue has "declined to strike punitive damages awards merely because they constituted repetitive punishment for the same conduct," noting that "[i]n concluding that multiple punitive damage awards are not inconsistent with the due process clause or substantive tort law principles, both state and federal courts have recognized that no single court can fashion an effective response to the national problem flowing from mass exposure to asbestos products." 1 F.3d at 1386. Accord, *Spaur v. Owens-Corning Fiberglas Corp.*,

questions about punitive damages may (or may not) have due process implications, such as whether the burden of proof for punitive damages may properly be set at only a preponderance of the evidence,<sup>54</sup> the propriety of basing punitive assessments upon the defendant's wealth,<sup>55</sup> and many others.

However one views the claim that punitive damages awards have "run wild,"<sup>56</sup> one may question whether the United States Supreme Court ever should have begun to constitutionalize state tort law in this area.<sup>57</sup> But *Haslip* decidedly crossed that Rubicon in 1991, since which time the Court has continued its march toward Rome. It is difficult to predict how far the Supreme Court ultimately may extend its foray of substantive due process into the punitive damages lair, and one must hope that the Court will be cautious in attempting to reform this unruly beast. While recent years have witnessed occasional punitive damages awards that by historical standards are extremely large, the accelerated growth and consolidation of corporate institutions is making more and more multi-national enterprises wealthier and more powerful than many nations on the planet. In this rapidly changing world, substantive due process should not require that people be deprived of what may be their most effective protection against the abuses of megalithic enterprises which may trample, sometimes flagrantly and always in the pursuit of profit, the safety and other interests of private individuals. The Constitution ought not be read to prohibit states from using all available resources, including the possibility of large assessments of punitive damages, to teach such enterprises that profitability at some point must give way to public safety and to provide an effective level of retribution and deterrence for flagrantly improper conduct that harms the citizens of this nation.

It is possible that the Supreme Court in time will recognize the perils of treading too deeply into this particular quagmire of state tort law, as it eventually saw the error of excessive

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510 N.W.2d 854 (Iowa 1994); *W.R. Grace & Co. – Conn. v. Waters*, 638 So. 2d 502 (Fla. 1994) (noting the problems of successive awards in mass tort litigation, but refusing to limit their imposition). Although the opportunity for consideration of the multiplicity of awards issue was less appropriate in *Gore* than in *Dunn*, the issue was presented to and sidestepped by the Court in *Gore*. See *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 607, 612 n.4 (1996) (Ginsburg, J., dissenting).

<sup>54</sup> *Haslip* suggests that such a higher standard of proof may not be constitutionally required. *Pacific Mut. Life Ins. Co. v. Haslip*, 449 U.S. 1, 23 n.11 (1991).

<sup>55</sup> A defendant's wealth "cannot justify an otherwise unconstitutional punitive damages award." *State Farm*, 538 U.S. at \_\_\_\_.

<sup>56</sup> See *Haslip*, 499 U.S. 1, 18 (1991).

<sup>57</sup> See generally Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 Ohio St. L.J. 859 (1991); Zwier, *Due Process and Punitive Damages*, 1991 Utah L. Rev. 407.

constitutional zeal in reforming the law of defamation.<sup>58</sup> If Congress chooses to enter this ever-shifting quagmire, it should only do so after deliberative study.

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<sup>58</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and *Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).