

THE UNCERT-WORTHINESS OF THE COURT'S UNMAKING OF PUNITIVE DAMAGES

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Professor Rustad authored the amicus brief on behalf of the plaintiff in *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (2003), for University Scholars and Law Professors in Support of the Respondent. He has been a co-author or signatory on amici briefs filed in five of the eight punitive damages cases decided by the Court. In *Philip Morris v. Williams*, he was most recently a signatory in the Amici Brief of Professors and Scholars, which relied extensively on his empirical research on punitive damages.

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I. INTRODUCTION

Rachel Barton, who grew up in poverty in Chicago, showed great promise as a violinist at a young age.¹ She began playing violin at age three, performed with the Chicago String Ensemble at age four, and debuted as a soloist with the Chicago Symphony at age ten.² She became the first American to win the Bach Competition, an international contest for aspiring string musicians, in Germany.³ On January 16, 1995, Rachel Barton's life changed forever when, trapped by her violin case straps, her shoulder became wedged in the doors of a Chicago METRA commuter train.⁴ On her left shoulder, she carried her purse, violin case, briefcase, and lunch bag. As she was disembarking the train, the violin case strap became tangled on poles in the

1. *Sunday Morning: Rachel's Story: A Musician Battles Back From Injury* (CBS television broadcast Mar. 14, 1999).

2. *Id.*

3. *Id.*

4. *Id.*

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vestibule.⁵ The violin case had “jostled sort of in back of” her but she moved back and stepped off the train.⁶ The Illinois Court of Appeals described what happened next:

Barton testified that she did not see or hear the train doors close, but felt and heard a bump. Barton attempted to take another step, but was unable to complete it. Barton thought that her violin case had become caught again. Barton testified that it was as if her left shoulder was pinned to the train. Barton could not turn to the right, so she began to turn to the left. Barton stated that she was bowed backwards because her feet were on the edge of the platform. As she turned her head, Barton could not see her violin case and deduced that it must have been inside the train.

Barton testified that based on her experience riding on CTA trains, she tried to spring open the train doors. Barton stated that it was difficult to get her right hand into the rubber where the doors met, given her body position. Barton could not see a door handle. Barton got a palm on the right door, but her hand slid down the door. Meanwhile, Barton was saying, “Hey, wait. Hey, open up the doors,” thinking someone would hear her. Theresa Croghan, who was jogging on the opposite side of the train at the time, heard a very annoyed voice say, “Wait. Wait. Wait a minute. Wait a minute.” Barton stated she had no sense of danger at this time, believing that a conductor would put his head out, see her, and open the doors. Ten seconds elapsed before the train began to move.⁷

Barton was dragged more than three hundred feet before the train came to a stop, suffering a traumatic amputation of her left leg and other catastrophic injuries.⁸

Barton had a split second to make a “Hobson’s choice”⁹:

5. Barton v. Chi. & Nw. Transp. Co., 757 N.E.2d 533, 540 (Ill. App. Ct. 2001).

6. *Id.*

7. *Id.*

8. *Id.* at 538 n.2 (noting that the plaintiff’s brief stated that Barton was dragged 366 feet, a fact not challenged by the defense).

9. A “Hobson’s choice” is one which really presents no choice at all. “The first known written usage of this phrase is in Joseph Addison’s paper *The Spectator* (October 14, 1712), though it also appears in Thomas Ward’s 1688

continue to be dragged by the train or attempt to release herself from her violin straps and risk being crushed under the wheels of the train.¹⁰ She chose to free herself from the straps—suffering devastating injuries—but avoided being run over by the train:

Barton testified that she decided to try to free herself. According to Barton, this was difficult, due to her gloved hand and the force pulling on her and her belongings. Barton testified that the violin strap was the third down, so she got her hand under the straps as a bunch, gave a push to get them over the lump of her coat, and flipped away from the train.

Barton found herself in the gravelly area between the train tracks and the platform. Barton continued screaming because she wanted someone to hear her. Barton testified that she did not know so much pain could exist. Barton stated that all she could see ‘was like blood and [her] left leg was gone.’ Checking herself, Barton concluded that her internal organs and upper extremities were intact, at which point she thought she might live. . . .

. . . The lower part of Barton’s left leg was attached only by a bridge of skin behind the knee. The front of Barton’s right leg was missing most of the skin and soft tissue from mid-thigh to mid-leg. There was a large gap in the bone just below the right knee. The skin over the front half of Barton’s right foot was torn away, exposing the bones over her toes.¹¹

Shortly thereafter, Rachel Barton filed a lawsuit against METRA and another commuter railroad defendant in which she sought punitive damages. Barton alleged that the train’s conductor negligently failed to follow the train’s “Second-Look” rule requiring a railroad employee to complete a visual check twice to be sure that all passengers have safely entered and exited the cars, and that all doorways are clear, before signaling

poem ‘England’s Reformation,’ not published until after Ward’s death.” Wikipedia.com, Hobson’s Choice, http://en.wikipedia.org/wiki/Hobson's_choice (last visited Jan.12, 2008).

10. *Barton*, 757 N.E.2d at 541.

11. *Id.* at 541-42.

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the train to move forward.¹² Rachel's attorneys obtained railroad records that revealed twelve prior similar incidents in which doors failed to reopen after closing on passengers:

Barton introduced testimony from 12 witnesses and the files of three claimants regarding prior substantially similar occurrences (SSOs) reported to CNW or METRA between April 1990 and July 1994, in which passengers had limbs and clothing become stuck in the closing doors of trains. In one case, a child became separated from its mother. Passengers were dragged in three of these incidents. Though some of the passengers were injured in these incidents, none suffered injuries of the magnitude Barton suffered, as the people involved were able to free themselves. Defendants elicited testimony that the train doors were open when the train began to move in some of these cases.¹³

The Illinois jury returned a verdict in favor of Rachel Barton. The award was comprised of the following amounts: \$9 million for disability; \$8 million for disfigurement; \$8 million for pain and suffering; \$3 million for future pain and suffering; \$20,250 in lost wages; \$104,370 in future lost wages; \$672,570.97 in medical expenses; and \$1,293,018 for future medical expenses.¹⁴ After a 4.5% reduction for Rachel's contributory negligence, the total verdict was \$28,736,149.57.¹⁵ Additionally, the jury awarded \$900,000 in punitive damages, but the trial judge remitted 4.5% for contributory negligence, lowering the total amount to \$859,500.¹⁶ Rachel's award for disfigurement alone was nearly four hundred times greater than what she received for lost wages. In Rachel's case, the non-economic damages award of \$27 million for pain and suffering was greater than thirty-one times the compensatory damages. Thus, her total award of non-economic damages far exceeded her special damages award for reimbursement of lost wages and medical expenses.

The plaintiff's counsel contends that the low-ratio punitive

12. *Id.* at 548.

13. *Id.* at 546.

14. *Id.* at 549.

15. *Id.*

16. *Id.*

damages award of \$859,500 was based upon evidence of the commuter railway's door closing policy.¹⁷ Rachel Barton's case for punitive damages resonates with distinctly American values such as personal responsibility, fairness in dealing with others, and protecting the consumer public. Private attorneys like Rachel Barton's provide an alternative regulatory role where government enforcement agencies fail to address a problem like passengers tragically trapped in train doors.

This private enforcement role is critical, but almost impossible to perform in a legal environment that caps non-economic damages. For example, Rachel's trial lawyer spent \$1.2 million to prepare the case.¹⁸ The public does not often appreciate the financial risk a lawyer takes even where there is a clear-cut case of corporate wrongdoing. With a cap of \$250,000 on non-economic damages, the contingency-fee share for the attorney would have been hundreds of thousands of dollars less than the attorney's expenditures.

If the railway had enforced the simple, no-cost safety step of requiring operators to take a second look, Barton would likely have never suffered her injuries. Nonetheless, "[o]ther high-level [railway] officials approved of their subordinates' failure to notify them of a problem."¹⁹ The railway's lame defense was that the previous door closings on passengers had not resulted in serious injuries.²⁰ The jury concluded, however, that the commuter railway was recklessly indifferent in failing to implement measures that would prevent trains from moving forward unless the doors were completely closed. The Illinois Court of Appeals found ample basis for the conclusion that the railroad consciously disregarded passenger safety.²¹ In Rachel's case, punitive

17. See Brief and Argument of Plaintiff-Appellee at 44, *Barton v. Chi. & Nw. Transp. Co.*, 757 N.E.2d 533 (Ill. App. Ct. 2001) (No. 99-2285).

18. Rachel Barton's attorney, Robert Clifford, recalled: "I spent \$1.2 million preparing the Rachel Barton case. I don't think we've tried a malpractice case to verdict without spending at least \$150,000 in the last 5 years, and that's the low-end number." Symposium, *Medical Malpractice: Innovative Practice Applications*, 6 DEPAUL J. HEALTH CARE L. 249, 300 (2003).

19. *Barton*, 757 N.E.2d at 556.

20. *Id.* at 555.

21. *Id.* at 556.

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damages were awarded for corporate inaction in light of known developing profiles of danger. The court affirmed the award observing:

It has long been established in this State that punitive or exemplary damages may be awarded when torts are committed with fraud, actual malice, deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others.²²

Tort reformers constantly call for the undoing of the common law as it pertains to the liability of corporate defendants.²³ Rachel Barton suffered through “25 surgeries, 223 medical appointments, 122 prosthetics appointments, and 170 physical rehabilitation sessions”²⁴ in a three year period and will suffer the consequences of the railway’s negligence for the rest of her life. The punitive damages in Rachel’s case were imposed for the failure of a company to protect the public consumer in light of known or developing profiles of dangers. Non-economic damages, like punitive damages, are widely perceived as lacking predictability. The President of the Illinois Civil Justice League contended that the “\$29.6 million verdict in favor of a violinist who lost a leg in a train accident shows that the justice system is ‘terribly flawed’” and called for immediate tort reform legislation.²⁵ The Illinois jury’s punitive damages verdict has been spun into a tort reform poster child. The violin case, like the tort reformer’s iconic McDonald’s hot coffee case, was depicted as a frivolous lawsuit filed by a greedy plaintiff. Rachel’s accident was portrayed by tort reformers as attributable to her reckless choice in not wanting to leave her treasured, if borrowed, violin behind—a decision that caused her devastating

22. *Barton*, 757 N.E.2d at 554 (internal citations omitted).

23. JAY M. FEINMAN, *UN-MAKING LAW: THE CONSERVATIVE CAMPAIGN TO ROLL BACK THE COMMON LAW* (2004); *see also* THOMAS H. KOENIG & MICHAEL L. RUSTAD, *IN DEFENSE OF TORT LAW* (2001).

24. *Barton*, 757 N.E.2d at 543.

25. Patricia L. Manson, *Barton Verdict Spurs New Tort-Reform Push*, CHI. DAILY L. BULL., March 2, 1999, at 1.

injuries.²⁶

The United States Supreme Court's 2007 decision, *Philip Morris v. Williams*,²⁷ answered the tort reformer's call for further restrictions on punitive damages. The *Philip Morris* Court reasoned that punitive damages are not impossible to punish for harm inflicted on non-parties, but harm to non-parties may be considered generally as part of the reprehensibility analysis.²⁸ If the *Barton* case had been decided in the post-*Philip Morris* period, a swirl of uncertainty over the prior train door closing accidents would likely cause her verdict to be reversed and remanded to determine if the other train door accidents influenced the size of her award.

26. Max Douglas Brown, Vice President and General Counsel to Rush-Presbyterian-St. Luke's Medical Center in Chicago, Illinois, a tort reform advocate, described Rachel's accident as a bad personal choice:

The accident took place when her violin strap was caught in the closing train doors as she exited the train. Instead of leaving her half-million dollar violin behind, Barton chose to hold onto the strap until a train conductor spotted the situation. The jury initially awarded Barton over \$30 million for her injuries, but this amount was reduced by 4.5% after the jury decided she was 4.5% responsible for her injuries.

Symposium, *Medical Malpractice: Innovative Practice Applications*, 6 DEPAUL J. HEALTH CARE L. 249, 256 n.2 (2003). The appeals court reviewing the *Barton* case rejected the theory that Rachel chose to save her violin at the cost of her own safety:

Defendants claim that the jury's allocation of fault was against the manifest weight of the evidence because the strap on the violin case was 45 1/2 inches long. Defendants' brief asserts that "[i]t is uncontroverted that the strap could readily have been removed," but this assertion is blatantly false, given Barton's testimony as recited above. Defendants also state that Barton's counsel acknowledged there was "evidence of 'sufficient slack.'" The record shows that during a sidebar, Barton's counsel accepted that defendants' expert had so opined, which is not a stipulation or judicial admission that there was in fact sufficient slack on the strap for Barton to free herself. The expert testimony may have raised a question of fact, but given Barton's testimony and the demonstrative evidence, we cannot conclude that the verdict was against the manifest weight of the evidence.

Barton, 757 N.E.2d at 559.

27. *Philip Morris v. Williams*, 127 S. Ct. 1057 (U.S. 2007).

28. *Id.* at 1063-64.

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This article is a new audit of the Supreme Court's project to unmake punitive damages,²⁹ and an attempt to peer into the uncertain future of tort remedies in general. Because Rachel Barton's punitive damages were a low ratio award, the excessiveness guideposts currently utilized would likely leave her punitive damages award intact. However, it would have been difficult for Rachel to have received punitive damages at all because evidence of prior train closings would likely be excluded in the wake of *Philip Morris*. In the post-*Philip Morris* world, the Supreme Court has found it is improper for juries to "use a punitive damages award to punish a defendant for injury that it inflicts upon non-parties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation."³⁰ The Court's holding in *Philip Morris*—that it would be unfair to allow courts to award punitive damages for harm done to "strangers to the litigation"—will make it more difficult for plaintiffs' counsel to introduce pattern and practice evidence against corporate defendants.

Although *Philip Morris* reaffirms the excessiveness review first articulated in *BMW of North America, Inc. v. Gore*,³¹ it also sketches new rules for reviewing awards that will influence trial strategy in any case against a corporation. Part II of this article presents a new look at how the Supreme Court unmade punitive damages. For instance, as Justice O'Connor notes, the states have "a legitimate interest in avoiding rigid strictures so that a jury may tailor its award to specific facts," and due process does not require that juries "be straightjacketed into performing a particular calculus."³²

Part III makes predictions on the future of constitutionalizing tort remedies in the post-*Philip Morris* period. My argument is that the Court's next foci beyond *Philip Morris* will be on the tort reformers' campaign to strike the wealth of the defendant from the punitive damages equation and on problems

29. *Id.* at 1057.

30. *Id.* at 1063.

31. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

32. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting).

caused by multiple independent punitive damages assessed against a defendant arising out of a single act. Finally, I examine the very real possibility that the Court will shift its attention to non-economic damages. A more extensive federal takeover of the tort system will occur if the Court extends constitutional principles, first articulated in punitive damage rulings, to the remedy of non-economic damages; tort reformers argue that there is no principled reason to distinguish between excessive punitive and non-economic damages.

I predict, or fear, that the Court will embark on a wholesale makeover of non-economic damages by finding multi-million dollar pain and suffering awards to be “cert-worthy.” Since only a handful of cases are heard in each Supreme Court term, the most critical step in the Supreme Court’s review process is convincing the Court at the petition stage that a given issue is cert-worthy. If the tort reformers are successful, then the Court will be urged to take aim at the due process constraints of jury’s awarding “standardless” non-economic damages, often referred to as pain and suffering. Non-economic damages are an attractive target for judicial tort reform because, like punitive damages, these types of awards have risen in recent years. The Court could unmake non-economic damages using the constitutional standards it refined in its punitive damages jurisprudence over the past decade and a half.

II. THE PUNITIVE DAMAGES BUSINESS OF THE U.S. SUPREME COURT

A. The Court’s Shrunk Docket

Beginning in 1989, the U.S. Supreme Court answered the tort reformers’ call for judicial tort reform by accepting writs of certiorari in eight different punitive damages cases.³³ The

33. Tort reformers have focused on promoting judicial tort reform. See generally Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91 (1993) (documenting that a “who’s who” of corporate America filed or signed amicus briefs in the punitive damages constitutionalization cases). The Washington

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Court's interest in punitive damages came at a time when forty-five out of fifty-one jurisdictions either had never recognized punitive damages or had implemented one or more tort reforms on this remedy since 1979.³⁴ Though its docket could only be described as light during that period, the Court took a great and piercing interest in how punitive damages were assessed against corporate defendants.³⁵ I cannot help but be reminded of one of my favorite *Seinfeld* episodes called "The Sponge," which aired on television December 7, 1995.³⁶ In this episode, Elaine decided that she must re-evaluate her boyfriend screening process when faced with a shortage of her favorite contraceptive sponges. Elaine's current beau, Billy, had to argue "his case" to prove his "sponge-worthiness," including things like the fact that he had a "good rapport" with her that he was employed, and that he was healthy, fit, and "actually quite good at it."³⁷

Just like Elaine in the *Seinfeld* episode referenced above, the U.S. Supreme Court should re-evaluate its screening process for "cert-worthiness" if it continues accepting so few cases. Historically, the Supreme Court used certiorari jurisdiction to resolve inter-circuit conflicts or state court decisions that

Legal Foundation (WLF), for example, states:

In particular, WLF has devoted substantial resources over the years through litigation and publishing to promote civil justice reform, including tort reform and opposing excessive punitive damages and attorneys' fee awards. WLF appeared as *amicus curiae* in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *BMW of N. America, Inc. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

Brief of the Washington Legal Foundation and Allied Educational Foundation as Amici Curiae Supporting Petitioner at 1, *Philip Morris v. Williams*, 127 S. Ct. 1057 (2007) (No. 05-1256).

34. Michael Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 LOY. L.A. L. REV. 1297, 1300 (2005) [hereinafter *Iron Cage*].

35. See William Banks, *At the Halfway Point*, 81 A.B.A. J., 50 (1995) (discussing the current Supreme Court's light docket and the effect it has on the prediction of trends).

36. *Seinfeld: The Sponge* (NBC Television Broadcast Dec. 7, 1995).

37. *Id.*

concerned the meaning of federal law provisions.³⁸ The judicial review of state punitive damage awards reflects the Court's judgment that, on eight occasions, there were compelling reasons to exercise judicial discretion.³⁹

However, the punitive damages cases did not present fundamentally important constitutional questions that needed to be resolved by the Court. Only one of the eight punitive damages cases decided by the Court, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* resolved conflicting decisions of United States appellate courts.⁴⁰ It seems the tort reformers have successfully convinced the Court that punitive damages were an issue of national importance although the states were concurrently enacting extensive tort reforms.⁴¹

The Court has been convinced that there are important, recurring questions regarding due process constraints on punitive damages at a time when it is taking fewer cases. Since 1989, the United States Supreme Court has granted writs of certiorari in eight cases and remanded hundreds of other punitive damages awards against corporate defendants.⁴² The shrinking of the Supreme Court's docket began in the very year the Court decided the first of those eight punitive damages cases:

From 1971 through 1988, the United States Supreme Court was hearing and deciding an average of 147 cases each Term. There were only three Terms during that period in

38. *See, e.g.*, *Braxton v. United States*, 500 U.S. 344, 347 (1991).

39. *See* SUP. CT. R. 10(a) (articulating standard that judicial discretion be granted only for compelling reasons in cases where there are conflicts between federal circuits; conflicts among state supreme courts or functionally similar courts on issues of federal law or important issues in the state court that should be settled).

40. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) (vacating a large punitive damages verdict awarded in an intellectual property infringement lawsuit on the ground that the federal circuit court applied the abuse of discretion rather than the less deferential *de novo* standard of review).

41. *Iron Cage*, *supra* note 34, at 1300 (documenting that all but a few states have enacted extensive statutory and common law reforms of punitive damages in the last two decades).

42. In the wake of *Philip Morris*, for example, the Court remanded *Ford Motor Co. v. Buell-Wilson*, 127 S. Ct. 2250 (2007) and *Exxon Mobil Corp. v. Grefer*, 127 S. Ct. 1371 (2007).

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which the number fell below 140. “One hundred fifty cases per year” came to be regarded both as a maximum and a norm for the plenary docket.

In the 1989 Term, the number of plenary decisions dropped to 132. That alone would not necessarily have signaled any change. But in 1990 the number dropped still further, to 116. Thereafter, with one trivial exception, the plenary docket continued to shrink. The 1995 Term, which came to an end in July 1996, yielded only 77 plenary decisions—half the number that the Court was handing down a decade earlier.

A 50% decline in the decisional output of the nation’s highest court would be remarkable under any circumstances. It is even more so when considered against the background of two other developments. One is the volume of cases brought to the Court for review. In the 1971 Term, the number of new filings was 3,643. In the 1995 Term, the number was 6,595. Thus, during the period when the Court was cutting its decisional output in half, the input came close to doubling.⁴³

During the 2001 term, when it decided *Cooper Industries*, the Court handed down only seventy-six signed opinions as compared to seventy-seven opinions in 2000.⁴⁴ In addition, the total number of filings in the U.S. Supreme Court was 7,924 in the 2001 Term, up from 7,852 in the 2000 Term.⁴⁵

The Court’s most recent punitive damages ruling in *Philip Morris* held that the punitive damages award violated the tobacco giant’s due process if the award was a product of the jury’s desire “to *punish* the defendant for harming persons who are not before the court (*e.g.*, victims whom the parties do not represent).”⁴⁶ Constitutionalizing punitive damages on behalf of corporate wrongdoing is antithetical to both federalism and judicial economy. The Court’s long-standing practice is to deny

43. Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 403-04 (1997) (internal citations omitted).

44. William H. Rehnquist, *2002 Year-End-Report on the Federal Judiciary*, 35 THE THIRD BRANCH 1 (2003), available at <http://www.uscourts.gov/ttb/jan03ttb/page3.html>.

45. *Id.*

46. *Philip Morris*, 127 S. Ct. at 1060.

review of cases where there is great potential for resolution of the need for review by another branch of the federal government, state court, or legislative resolution. If punitive damages were truly a legal remedy in crisis, Congress would be in the best position to effect a federal “takeover”—not the U.S. Supreme Court.

There are many other reasons why the Supreme Court should re-evaluate the cert-worthiness of punitive damages. To begin with, state courts have historically been given great leeway in managing punitive damages and tort remedies in general.⁴⁷

Further, punitive damages are not cert-worthy on the ground of a conflict between circuit courts. The Supreme Court generally will not venture into any disputes absent a finding that there is a fundamentally important constitutional question demanding resolution. Further, the members of the Court generally lack expertise in remaking tort remedies. The Justices of the U.S. Supreme Court are never asked about their prior writings or decisions on tort law remedies during the confirmation process.⁴⁸ Judge Calabresi notes that the Supreme Court’s punitive damages jurisprudence tends to view the remedy in a one-dimensional and simplistic way because the justices are “even less qualified in common-law matters” than other federal courts.⁴⁹

Further, punitive damages are not cert-worthy on the ground of a conflict between circuit courts. The Court’s eagerness to reconstruct detailed procedural and evidentiary rules for punitive damages is at odds with Chief Justice John Roberts’s vision of a limited court whose job is “to decide cases, not promulgate comprehensive rules.”⁵⁰ Well-heeled corporate defendants and their amici parties have managed to convince the Court that the review of punitive damage awards is more cert-worthy than

47. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255-56 (1984).

48. I am indebted to Judge Calabresi who made this apt observation in conversation at the Maryland Law Review Symposium on Calabresi’s *The Costs of Accidents: A Generation of Impact on Law and Scholarship*.

49. Guido Calabresi, *The Complexity of Torts—The Case of Punitive Damages*, in *EXPLORING TORT LAW* 333 (M. Stuart Madden ed., 2005).

50. Robert Barnes, *Roberts Supports Court’s Shrinking Docket*, WASH. POST, Feb. 2, 2007, at A6 (quoting Chief Justice John Roberts).

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many other social problems in the thousands of other cases seeking writs of certiorari.⁵¹ Considering it takes four Justices to vote in favor of granting review, corporate defendants have enjoyed unprecedented success in convincing at least four members of the Court to review punitive damages awards against corporations since 1989.⁵²

B. Punitive Damages' Commanding Role on the Docket

The Court's punitive damages decisions open the door for future due process challenges to both liability for punitive damages and the amount of an award. These decisions will allow no easy exit strategy because of the great diversity of state procedures for trying punitive damages cases.⁵³ The number of

51. In the *TXO* case, for example, briefs of amici curiae urging reversal were filed on behalf of the corporate defendant by the American Automobile Manufacturers Association et al. by Victor E. Schwartz; for the American Council of Life Insurance et al. by Erwin N. Griswold, Richard E. Barnsback, Phillip E. Stano, Theresa L. Sorota, and Patrick J. McNally; for the American Tort Reform Association et al. by Andrew L. Frey, Charles Rothfeld, and Fred J. Hiestand; for Arthur Andersen & Co. et al. by Leonard P. Novello, Jon N. Ekdahl, Harris J. Amhowitz, Howard J. Krongard, Carl D. Liggio, and Eldon Olson; for the Business Council of Alabama by Forrest S. Latta; for the Center for Claims Resolution by John D. Aldock and Frederick C. Schafrick; for Continental Casualty Co. by Rodney L. Eshelman, Donald T. Ramsey, and David M. Rice; for the Equal Employment Advisory Council by Robert E. Williams and Douglas S. McDowell; for Owens-Illinois, Inc., et al. by Walter Dellinger; for the Product Liability Advisory Council, Inc., by Malcolm E. Wheeler; for the Securities Industries Association, Inc., by Paul Windels III and William J. Fitzpatrick; and for the Washington Legal Foundation by Carolyn B. Kuhl, Daniel J. Popeo, and Paul D. Kamenar. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (2003).

52. See *Philip Morris v. Williams*, 127 S.Ct. 1057, 1063 (2007) (discussing the history of punitive damages cases against corporations).

53. The complexity and diversity of state punitive damages laws opens the door to future Due Process challenges. The American Tort Reform Association (ATRA) will likely pursue further reform of punitive damages in the Courts as well as in Congress and state legislatures. ATRA's current wish list is for reform of four other aspects of punitive damages which are also likely future subjects of writs of certiorari:

Establishing a liability "trigger" that reflects the intentional tort origins and quasi-criminal nature of punitive damages awards - "actual malice."

times the Supreme Court has granted cert in punitive damages cases confirms the commanding role of the Court in unmaking the remedy of punitive damages. Punitive damages are increasingly constrained within a federal constitutional straitjacket which often conflicts with, or is duplicative of, state tort reforms.⁵⁴ The highly politicized punitive damages cases are reminiscent of the Supreme Court's decision in *Bush v. Gore*,⁵⁵ where the Court ruled that uniformity among Florida's counties' voting procedures was entitled to federal constitutional equal protection. Society loses when the Supreme Court actively enters into a realm where it has such limited practical expertise. The Court should defer to state tort law in fact-intensive cases like Rachel Barton's personal injury case.

Since *Honda Motor Co. v. Oberg* in 1994, the Court has given corporate defendants an unbroken string of victories.⁵⁶ Corporate defendants in punitive damages litigation are represented by the most able, repeat-player, Supreme Court counsel and are backed by scores of amici briefs authored by top appellate attorneys. In each of the eight corporate punitive damages cases, scores of amici briefs signed by a "Who's Who" of corporate America were filed.⁵⁷

Requiring "clear and convincing evidence" to establish punitive damages liability.

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

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

American Tort Reform Association, Punitive Damages Reform, <http://www.atra.org/show/7343> (last visited Jan. 12, 2008).

54. My fifty-one jurisdiction survey confirmed that all but a few states either do not recognize punitive damages or have reformed this remedy in the past two decades. See *Iron Cage*, *supra* note 34, at 1370-1420.

55. *Bush v. Gore*, 531 U.S. 98 (2000).

56. *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994).

57. Michael L. Rustad, *Happy No More: Federalism Derailed by the Court that Would be King of Punitive Damages*, 64 MD. L. REV. 461, 506 (2005) [hereinafter *Happy No More*] (noting how the corporate community organized

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The preeminence of punitive damages on the Court's docket means that other pressing social problems cannot be addressed. During this last term, the Court accepted Philip Morris's petition but denied certiorari on another tobacco case asking the Court to resolve the question of whether a federal district court can hear cases concerning state attorneys general in other jurisdictions.⁵⁸ Likewise, the Court chose the *Philip Morris* case challenging punitive damages over a consumer case filed by Minnesota's Attorney General supported by state attorneys general in thirty-six jurisdictions: "The question presented was whether Minnesota's 'Consumer Protection for Wireless Customers' law—which requires wireless service providers to give notice and obtain customer consent before they change the terms of an existing contract—is preempted by federal law."⁵⁹

The Court has been too eager to unmake state tort law in favor of corporate defendants while declining to address truly cert-worthy cases such as federal circuit court splits in the fields of criminal law, civil rights, and consumer law. One possible explanation for the Court's greater attention to corporate punitive damages is that counsel representing these interests have unlimited legal resources in contrast to counsel representing consumers, criminals, or the public interest. Unlike the top-shelf legal talent representing Philip Morris,⁶⁰ many

amicus briefs pointing to a punitive damages crisis in Supreme Court punitive damages cases); see also Michael L. Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91 (1993) (documenting the widespread participation of corporations, insurers, and corporate-financed tort reform advocates in Supreme Court punitive damages amici briefs).

58. "The petition [was] filed by a large group of state Attorneys General in *King et. al. v. Grand River Enterprises*. The question there was whether, in a suit filed by tobacco companies challenging certain state statutes aimed at tobacco, a federal court in one state may exercise jurisdiction over AGs from other states solely on the grounds that they had 'assembled purposefully' and agreed while there to 'pass' the challenged laws."

Deepak, Gupta, *Consumer Cases and the U.S. Supreme Court's Docket*, CONSUMER LAW & POLICY BLOG, Oct. 17, 1996, http://pubcit.typepad.com/clpblog/2006/10/consumer_cases_.html.

59. *Id.*

60. For example, former Solicitor General Theodore Olson of Gibson, Dunn & Crutcher LLP, who represented George W. Bush in *Bush v. Gore*, represents

criminal cases are “*in forma pauperis*: filed by impoverished criminal defendants and prisoners, either *pro se* or by assigned counsel.”⁶¹ The Court was willing to review a multi-million dollar punitive award against Philip Morris but refused to accept a writ of certiorari in a functionally equivalent case involving the criminal side of the law,⁶² thus declining to review a case that would have resolved the important issue of whether the admissibility of other bad acts violates an individual criminal defendant’s due process rights.⁶³

The Court has been steadfast in its reluctance to decide important criminal law cases where the circuit courts are split on the issues of the admissibility of testimonial hearsay, assistance of counsel, and the Fourth Amendment rights of persons charged with illegal reentry.⁶⁴ An empirical study of the Court’s shrunken docket concluded that the retirement of the Court’s “three most liberal Justices”⁶⁵ correlated with the Court’s taking of “fewer cases in which lower courts had upheld convictions or rejected

Philip Morris in tobacco litigation. Transcript of Oral Argument at 1, *Watson v. Philip Morris Co.*, 127 S. Ct. 2301 (2007) (No. 05-1284). Gibson, Dunn & Crutcher is a highly ranked Supreme Court appellate firm. Andrew L. Frey of Mayer, Brown, Rowe, & Maw, a leading Supreme Court appellate attorney, represented Philip Morris in the *Philip Morris* case. Mayer, Brown, Rowe, and Maw’s Supreme Court “appellate practice is the nation’s oldest and largest. . . . Andrew Frey, who splits his time between New York and Washington, DC, is known as ‘a well-established denizen of the appellate bar.’” Legal500.com, Appellate and Supreme Court: Recommended Law Firms, http://www.legal500.com/index.php?option=com_content&task=view&id=1136&l5country_code=usv3_ap&l5directory=us500&Itemid=630# (follow “United States” hyperlink; then follow “Appellate and Supreme Court” hyperlink; then follow “Mayer, Brown, Rowe, & Maw” hyperlink) (last visited Jan. 12, 2008).

61. Robert M. Lawless & Dylan Lager Murray, *An Empirical Analysis of Bankruptcy Certiorari*, 62 MO. L. REV. 101, 116 (1997) (quoting ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 8.1, at 407 (7th ed. 1993)) (describing the majority of criminal law petitions as either filed *pro se* or by assigned counsel).

62. Jonathan Soglin, Cert-Worthy Issues Being Overlooked?, CRIMINAL APPEAL: POST-CRIMINAL PRACTICE IN THE NINTH CIRCUIT & CALIFORNIA STATE COURTS, Dec. 8, 2006, http://www.crimblawg.com/2006/12/xxx_whether_adm.html

63. *Id.*

64. *See id.*

65. Justices Brennan, Marshall, and Blackmun were the three liberal justices whose retirement correlates highly with the Court’s shrunken docket.

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civil rights claims.”⁶⁶

In addition, during the same period the Court accepted eight punitive damages cases, it refused to review important public policy issues arising out of the HIV-AIDS epidemic that has swept the country.⁶⁷ In the dozen years between 1987 and 1999 alone, the Court declined to review twenty-eight HIV-AIDS cases.⁶⁸ During this decade, the Supreme Court could have played an important role “as the country has confronted the political, economic, social, and legal facets of the HIV-AIDS epidemic,”⁶⁹ but it instead shifted its attention to unmaking state tort law remedies.

1. The Eighth Amendment’s Excessive Fines Clause

It is questionable whether the Court should be regulating procedures under which punitive damages are awarded. Justice Byron White noted that such issues were:

within the power of the State to regulate procedures under which its laws are carried out . . . and its decision in this regard is not subject to proscription under the Due Process Clause unless “it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”⁷⁰

Chief Justice Burger quoted Justice White’s language in a 1986 case where an insurer contended that a state supreme court justice’s failure to recuse himself violated the company’s due process rights.⁷¹ In that case, the Court declined to decide

66. Hellman, *supra* note 43, at 405.

67. Michael L. Closen, *The Decade of Supreme Court Avoidance of AIDS: Denial of Certiorari in HIV-AIDS Cases and Its Adverse Effects on Human Rights*, 61 ALB. L. REV. 897, 900-01 (1998).

68. *Id.* at 902.

69. *Id.* at 901.

70. *Patterson v. New York*, 432 U.S. 197, 201-02 (1977) (quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1952)).

71. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821 (1986) (holding that the Due Process Clause required the recusal of a state supreme court justice in an insurance bad faith case where punitive damages were awarded but not reaching the question of whether a punitive damages award was so large as to violate the Eighth Amendment’s Excessive Fines Clause).

whether the \$3.5 million punitive damages award imposed on the insurer was impermissible under the Excessive Fines Clause of the Eighth Amendment.⁷² The insurer argued that the indeterminate and unclear standards governing punitive damages awards in Alabama violated the Due Process Clause of the Fourteenth Amendment.⁷³ Only three years later, the Court found an appropriate factual setting to consider the question of whether punitive damages violated the Excessive Fines Clause.

The U.S. Supreme Court's first major pronouncement in area of tort damages was that the Eighth Amendment's Cruel and Unusual Punishment Clause was inapplicable to a multi-million dollar punitive damages award in the 1989 case of *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*⁷⁴ *Browning-Ferris*, the nation's largest commercial waste disposal firm, challenged the large ratio of punitive damages award imposed by a Vermont jury in a state antitrust action.⁷⁵ The *Browning-Ferris* Court declined to rule on whether the large punitive damages award violated the Due Process Clause and ruled that the issue was not properly before them.⁷⁶

The U.S. Supreme Court rejected *Browning-Ferris's* argument that punitive damages awards could be the functional equivalent of cruel or unusual corporate punishment. The Court held that the Eighth Amendment Excessive Fines Clause was inapplicable because a private party, rather than the state, was imposing the punishment.⁷⁷ Since *Browning-Ferris*, a number of

72. *Id.* at 828-29.

73. *Id.* at 828.

74. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 262-63 (1989).

75. The defendant in *Browning-Ferris* argued that punitive damages verdicts were like amercements and were, therefore, covered by the Eighth Amendment's prohibition against excessive fines. *Id.* at 268. The Supreme Court rejected this argument, holding "on the basis of the history and purpose of the Eighth Amendment, that its Excessive Fines Clause does not apply to awards of punitive damages in cases between private parties." *Id.* at 260. Justice Blackmun, writing for the majority, found the meaning of "fine," as used in the Eighth Amendment, to be "a payment to a sovereign as punishment for some offense" and, therefore, inapplicable to punitive damages awards. *Id.* at 265.

76. *Id.* at 280.

77. *Id.* at 260.

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states have enacted statutes requiring that punitive damages recoveries be shared with the state treasury or other instrumentality.⁷⁸ Thus, the unsettled constitutional question is whether the Court would have a different view of the applicability of the Excessive Fines Clause to punitive damages awards where part of the award is shared with the state treasury or another state governmental instrumentality.

Still, there were signs of great concerns by individual justices in the *Browning-Ferris* dissent. Justice O'Connor sounded an alarm about skyrocketing punitive damages, observing that “[a]s recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was \$250,000. Since then, awards more than 30 times as high have been sustained on appeal.”⁷⁹ Justice O'Connor’s dissenting opinion noted, “[t]he threat of such enormous awards has a detrimental effect on the research and development of new products.”⁸⁰

The most significant impact on punitive damages jurisprudence was the *Browning-Ferris* Court’s tacit assumption that trial courts, as well as appellate courts, are required to go beyond state excessiveness reviews to assess the question of whether a given punitive damages award was constitutional. This means that since *Browning-Ferris*, trial courts must apply a federal constitutional layer of review to “those issues involving the proper review of the jury award by a federal district court.”⁸¹

2. Due Process Constrains Jury Discretion

In 1991, in *Pacific Mutual Life Insurance Co. v. Haslip*,⁸² the U.S. Supreme Court placed structural limitations on the state’s power to award punitive damages. In that case, the Supreme Court analyzed the problem of whether a given punitive damages award could be so excessive as to violate substantive due

78. *E.g.*, GA. CODE ANN. § 51-12-5.1(e)(2) (West 2002).

79. *Browning-Ferris*, 492 U.S. at 282 (O’Connor, J., concurring in part and dissenting in part) (internal citations omitted).

80. *Id.*

81. *Id.* at 279.

82. *See Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

process.⁸³ The bad faith insurance case in *Haslip* arose out of the duplicity of an insurance agent who surreptitiously pocketed his clients' premiums rather than sending them to Pacific Mutual Life Insurance Co.⁸⁴ The deceitful agent concealed from the "policyholders" the fact that he had pocketed his clients' premiums.⁸⁵

Cleopatra Haslip, the principal plaintiff, learned of the agent's malfeasance only after the insurance company rejected her hospital bill.⁸⁶ While the Court upheld an \$800,000 punitive award (an amount four times greater than the compensatory damages and exponentially greater than the plaintiff's out of pocket expenses), it conceded that juries might not award unreasonably high punitive damages without regard for the defendant's due process rights.⁸⁷

For the first time in American history, the Court stated that the jury power to award punitive damages was constrained by the Due Process Clause of the Fourteenth Amendment and that a given award could "jar one's constitutional sensibilities."⁸⁸ The Court also reasoned that Alabama's jury instructions and common law method for imposing punitive damages did not violate due process.⁸⁹ In *Haslip*, the Court refused to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case."⁹⁰ This precedent-setting case set the stage for the Court's new role as punitive damages guru.

The Court's acknowledgement that punitive damages could violate due process created dual federal and state standards of review. The "passion or prejudice" and "shocks the conscience" standards are the two most common review standards employed by state courts.⁹¹ After *Haslip*, states were required to first apply

83. *See id.*

84. *Id.* at 12-13.

85. *Id.* at 13.

86. *Id.* at 6.

87. *Id.* at 13.

88. *Id.* at 18.

89. *Id.* at 17.

90. *Id.* at 18.

91. *Iron Cage*, *supra* note 34, at 1329-34. "Passion or prejudice" asks

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either a “passion or prejudice” or “shocks the conscience” test and then apply the federal constitutional standard of whether the award violated due process. A given punitive damages award could theoretically survive a “passion or prejudice” tort test but fail the constitutional test for excessiveness.

Only two years later, in *TXO Production Corp. v. Alliance Resources Corp.*, the Court again accepted an invitation to review a corporate punitive damages award, this one 526 times greater than actual damages.⁹² The jury found the defendant in the *TXO* case liable for predatory business torts in the natural gas industry.⁹³ Again, the Court reviewed a high-ratio punitive damages award, as well as state common-law procedures. The Supreme Court rejected TXO’s argument “that a \$10 million punitive damages award—an award 526 times greater than the actual damages awarded by the jury—is so excessive that it must be deemed an arbitrary deprivation of property.”⁹⁴ The Court, in upholding the large ratio award, refused to incorporate a mathematical test for excessiveness.⁹⁵

In *BMW of North America, Inc. v. Gore*, a 5-4 majority struck down a \$2 million punitive damages award by holding that the award was excessive and violated the Due Process Clause in a case where the actual damages were only \$4,000.⁹⁶ In BMW’s case, the result of the defendant’s misconduct was only slight economic loss to personal property.⁹⁷ To complicate things, the carmaker’s fraudulent or deceptive misconduct was legal in jurisdictions outside Alabama.⁹⁸ At worst, BMW failed to disclose a minor pre-delivery repair that affected only three

“whether a punitive damages award is so large as to create an inference that it was the product of juror bias.” *Id.* at 1331. Under the “shock the conscience” test, “[a] verdict should not be set aside unless it is so grossly excessive as to shock the Court’s conscience and sense of justice.” *Id.* at 1332.

92. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 453 (1993).

93. *Id.* at 449.

94. *Id.* at 453.

95. *Id.* at 458.

96. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585-86 (1996).

97. *Id.* at 565.

98. *Id.*

percent of the retail price of a new luxury car.⁹⁹ The plaintiff, a Birmingham physician, contended that his compensatory damages were \$4,000, a number based upon the difference in the value of a repainted BMW against one with pristine original paint.¹⁰⁰ BMW presented evidence showing that its nondisclosure policy at issue would not have been against the law in approximately half of the states that had rules “defining the disclosure obligations of automobile manufacturers, distributors, and dealers.”¹⁰¹

BMW argued that its disclosure policy would not violate the statutes, “most stringent [of which] required disclosure of repairs costing more than 3 percent of the suggested retail price; none mandated disclosure of less costly repairs.”¹⁰² The plaintiff acknowledged that no jury had previously held that BMW’s disclosure policy was unlawful, but noted that the company had a “number of customer complaints relating to undisclosed repairs and had settled some lawsuits.”¹⁰³

Punitive damages were imposed on BMW for merely touching up the paint on new automobiles damaged in ocean transit to the United States.¹⁰⁴ The carmaker’s failure to disclose to the consumer that slight retouching of the paint had been done was the aggravated wrongdoing that served as the basis for punitive damages.¹⁰⁵ The Alabama trial court reduced the \$4 million punitive damages award to \$2 million.¹⁰⁶ The United States

99. The Court stated at trial that BMW acknowledged it had adopted a nationwide policy in 1983 concerning cars that were damaged in the course of manufacture or transportation. If the cost of repairing the damage exceeded 3 percent of the car's suggested retail price, the car was placed in company service for a period of time and then sold as used. If the repair cost did not exceed 3 percent of the suggested retail price, however, the car was sold as new without advising the dealer that any repairs had been made. Because the \$ 601.37 cost of repainting Dr. Gore's car was only about 1.5 percent of its suggested retail price, BMW did not disclose the damage or repair to the Birmingham dealer. *Id.* at 563-66.

100. *Id.* at 564.

101. *Id.* at 565.

102. *Id.*

103. *Id.* at 566.

104. *Id.* at 563.

105. *Id.* at 565.

106. *Id.* at 567.

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Supreme Court found the award to be excessive and in violation of BMW's due process rights, thereby articulating a new test for excessiveness. The Court concluded that BMW's award in question (that amounted to 500 times the compensatory-damages award) was "grossly excessive,"¹⁰⁷ after considering three guideposts: (1) "the degree of reprehensibility of the [defendant's conduct]"; (2) "the disparity between the harm or potential harm suffered by [the plaintiff] and [the] punitive damages award"; and (3) "the difference between this remedy and the civil penalties authorized or imposed in comparable cases."¹⁰⁸

The Court expressed concern over BMW's reprehensible conduct and whether the jury crossed a Commerce Clause line on the permissible extraterritorial reach of tort law.¹⁰⁹ This commerce clause argument was reiterated later in the 2003 case of *State Farm Mutual Automobile Insurance Co. v. Campbell*.¹¹⁰ In *BMW*, Justice Scalia's prescient dissent warned against the Court's intrusion and micromanagement of a well-established state court remedy: "The legal significance of these 'guideposts' is nowhere explored, but their necessary effect is to establish federal standards governing the hitherto exclusively state law of damages."¹¹¹ Throughout U.S. history, punitive damages were "not an innovation of the common law, [they were] the common law."¹¹² He characterized the majority's punitive damages due process framework as marking "a road to nowhere."¹¹³ Justice Scalia also cautioned about the practical difficulties in implementing the Court's new substantive due process standards: "Of course it will not be easy for the States to comply with this new federal law of damages, no matter how willing they are to do so. In truth, the 'guideposts' mark a road to nowhere; they provide no real guidance at all."¹¹⁴

Justice Ginsburg also warned against the Court's

107. *Id.* at 575.

108. *Id.* at 575.

109. *Id.* at 568-74.

110. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003).

111. *BMW*, 517 U.S. at 605 (Scalia, J., dissenting).

112. *Edwards v. Leavitt*, 46 Vt. 126, 135 (1873).

113. *BMW*, 517 U.S. at 605 (Scalia, J., dissenting).

114. *Id.* at 605.

encroachment into the state common law as venturing “unnecessarily and unwisely . . . into territory traditionally within the States’ domain.”¹¹⁵ The *BMW* case prefigured *Philip Morris* in questioning whether extraterritorial harms caused to third parties could be the basis for setting the amount of punitive damages.

3. Compulsory Post-Verdict Reviews for Excessiveness

However, it was not long before the Supreme Court again reformed the standard of review in state punitive damages litigation. In the 1994 case of *Honda Motor Co. v. Oberg*, the Court, for the first time in American history, struck down a punitive damages award on the grounds that a state’s common law procedures were deficient.¹¹⁶ The Court’s opportunity to review substandard tort law came when Honda Motor Company filed a petition that challenged a longstanding Oregon law and constitutional provision that prohibited any post-verdict review for excessive punitive damages.¹¹⁷

The U.S. Supreme Court considered the narrow procedural issue of whether states are required to grant a post-judicial review of punitive damages awards. The Court ruled that Oregon’s prohibition on post-trial excessiveness reviews violated Honda Motor Company’s due process rights.¹¹⁸ The *Oberg* decision requires all states to institute post-verdict procedures to evaluate whether a given award is so excessive that it violates due process.¹¹⁹

Never before had the high court mandated a compulsory post-verdict review for excessiveness. In *Honda Motor Co. v. Oberg*, the Court held that the Due Process Clause required that courts apply a meaningful post-verdict judicial review to reduce excessive punitive damages awards.¹²⁰ “Judicial review of the size of punitive damages awards has been a safeguard against

115. *Id.* at 607 (Ginsburg, J., dissenting).

116. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 418-35 (1994).

117. *Id.* at 418.

118. *Id.*

119. *Id.* at 434-35.

120. *Id.*

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excessive verdicts for as long as punitive damages have been awarded.”¹²¹

4. Appellate Courts Must Apply De Novo Review to Punitive Damages

In a 2001 case, the Court again entered the arena of a corporation’s procedural due process rights in punitive damages litigation. In *Cooper Industries, Inc. v. Leatherman Tool Group*, Leatherman manufactured the Pocket Survival Tool.¹²² When Cooper Industries marketed a functionally equivalent tool, Leatherman filed a business tort lawsuit against Cooper alleging trade dress infringement, unfair competition, false advertising, and “passing off” goods of a competitor as its own.¹²³ The jury awarded the plaintiff \$50,000 in compensatory damages and \$4.5 million in punitive damages, finding Cooper’s conduct to be malicious.¹²⁴ After a trial judge upheld the award, Cooper Industries filed an appeal with the Ninth Circuit Court of Appeals, which affirmed the punitive damages award.¹²⁵

The U.S. Supreme Court granted certiorari on the issue of whether the Ninth Circuit applied the correct standard of review.¹²⁶ The Court affirmed the Ninth Circuit’s finding that the award did not violate due process since it was “proportional and fair, given the nature of the conduct, the evidence of intentional passing off, and the size of an award necessary to create deterrence to an entity of Cooper’s size.”¹²⁷ The Court’s procedural innovation was to require all circuit courts to apply *BMW* test for punitive damages excessiveness using a de novo standard, rather than a more liberal abuse of discretion standard of review.¹²⁸

121. *Id.* at 421.

122. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. at 424, 427 (2001).

123. *Id.* at 427-28.

124. *Id.* at 429.

125. *Id.* at 430.

126. *Id.* at 431.

127. *Id.* at 430.

128. *Id.* at 436.

In establishing the rule that federal circuit courts must apply the de novo standard of review instead of the more deferential abuse of discretion standard, the Court justified the new requirement based upon greater judicial control. The Court reasoned that the independent or de novo review of the *BMW* guideposts for excessiveness is “necessary if appellate courts are to maintain control of, and to clarify, the legal principles”; these guideposts “will acquire more meaningful content through case-by-case application at the appellate level”; and “de novo review tends to unify precedent and stabilize the law.”¹²⁹ Punitive damage claims rest peculiarly within the province of state court “jur[ies] and [were not] casually interfered with on appeal where it is claimed to have been actuated by passion or prejudice.”¹³⁰ The *Cooper* case set a standard of review making it more likely that punitive damages will be reversed or emitted by reviewing courts. The case also signaled the Court’s willingness to meddle with procedural issues as well as substantive due process that it again addressed in 2003 in *State Farm v. Campbell*.¹³¹

5. *State Farm*’s Further Rules on Ratios & Extraterritoriality

The jury in *State Farm v. Campbell* awarded the plaintiffs \$2.6 million in compensatory damages and \$145 million in punitive damages that the trial court subsequently reduced to \$1 million and \$25 million respectively.¹³² The Utah Supreme Court reinstated the entire punitive damages award after applying the guideposts of *BMW v. Gore*.¹³³ The Court, in a 6-3 decision, reversed the judgment of the Utah Supreme Court, holding that the high-ratio punitive damages award violated the defendant’s substantive due process rights.¹³⁴ The *State Farm* Court held

129. *Id.*

130. *Mantha v. Liquid Carbonic Indus.*, 839 P.2d 200, 205 (Okla. 1992).

131. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (reversing an award of \$145 million in punitive damages, where full compensatory damages only amounted to \$1 million, because such an excessive award would violate the Due Process Clause of the Fourteenth Amendment).

132. *Id.* at 415.

133. *Id.* at 408 (formulating guidelines to test the constitutional limits of punitive damages).

134. *Id.* at 429.

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that the high-ratio punitive damages award, fifty-six times the compensatory damages, was unreasonable and disproportionate to the wrong committed by the insurer as well as the economic harm suffered by the plaintiff.¹³⁵ The punitive damages imposed against State Farm for its unfair settlement practices were ruled an arbitrary and unconstitutional deprivation of due process because the insurer's conduct failed both the reprehensibility and the high-ratio guideposts.¹³⁶ While the Court acknowledged "State Farm's handling of the claims against the [plaintiffs] merit[ed] no praise,"¹³⁷ it did not think it proper to view State Farm as a recidivist, nor did it find evidence of a nationwide pattern of misconduct.¹³⁸

Justice Ginsburg took issue with the majority's reading of the record and disagreed with its rather abbreviated discussion of State Farm's misconduct.¹³⁹ Justice Ginsburg noted that State Farm's conduct reasonably could have been found to be reprehensible by a jury.¹⁴⁰ She noted that a basis for a high-ratio award was State Farm's nationwide pattern of bad acts, cover-ups, and spoliation of evidence.¹⁴¹ Justice Ginsburg's dissent argued that the *State Farm* ruling was a rather bold initiative in supplanting the work of common law courts and state legislatures.

The Court reaffirmed its early ruling in *BMW v. Gore*,¹⁴² that courts are required to consider "three guideposts" in determining whether punitive damages satisfy the Due Process Clause of the Fourteenth Amendment: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized

135. *Id.*

136. *Id.* at 410 ("few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process").

137. *Id.* at 419.

138. *Id.* at 423.

139. *Id.* at 430-31.

140. *Id.*

141. *Id.* at 432.

142. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

or imposed in comparable cases.”¹⁴³ The Court has created a new institutional role for itself, as a specialized punitive damages court of last resort for corporate wrongdoers.

a. Guidepost #1: Reprehensibility

Traditionally, punitive damages are awarded when the defendant’s conduct is “oppressive, evil, wicked, guilty of wanton or morally culpable conduct, or shows flagrant indifference to the safety of others.”¹⁴⁴ The Supreme Court’s federal standard of reprehensibility is the acid test for assessing the constitutionality of a given punitive damages award. A plaintiff must demonstrate that a company’s wrongdoing is reprehensible enough in order to satisfy due process. The *State Farm* Court added more conceptual detail to the *BMW* guideposts relevant to punitive damages litigation.¹⁴⁵

i. Physical vs. Economic Harm

A defendant’s misconduct is considered to be more reprehensible where the harm is physical as opposed to purely economic.¹⁴⁶ A successful bad faith plaintiff may be able to recover for emotional distress caused by a high-handed insurance company in either first-party or third-party actions.¹⁴⁷ Denial of insurance benefits can lead to physical illness caused by severe mental distress occurring during a major life readjustment.¹⁴⁸ In addition to the tort of the intentional infliction of emotional distress (outrage), emotional distress damages are recoverable as a form of parasitic damages.¹⁴⁹ Punitive damages are more likely in a bad

143. *State Farm*, 538 U.S. at 418.

144. DAN B. DOBBS, *LAW OF REMEDIES* § 3.11(2) 319 (2d ed. 1993).

145. *State Farm*, 538 U.S. at 419 (noting, for example, that reprehensibility is higher where the “target of the conduct had financial vulnerability”).

146. *Id.* at 419.

147. See RESTATEMENT (SECOND) OF TORTS § 46 (1965).

148. David Tartaglio, Note, *The Expectation of Peace of Mind: A Basis for Recovery of Damages for Mental Suffering Resulting from the Breach of First Party Insurance Contracts*, 56 S. CAL. L. REV. 1345, 1365-66 (1983).

149. STEPHEN S. ASHLEY, *BAD FAITH ACTIONS: LIABILITY AND DAMAGES* § 8.04 at 8-14 (1997) (2002 Supp.) (noting that emotional distress damages are

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faith case where the plaintiff has proof of emotional distress damages than when the action is only for proceeds of a policy or other contractual remedy.

ii. Financial Vulnerability of Plaintiff

One of the strongest indicators of reprehensibility is when the target of misconduct is financially vulnerable. In the insurance bad faith context as in *State Farm*, the insurer's misconduct targeted policyholders throughout the country with its predatory settlement practices.¹⁵⁰ Financial vulnerability is often at the heart of a delay or denial of coverage without a reasonable basis position of trust.¹⁵¹ At issue in *State Farm* was the special bond of trust inherent in the insurance contract.¹⁵² When a consumer purchases insurance, she is not only seeking financial security, but also peace of mind. As Chief Justice Berkeley Lent of the Oregon Supreme Court observed:

One cannot watch nationally televised entertainment for very long without being exposed to commercials for the sale of insurance which, for example, indicate that the purchaser will be in 'good hands,' that he will have the assistance of a troop of mounted cavalry, that he has a 'piece of the rock,' or that 'like a good neighbor' the insurer will be there. As such advertisements reflect, the relationship between insurer and insured does not merely concern indemnity for monetary loss.¹⁵³

Insurance is a hybrid of contract law with elements of the fiduciary relationship. However, when asked to pay claims, insurance companies tell "claims stories" that resemble the

recoverable for an intentional tort and "if the claimant suffered emotional distress in conjunction with other harm to his person or property").

150. *State Farm*, 538 U.S. at 408.

151. The doctrine of exemplary damages originated to protect against oppression and abuses of power by individuals and organizations. *Huckle v. Money*, (1763) 95 Eng. Rep. 768, 768 (K.B.).

152. *See, e.g., State Farm*, 538 U.S. at 408.

153. *Farris v. U.S. Fid. & Guar. Co.*, 587 P.2d 1015, 1028-29 n.4 (Or. 1978) (Lent, J., dissenting) (en banc).

schemes of the wicked and self-serving King Richard III.¹⁵⁴ The role of punitive damages is to deter insurance companies from having two kinds of stories: one for marketing purposes and another for dealing with the claims of the insured. The *State Farm* Court was not swayed by the financial vulnerability of the policyholder forced into bankruptcy by an insurer's greedy corporate policy.

iii. Recidivism vs. Isolated Incident

The *State Farm* Court notes that where the conduct involves repeated actions, it is more reprehensible than an isolated incident.¹⁵⁵ Justice Kennedy stated that the plaintiff's counsel misused "dissimilar and out-of-state conduct evidence" to "expose and punish . . . deficiencies of State Farm's operations throughout the country."¹⁵⁶ He observed that "[l]awful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the [s]tate where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff."¹⁵⁷ In an insurance bad faith case, the plaintiff will not typically be in a position to prove that the insurer was a recidivist unless out-of-state non-party evidence is broadly admissible. In the typical insurance bad faith case, policies are set at the national level and it is improbable that a company sets policies with any individual claimant in mind. Equally unlikely is that a company would reach out and crush an individual consumer in a specific jurisdiction to carry out its unfair or deceptive settlement practices.

State Farm opened the door to out-of-state prior bad act evidence by noting the importance of recidivism in indicating reprehensibility. In the typical insurance bad faith case, recidivism could not be proven if there was an absolute bar on out-of-state misconduct evidence. The Court does not foreclose the possibility

154. Tom Baker, *Constructing the Insurance Relationship: Sales Stories, Claims Stories, and Insurance Contract Damages*, 72 TEX. L. REV. 1395, 1396 (1994).

155. *State Farm*, 538 U.S. at 419.

156. *Id.* at 420.

157. *Id.* at 409-10.

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of using out-of-state evidence, but does require the plaintiff to demonstrate that other bad acts have a close connection or nexus to the plaintiff's injury.¹⁵⁸ An insurer's "dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages."¹⁵⁹ The gap between admitting evidence of a company's other bad acts for purposes of reprehensibility and not for the dollar amount of the punitive damages award has no clear borderline.

iv. Intentional Malice, Trickery, or Deceit vs. Accident

The degree of reprehensibility is greater where the defendant's conduct was the result of intentional malice, trickery, or deceit rather than mere negligence.¹⁶⁰ Courts have traditionally upheld punitive damages awards based on evidence that the defendant was dishonest, malicious, or outrageous.¹⁶¹ All too often, corporate wrongdoing involves a pattern and practice of chiseling where, because minor amounts of money are skimmed off the top from each member of a large class of victims, the probability of detection is low.

In *Braswell v. Conagra, Inc.*, hundreds of Alabama chicken growers were awarded \$9.1 million in punitive damages to punish a dishonest buyer who systematically cheated them by mis-weighting broilers over an extended period.¹⁶² However, a pattern of trickery or deceit of financially disadvantaged consumers by a national insurer would likely warrant a high-ratio award in the post-*State Farm* period. The *State Farm* Court comes perilously close to developing a per se mathematically-based test as a surrogate for the reasonable punitive damage damages award: "Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, or in this case, of 145 to 1."¹⁶³

158. *Id.*

159. *Id.* at 422-23.

160. *Id.* at 419.

161. *See, e.g.,* Hawkins v. Allstate Ins. Co., 733 P.2d 1073, 1080 (Ariz. 1987).

162. *Braswell v. Conagra, Inc.*, 936 F.2d 1169, 1172 (11th Cir. 1991).

163. *State Farm*, 538 U.S. at 425 (internal citation omitted).

Corporate defendants have won a large victory in the Court's marginalization of the role of wealth in the punitive damages equation. The Court creates a presumption that compensatory damages are an adequate remedy and that punitive damages are only recoverable if the conduct is "so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence."¹⁶⁴ Capped punitive damages create a perverse incentive in that they permit insurers to calculate the price of wrongdoing in advance, without the fear of being held accountable by an empowered jury.

b. GuidePost #2: Ratio of Punitive to Compensatory Damages

The second due process guidepost focuses on the mathematical ratio between actual or potential harm suffered and punitive damages.¹⁶⁵ The Court gave instructive guidance that a ratio of punitive damages greater than 10:1 may violate due process and that punitive awards greater than 4:1 may only rarely satisfy due process.¹⁶⁶ The Court created a presumption against high-ratio punitive awards, when it noted "few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process."¹⁶⁷ The use of single-digit ratios tied to compensatory damages marginalizes the role of the defendants' wealth in calibrating punishment. The *State Farm* Court addressed the use of wealth in determining punitive damages when it concluded, "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award."¹⁶⁸ Limiting a policyholder to capped punitive damages will certainly result in under-deterrence and tempt insurers to elevate profits over payouts.

It is the unpredictability of the remedy of punitive damages that makes the rogue insurance company think twice before engaging in wrongful conduct that is profitable to the company

164. *Id.* at 419.

165. *Id.* at 424.

166. *Id.* at 425.

167. *Id.*

168. *Id.* at 427.

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but abhorrent to the community. The Court does not slam the door entirely on high-ratio punitive awards noting that such awards may be proper where compensatory damages are slight.¹⁶⁹ However, plaintiffs' counsel will have a significant burden of persuasion in convincing appellate courts to uphold high-ratio awards even where the company's misconduct causes widespread social harm by the Court's restriction on pattern and practice evidence.

c. Guidepost #3: Punitive Damages vs. Civil Penalties

The third guidepost in the federal punitive damages constitutionality analysis is an evaluation of how punitive damages compare to civil or criminal penalties in similar cases.¹⁷⁰ In *State Farm*, the Court compared the \$145 million punitive damages award to the most relevant civil penalty, a \$10,000 fine for fraud.¹⁷¹ In insurance bad faith cases, the analogous civil sanction will rarely guide the due process analysis. To date, few appellate courts have made more than a passing nod to this third measure of excessiveness. In *State Farm*, Justice Scalia referred once again to his dissenting opinion in *BMW*, arguing that the Due Process Clause provided no substantive protections against "excessive" or "unreasonable" awards of punitive damages.¹⁷² When an insurer makes a strategic decision to exploit its dominant relationship by falsifying records, delaying settlement, or targeting vulnerable segments of its customer base, those corporate sanctioned decisions to elevate profits over policyholders constitute an abuse of trust.

6. *Philip Morris v. Williams*' Evidentiary & Procedural Rules

The Supreme Court's unmaking of punitive damages continued with the 2007 case of *Philip Morris v. Williams*.¹⁷³

169. *Id.* at 425.

170. *Id.* at 428.

171. *Id.*

172. *Id.* at 429 (Scalia, J., dissenting) (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 598-99 (1996) (Scalia, J., dissenting)).

173. *Philip Morris v. Williams*, 127 S.Ct. 1057 (2007).

Authored by Justice Stephen Breyer, the majority decision in *Philip Morris*¹⁷⁴—the eighth U.S. Supreme Court ruling on the constitutionality of punitive damages since 1989—trivializes corporate punishment and threatens its deterrent role in cases of corporate wrongdoing. The punitive damages award in *Philip Morris* arose out of the claim of the death of Jesse Williams, a heavy cigarette smoker whose estate claimed Williams was lured into complacency by misleading advertisements.¹⁷⁵ The estate contended that Williams smoked throughout his life because the cigarette maker knowingly and falsely led him to believe that cigarette smoking was safe.¹⁷⁶

The *Philip Morris* jury awarded the decedent's estate compensatory damages of "about \$821,000 (about \$21,000 economic and \$800,000 non-economic damages) along with \$79.5 million in punitive damages," which the Supreme Court struck.¹⁷⁷ Writing for the majority, Justice Stephen Breyer stated: "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon non-parties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation."¹⁷⁸ Here we are, in the twenty-first century, and the Court apparently believes that the tobacco company could only be punished for harm it caused an individual smoker and that the jury must disregard corporate deception that harmed millions of other smokers.

7. How *Philip Morris* Causes Uncertainty for Rachel Barton's Punitive Award

The U.S. Supreme Court held that the Due Process Clause of the U.S. Constitution forbids juries from awarding punitive damages designed to punish a corporate defendant for harming a non-party in other prior or pending cases outside the scope of the

174. *Id.*

175. *Id.* at 1060-61.

176. *Id.*

177. *Id.* at 1061.

178. *Id.* at 1063.

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lawsuit.¹⁷⁹ The idea that punitive damages should be based upon a company's patterns and practice of corporate wrongdoing goes to the heart of the punitive damages awarded in Rachel Barton's case. A leading insurance defense journal described Rachel's punitive damages verdict as a product of the jury accepting the argument that "if only [the railroad] had looked into prior complaints about the safety system on its doors and if only METRA had required conductors to take a second look for any trapped passengers before the train departed a station, the accident would not have happened."¹⁸⁰

One plausible interpretation of the Court's ruling in *Philip Morris* is that a jury may consider a defendant's harm to non-parties for the purposes of whether punishment is required at all, but this evidence may not be used to set the level of punishment. The Court made it clear that jurors were not to consider harm to non-parties when setting the amount of the punitive damages: "a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on non-parties."¹⁸¹

It will be difficult to instruct juries in applying this newly minted standard, which treats a defendant's other bad acts as material to reprehensibility but inadmissible for purposes of setting the dollar amount of punitive damages. It is unclear how a trial court will draft or modify jury instructions to ensure compliance with the odd view that it is possible to erect a Chinese wall separating such interrelated features of the punitive damages equation. The problem with the Court's pattern and practice restrictions is that reprehensibility is both the measure of whether punitive damages should be awarded and in what amount. In fact, reprehensibility is the acid test of the reasonableness of a punitive damages award.¹⁸²

Legislative and judicial punitive damages reform is easily the most sweeping downsizing of any tort right or remedy in Anglo-

179. *Id.*

180. Kathryn J. McIntyre, *Settlement Sensible in this Tragic Case*, BUSINESS INSURANCE, March 8, 1999, at 25.

181. *Philip Morris*, 127 S.Ct. at 1064.

182. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996).

American history.¹⁸³ The Justices of the U.S. Supreme Court are, in effect, federalizing the rules for punitive damages trials, a province traditionally reserved for state courts and legislatures. The Court places sharp restrictions on the types of evidence that are properly admissible when punitive damages are an issue in a case. In doing so, the Court mandates a narrow focus upon the defendant's wrongdoing in the plaintiff's case as opposed to considering pattern and practice conduct that is nearly always the gist of corporate wrongdoing.

Counsel will need to be wary about introducing "smoking gun" evidence relevant to the insurer's general course of conduct. One reading of the *Philip Morris* and *State Farm* cases is that punishment must be confined to reflect the defendant's bad behavior toward the plaintiff, rather than the defendant's other bad acts. Counsel must therefore be cautious about asking juries to send a message based upon other bad acts occurring in different jurisdictions. Historically, juries have been permitted to consider a defendant's nationwide pattern of misconduct.¹⁸⁴ Now, juries are instructed to think about those acts as a determination of reprehensibility (the most important indication of the appropriateness of a punitive damage award) and, at the same time, are instructed not to consider those bad acts as a basis for awarding or determining an amount of punitive damages.

Over more than two centuries of jurisprudence, the states have had complete discretion to craft the purpose, procedures, and evidentiary rules for trying cases that involve punitive damages.¹⁸⁵ In Rachel Barton's case, for example, all of the twelve prior train-door-closing victims were non-parties who did not appear before the trial court.¹⁸⁶ It will be difficult for a jury to follow the Court's ruling that it is permissible to consider the past cases for purposes of reprehensibility but that such evidence

183. See generally *Iron Cage*, *supra* note 34, at 1300, 1311-59.

184. THOMAS C. GALLIGAN JR. ET. AL., *TORT LAW: CASES, PERSPECTIVES, AND PROBLEMS*, at 962-63 (4th ed. 2007).

185. See *id.* at 980-81.

186. *Barton v. Chi. & Nw. Transp. Co.*, 757 N.E.2d 533, 546 (Ill. App. Ct. 2001).

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may not reflect the jury's desire "to *punish* the defendant for harming persons who are not before the court (*e.g.*, victims whom the parties do not represent)."¹⁸⁷

The *Philip Morris* decision conflicts with legislatively enacted state rules for dealing with other claims. Florida, for example, precludes the awarding of punitive damages if the defendant can establish that a previous award was for the same harm "from the same act or single course of conduct."¹⁸⁸ Georgia enacted a tort reform limiting punitive damages in products liability cases to one award irrespective of the number of plaintiffs harmed by a defective product.¹⁸⁹ *Philip Morris* also seems to clash with state punitive damages laws in Missouri¹⁹⁰ and Montana¹⁹¹ that give the trial court the discretion to reduce punitive damages awards after considering prior awards to non-parties for the same conduct. The difficulty for the fact-finder is how to apply evidence of non-party harm to assess reprehensibility, keeping in mind that reprehensibility is also the test for excessiveness, but not for the amount of punitive damages.

The Court's "other bad acts" rule of evidence will have the most impact in mass product liability cases where a single defect or failure to warn will result in a portfolio of claims. If this rule had been applicable in Ford Pinto cases, evidence of other fatalities associated with crash-induced fuel leakage would have been admissible for the purposes of determining reprehensibility, but would not have been admissible to set the punitive damages award. In a product design case involving back-up alarms on construction equipment, the jury could consider the absence of an alarm in prior cases to assess whether the company recklessly disregarded a known risk, but the other accident evidence would be inadmissible to set the level of punitive damages to an individual plaintiff injured by equipment without a backup-

187. *Philip Morris v. Williams*, 127 S.Ct. 1057, 1060 (U.S. 2007).

188. FLA. STAT. ANN. § 768.73(2)(a) (West 2000).

189. A federal court ruled that the Georgia limitation on multiple awards discriminated among plaintiffs and violated the Equal Protection Clause of the Fourteenth Amendment as well as Georgia's state equal protection provision. *McBride v. Gen. Motors Corp.*, 737 F. Supp. 1563 (M.D. Ga. 1990).

190. MO. ANN. STAT. § 510.263(4) (West 2000).

191. MONT. CODE ANN. § 27-1-221(7)(c) (2006).

alarm. Moreover, plaintiffs' attorneys will be able to show, for example, that a company knew of the danger of blade kickback in weed-wackers for purposes of reprehensibility, but the jury cannot use evidence that the weed-wacker maker continued to market the product without redesign or adequate warnings of the danger in setting the dollar amount for punitive damages. Courts will have a difficult time distinguishing between admissibility for purposes of reprehensibility and admissibility for setting the dollar amount for punitive damages because reprehensibility is also the leading guidepost for determining excessiveness.

The *Philip Morris* Court's limitations on non-party claims are also at odds with the Federal Rules of Evidence. The Rules allow "other bad acts" evidence if: (1) there is sufficient proof for the jury to find that the defendant committed the other act; (2) the other act is not too remote in time; (3) the other act is introduced to prove a material issue in the case; and (4) the other act is, in some cases, similar to the offense charged.¹⁹² Corporate punitive damages cases generally focus on business practices where other bad acts are material in the issue of punitive damages.

III. READING THE TEA LEAVES BEYOND *PHILIP MORRIS*

In the post-*Philip Morris* period, courts must somehow make the Supreme Court's new federal evidentiary rules on other bad acts fit with admissibility rules in the states. In addition, they must somehow make the Supreme Court's newly minted rules on injuries to third parties fit established state rules.¹⁹³ The

192. Fed. R. Evid. 404(b).

193. *Philip Morris* has already been cited and discussed in a large number of punitive damages cases in less than six months. See, e.g., *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574 (6th Cir. 2007); *Baldwin v. McConnell*, 643 S.E.2d 703 (Va. 2007); *Seltzer v. Morton*, 154 P.3d 561 (Mont. 2007); *Cerqueira v. Am. Airlines, Inc.*, 484 F. Supp. 2d 232 (D. Mass. 2007); *Nelson v. Wal-Mart Stores, Inc.*, 245 F.R.D. 358 (E.D. Ark. 2007); *Estate of Embry v. GEO Transp. of Ind., Inc.*, 478 F. Supp. 2d 914 (E.D. Ky. 2007); *Doe v. Kaiser*, No. 6:06-CV-1045 (DEP), 2007 WL 2027824 (N.D.N.Y. July 9, 2007); *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, No. 1:00-1898, MDL 1358 (SAS), M21-88, 2007 WL 1791258 (S.D.N.Y. June 15, 2007); *Hughes v. N. Cal. Carpenters Reg'l Council*, No. A112272, 2007 WL 1448746 (Cal. App.

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Supreme Court's rules fit better for individual defendants than for corporate ones. While it may make sense to restrict non-party evidence for individuals, corporate wrongdoing is usually based upon evidence of corporate patterns and practices. The punitive damages paradigm promulgated by the Court in *Philip Morris* is based upon a "legal fiction" that juries can be instructed to consider a defendant's other bad acts for purposes of reprehensibility (the leading index for excessiveness) but not for the quantum of punishment. As in the *Lochner* era, the Court is acting as a super-legislature by striking down punitive damages doctrines that have evolved over two hundred years of jurisprudence.¹⁹⁴

The Court is overly concerned with addressing tort reformers' concerns, which undermine the greatest social benefit of tort law: its ability to evolve in order to constrain new forms of corporate oppression. Justice Hugo Black warned against the Court overstepping its mandate by "striking down state laws, regulatory of business and industrial conditions."¹⁹⁵ *Philip Morris* is just the latest indication of the Supreme Court's willingness to address Corporate America's demand for judicial tort reform. The Court has turned onto the highway to tort purgatory where there can be no easy exit in that many features of tort remedies vary across jurisdictions.¹⁹⁶ In protecting the due process rights of corporate defendants, the Court has left individuals at a great disadvantage in protecting their own rights to safe, ethical business practices and the right to have their injuries adjudicated by their peers, not a super-legislature.

The case for the common law punitive damages remedy is that it resonates with distinctly American values such as personal accountability, fairness in dealing with others, and protecting the consuming public. It is the unpredictability of the

1 Dist. May 17, 2007).

194. THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 4 (2001).

195. *Ferguson v. Skrupa*, 372 U.S. 726, 731-32 (1963) (quoting *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955)).

196. Leslie E. John, *Formulating Standards for Awards of Punitive Damages in the Borderland of Contract and Tort*, 74 CAL. L. REV. 2033, 2051 (1986).

remedy of punitive damages that makes the defendant think twice before engaging in wrongful conduct that is profitable to the company, but abhorrent to the community.¹⁹⁷ With predictable punitive damages, corporate wrongdoers will be tempted to perform a socially harmful cost-benefit analysis deciding that it is profitable to risk the consuming public, especially where the probability of detection is low.

Punitive damages punish conduct with a low probability of detection that is socially harmful. Justice and accountability go hand in hand in the role punitive damages play in fulfilling what Judge Guido Calabresi calls “socially compensatory damages.”¹⁹⁸ Punitive damages “can ensure that a wrongdoer bears all the costs of its actions, and is thus appropriately deterred from causing harm, in those categories of cases in which compensatory damages alone result in systematic underassessment of costs, and hence in systematic underdeterrence.”¹⁹⁹ Judge Calabresi reasons that it is easy to demonstrate the necessity of punitive damages where there is a low probability of detection:

It is easy to show why this is so. A rational actor will undertake an activity when the benefits of doing so exceed the costs. In doing so, it will make some sort of formal or informal, spoken or unspoken, cost-benefit analysis, based on the information it possesses, to determine if a particular activity is worth its price. Such an analysis cannot be even roughly accurate unless approximately all the costs of the activity are borne by the actor. When the perceived benefits of an activity accrue to the actor, but some significant part of the costs is borne by others, the cost-benefit analysis will necessarily be distorted. In such a case, the actor will have an incentive to undertake activities whose social costs exceed their social benefits. In other words, the actor will not be adequately deterred from undesirable activities. And society will suffer.²⁰⁰

The deterrent theme that should animate punitive damages

197. Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 88 (1992).

198. *Ciraolo v. City of New York*, 216 F.3d 236, 245 (2d Cir. 2000) (Calabresi, J., concurring).

199. *Id.* at 243.

200. *Id.*

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and tort remedies in general is the unequivocal message to the industry that “tort does not pay.”²⁰¹ The focus of the punitive damages issue is that a large deterrent award is required to reform corporate practices, as there are cases when an award proportionate to actual damages does not achieve that objective. Punitive damages in insurance cases have a larger social purpose of changing corporate policies and attitudes towards policyholders.

Punitive damages are designed to punish a defendant for grossly inappropriate actions and to deter such future action by signaling that the consequences can be severe.²⁰² Punitive damages are a common law remedy where the citizen serves as prosecutor, bringing wrongdoers to justice.²⁰³ Judge Jack Weinstein argues that punitive damages assuage moral indignation.²⁰⁴ In addition, punitive damages serve as a remedy of disgorgement where individual compensatory claims do not capture the total harm of a given corporate act or practice.²⁰⁵ Punitive damages are the one social sanction that requires insurance companies who open their mouths with deceptive come-ons to open their purses as well.²⁰⁶

201. *Rookes v. Bernard*, (1964) 1 All E.R. 367, 369 (H.L.) (stating that one purpose of exemplary damages is to deter the defendant’s wrongful conduct when his calculated profit may exceed the defendant’s liability for plaintiff’s actual damages).

202. *See, e.g.*, THOMAS C. GALLIGAN, JR., ET. AL., *TORT LAW: CASES, PERSPECTIVES, AND PROBLEMS* 956 (4th ed. 2007); *see also* Michael Rustad, *Neglecting the Neglected: The Impact of Noneconomic Damage Caps on Meritorious Nursing Home Lawsuits*, 14 *ELDER L.J.* 331 (2006); *see also* Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 *IOWA L. REV.* 1 (1992).

203. *See* Richard Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 *FORDHAM L. REV.* 37, 43 (1983).

204. *In re Simon II Litig.*, 211 F.R.D. 86, 159 (E.D.N.Y. 2002).

205. *Id.*

206. My teacher, Tom Lambert Jr., often used this wonderful phrase describing the fiduciary duties owed policyholders to name the basis of most bad faith insurance cases.

A. Reading the Tea Leaves About Wealth-Calibrated Punitive Damages

Tort reformers will next aim at convincing the Court that the issue of the wealth of the defendant is a cert-worthy question.²⁰⁷ In our system of federalism, domestic and foreign corporations marketing products and services are subject to the punitive damages laws of fifty-one plus jurisdictions. Most states permit corporate wealth to be introduced to determine whether a given punitive damages award is reasonable “in light of [its] purpose to punish what has occurred and to deter its repetition. This evaluation requires a delicate balance between the amount necessary to deter and punish unacceptable conduct and an amount that will not result in financial devastation.”²⁰⁸

Punitive damages are one of the most complex remedies because of diversity in the procedural and substantive safeguards. The use of wealth to calibrate corporate civil punishment is an issue likely to be the subject of future writs of certiorari. Attorneys representing corporate defendants frequently characterize punitive damages recoveries as a redistribution of wealth from their deep-pocketed clients to plaintiff's attorneys. A veteran product liability defense attorney

207. It is likely that the wealth or the financial condition of the defendant is the next new area of punitive damages ripe for writs of certiorari. State tort reforms restricting the wealth or financial condition of the defendant is one of the fastest growing developments in the law of punitive damages. A growing number of states restrict the discovery of the defendant's wealth. *Iron Cage*, *supra* note 34, at 1316-17. At least eight states restrict evidence of a defendant's wealth until the jury determines whether punitive damages should be imposed. *Id.* at 1317, n.112. States vary in the fundamental question of whether wealth should be admissible in determining punitive damages. California requires the fact finder to consider wealth as does Ohio's recent tort reform governing nursing home litigation. *Id.* at 1318. However, the trend has been to restrict or prohibit the use of wealth in setting damages. *See id.* at 1319. The use of wealth in setting punishment has been undermined by the Court's guideposts setting de facto caps on recovery. Members of the Court have been long concerned with the role of wealth in the punitive damages equation. *See, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996) (“The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice.”).

208. *Grassilli v. Barr*, 142 Cal. App. 4th 1260, 1291 (2006) (internal citations and quotations omitted).

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described plaintiff's attorneys as "hav[ing] many of the earmarks of the Great Robber Barons; a predominately unregulated wealthy elite."²⁰⁹ He contends that litigation "as a means of distributing money from corporations of wealth to injured persons" is not efficient, given high transaction costs.²¹⁰

The constitutionality of basing punitive damages on the wealth of the defendant has yet to be tackled directly by the Court. The states have long used corporate wealth as an important variable when setting the quantum of punitive damages dollars to achieve optimal deterrence.²¹¹ The Restatement acknowledges that the trier of fact can properly consider the wealth of the defendant to achieve deterrence, noting: "[p]unitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future."²¹²

Courts have deemed wealth relevant to bring about individuated punishment and optimal deterrence. "[T]he degree of punishment or deterrence resulting from a judgment is to some extent in proportion to the means of the guilty person."²¹³ Despite the dominance of punishment and deterrence as the twin aims of punitive damages in the states, deterrence is barely mentioned as having any continuing vitality in the Supreme Court's reframing of punitive damages.

The defendant's financial condition or wealth is a factor setting the amount of punishment in the majority of states.²¹⁴ Arizona's highest court, for example, notes: "It is axiomatic that

209. Richard A. Mueller, *Product Design and the Litigation Process*, in *INSIDE THE MINDS: LEADING PRODUCT LIABILITY LAWYERS: INDUSTRY INSIDERS ON THE ART & SCIENCE BEHIND A SUCCESSFUL PRODUCT LIABILITY PRACTICE* 55 (2003).

210. *Id.*

211. *See, e.g.*, *Hawkins v. Allstate Ins. Co.*, 733 P.2d 1073, 1080 (Ariz. 1987) (spelling out three factors determining punitive damages: the financial position of the defendant, the nature of the defendant's conduct, and the profitability of the defendant's conduct).

212. RESTATEMENT (SECOND) TORTS, § 908(1).

213. RESTATEMENT (SECOND) TORTS, § 908(2), cmt. e.

214. Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WIS. L. REV. 15, 44-48 (1998).

the wealthier the wrongdoing defendant, the greater the award of punitive damages necessary to punish him. We recognize, however, that the award must not financially kill the defendant.”²¹⁵ After two decades of punitive damages, jurisprudence in the Court has eroded the legitimacy of wealth-based punishment. The Court has shifted its focus to proportionate punitive damages measured against actual damages rather than the financial condition of the defendant. Justice Stevens’ plurality opinion in *TXO* stated: “[u]nder well-settled law, however, factors such as [net worth] are typically considered in assessing punitive damages.”²¹⁶

In *Honda Motor Co. v. Oberg*, the Court expressed its concern that the presentation of evidence about a large multinational corporation’s net worth “creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.”²¹⁷ In *State Farm*, the Court echoed that concern in commenting on the Utah Supreme Court’s perceived over-reliance on “State Farm’s enormous wealth,” as validating a huge award, stating, “[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.”²¹⁸

Tort reformers will next ask the Court to revisit the role that wealth of the defendant plays in the punitive damages equation. The U.S. Supreme Court has suggested that it may be receptive to curbing the use of wealth in setting punishment. The Court was critical of the Utah Supreme Court’s reliance on several factors, including out-of-state conduct and “State Farm’s enormous wealth,” as justification for a punitive award that was presumptively disproportionate given the facts of the case.²¹⁹ Moving forward, it is most likely that the Court will adopt some new rule of evidence for the admissibility of wealth or the financial condition of the defendant to curb jury discretion.

215. *Hawkins*, 733 P.2d at 1084.

216. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 n.28 (1993) (plurality opinion).

217. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994).

218. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426-27 (2003).

219. *Id.*

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A number of states capping the total amount of punitive damages use wealth of the defendant as a measuring stick. Alabama's variable punitive damages cap considers net worth of the defendant and type of injury, and is inflation-adjusted.²²⁰ The states' diverse practices coupled with the Court's past disapproval of wealth in setting the amount of punitive damages makes this issue a prime suspect for the next Court's incursion. In lay terms, the notion of retribution requires that corporate wealth be considered in requiring the defendant "to pay" the price of wrongdoing. In the case of punitive damages, the message must be that torts do not pay.²²¹ Retribution is predicated upon the salutary principle that the "payback" should be proportional to the wrong committed. A "myopic focus on one-on-one torts"²²² is inconsistent with the economic reality that company executives do not enact corporate policies to harm individual victims.

B. The Multiple Punishment Problem

The multiple punishment problem occurs when a state imposes punitive damages for the same product, practice, or course of conduct where there have been prior awards.²²³ The

220. ALA. CODE. § 6-11-21(a)-(c),(f) (LexisNexis 2007).

221. Note, *Punitive Damages and Libel Law*, 98 HARV. L. REV. 847, 849 n. 16 (1985) (defining retribution as "society's moral concern with giving wrongdoers their just deserts").

222. *Happy No More*, *supra* note 57, at 464.

223. A second related area ripe for a flurry of writs of certiorari is the so-called multiple punishment problem. The Court could easily extend its proportionality guideposts to placing limits on multiple punishments for the same conduct, as in asbestos or tobacco litigation. A few jurisdictions do have limitations on the number of punitive damages awards arising out of the same conduct. Florida, for example, precludes the awarding of punitive damages where there was a previous award for the same act or single damages. Michael Rustad, *Iron Cage*, *supra* note 34, at 1300 (discussing FLA. STAT. ANN. § 768.73(2)(a)). Georgia, too, limits the number of punitive damages in products liability cases. *See id.* at 1359. The Court has a great diversity of substantive and procedural methods of trying punitive damages which could be the target of future due process challenges: [1] Must punitive damages issues be bifurcated or trifurcated? Many, but not all states, require some form of punitive damages bifurcation. *Id.* at 1322. [2] Must punitive damages be proven by a heightened standard such as "clear and convincing evidence?" The majority of states now require punitive damages to be proven by clear and convincing evidence and

“portfolio of punitive damages” problem frequently occurs in mass product design or failure to warn cases. In tobacco litigation, this problem arises when a company such as Philip Morris is subject to multiple punitive damages awards based upon the same course of conduct in marketing cigarettes. In asbestos mass tort cases, numerous manufacturers filed Chapter 11 reorganizations in order to shield themselves from multiple potential punitive damages claims.²²⁴ The tobacco and asbestos cases are the two most high profile examples of the multiple damages problem. In the Dalkon Shield intrauterine device (IUD) litigation, A.H. Robins filed for a Chapter 11 reorganization bankruptcy to avoid the multiple civil punishment problem.²²⁵ Attorney Theodore Olson articulated a compelling argument for the Court to address the multiple punitive damages problem in an amicus brief in *Philip Morris*:

Imposing punitive damages on this basis creates a grave risk of excessive, duplicative punishment for the same conduct. Indeed, because this was not a class action, nothing would prevent each of the thousands of unidentified Oregonians whose rights respondent purported to vindicate from filing his or her own individual action against Philip Morris and advancing the same (unproven) assertions of widespread harm that were advanced in this case. And nothing would prevent each individual plaintiff from recovering the same \$79.5 million award of punitive damages that respondent received here. Due process forbids such an unfair result.²²⁶

The portfolio of punitive damages problem can also arise out

Colorado requires evidence “beyond a reasonable doubt.” *Id.* at 1324 n.152. [3] Must states reformulate punitive damages liability standards to conform to the Court’s unidimensional retribution theory? Twenty-six states currently require punitive culpability to be proven by a standard greater than gross negligence. *Id.* at 1326. [4] The content of jury instructions for punitive damages varies widely and twenty-two states have enacted statutes mandating specific jury instructions. *Id.*

224. See Georgene Vairo, *Mass Tort Bankruptcies: The Who, the Why, and the Who*, 78 AM. BANKR. L.J. 93, 117 (2004)

225. *Id.*

226. See Brief of the Product Liability Advisory Council as Amicus Curiae in Support of Petitioner at 18, *Philip Morris v. Williams*, 127 S.Ct. 1057 (U.S. 2007) (No. 05-1256).

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of corporate policies such as in insurance bad faith cases or product liability actions. The “portfolio of punitive damages” problem is sometimes conceptualized as a quasi-aggregate class action.²²⁷ The most likely multiple punitive damages issue is when a defendant is punished for “aggregate harm” to society:

Another issue that will require development in future cases involves the propriety of punishing the defendant not only for the injuries it caused or threatened to the plaintiffs but also for the other “victims” of its conduct. This is a recurring question in cases alleging fraud in the sale of insurance and first-party bad faith even when there is no extraterritoriality issue (for example, if the evidence is limited to transactions affecting only residents of the forum state). It underlies the multiple-punishment problem that has received so much attention (but so little in the way of judicial solutions).

The answer from the plaintiffs’ side is that the defendant might perhaps be entitled to some kind of credit in future cases once it has paid “enough” punitive damages in earlier cases. Defendants retort that this is both impractical to administer and inadequate to deal with the “one-way class action problem,” in which each defense win knocks out only the parties to that case, but a single, possibly aberrational plaintiff’s verdict punishes for the full range of conduct even though the vast majority of other juries have found or would find no wrongful conduct.²²⁸

A possible constitutional issue arises whenever a fact-finder sets the level of punitive damages by considering the total harm of a corporate defendant in making a punitive damages award to a single victim.²²⁹ In Rachel Barton’s case, this problem would

227. Roy T. Englert Jr. & Daniel R. Walfish, *Too Much: The Supreme Court Debates Whether a Judge was Wrong to Smack Philip Morris with \$79.5 in Punitive Damages*, LEGAL TIMES, Oct. 30, 2006, <http://www.robbinsrussell.com/pdf/362.pdf> (describing the suspect practice of exposing punitive damages to the “hazards of a class action—namely liability for aggregate harm—but without any of its protections”).

228. Evan Trager, *Punitive Damages After BMW of America, Inc. v. Gore*, Appellate.Net, <http://www.appellate.net/articles/pundam799.asp> (last visited Aug. 22, 2007).

229. See Thomas Colby, *Beyond the Multiple Punishment Problem: Punitive*

have arisen if her punitive damages award reflected the aggregate societal harm caused in all train door closing cases. This aspect of the multiple punishment problem is akin to the issue decided in *Philip Morris* as to the admissibility of “other bad acts” in setting the level of punishment. Tort reformers will call for the Court to enact a uniform procedure for coping with the multiple punitive damages problem. If the Court decides that corporate multiple punitive damages awards is a cert-worthy issue, it will need to forge a solution that does not unduly interfere with the functioning of the tort system. If the Court decides to tackle the multiple punishment problem, it will have difficulty in setting the level of corporate punishment without considering other claims against the defendant. The Court’s one-on-one approach to retributory punishment is inconsistent with the idea of reducing or obviating punitive damages based on the award made to other plaintiffs. It is difficult to think of a tort reform to resolve the multiple punitive damages problem that would not take into account other claims against corporate defendants. The multiple punitive damages issue is best addressed by state legislatures that can forge punitive damages rules responsive to local concerns.

C. Reading the Tea Leaves About Non-Economic Damages²³⁰

The constitutionality of non-economic damages will next be targeted for cert petitions since there is no principled way to separate “standardless” non-economic damages from punitive damages.²³¹ A Justice Department study completed during the Reagan Administration advocated a \$100,000 cap on non-

Damages as Punishment for Individual, Private Wrongs, 87 MINN. L. REV. 583, 650-56 (2003) (arguing that awarding punitive damages reflecting “total harm” to a single plaintiff victim poses constitutional problems).

230. This subsection draws upon Chapter 15 on Tort Remedies that I authored for my new torts casebook. See *Galligan*, *supra* note 1846, at 907-74.

231. Theodore Olson made this argument in a brief filed in the *Philip Morris* case: “As Judge Niemeyer has recognized, non-economic damages are now plagued by the same problems as punitive damages, such as inadequate guidance to juries, which leads to radically varying and arbitrary awards.” See Brief of the Product Liability Advisory Council as *Amicus Curiae* In Support Of Petitioner at 13 n.4, *Philip Morris v. Williams*, 127 S.Ct. 1057 (2007) (No. 05-1256).

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economic damages to curb the “explosion in damage awards’ for non-economic losses, i.e., pain and suffering and punitive damages.”²³² In a 2005 speech in Scranton, Pennsylvania, President George W. Bush called for a cap on non-economic damages in medical malpractice lawsuits.²³³ Tort reformers hope that the Court will next take aim at the constitutionality of non-economic damages or pain and suffering. The American Tort Reform Association (ATRA) calls for greater control over “unguided discretion given juries in awarding damages for non-economic loss.”²³⁴ Non-economic damages are perceived as a highly manipulable remedy in the hands of talented trial lawyers exploiting the plight of the plaintiff.²³⁵ Tort reformers have targeted non-economic damages, like punitive damages, for the past two decades. ATRA blames standardless “non-economic damages as the single greatest contributor to the inequities and inefficiencies of the tort liability system.”²³⁶

Compensatory damages are subdivided into economic losses such as lost earning capacity, categorized as special damages, and non-economic damages, often referred to as pain and suffering damages—categorized as non-pecuniary damages—in contrast to more easily measurable special damages.²³⁷ Courts use many different terms when referring to non-economic damages:

Tort law has many terms for suffering, including general damages, noneconomic damages, pain and suffering, mental anguish, impairment, loss of the enjoyment of life, and loss of companionship and society. All these terms signify forms of human suffering: from pain; from injury and shock; from loss of

232. Teresa Moran Schwartz, *Punitive Damages and Regulated Products*, 42 AM. U. L. REV. 1335, 1356-57 (1993) (citing Justice Department study of non-economic damages).

233. Colin Suit, *Questionable Medicine—Why Federal Medical Malpractice Reform May Be Unconstitutional*, 47 ARIZ. L. REV. 195, 196 (2005).

234. American Tort Reform Association, *Non-economic Damages Reform*, <http://www.atra.org/issues/index.php?issue=7340> (last visited Jan. 24, 2008) [hereinafter ATRA].

235. See Amanda E. Haiduc, Note, *A Tale of Three Damage Caps: Too Much, Too Little and Finally Just Right*, 40 CASE W. REV. L. REV. 825, 830 (1990).

236. ATRA, *supra* note 234.

237. *Galligan*, *supra* note 184, at 916.

ability, mobility, or livelihood; from the loss of a loved one; from the recognition that life will never be the same. Each year the vast tort engine processes tens of thousands of claims for suffering. The players in the tort system—the plaintiff's lawyer, the defense lawyer, and the insurance company and its adjusters—articulate, investigate, measure, probe, argue, gather evidence, strategize, monetize, and bargain over these claims for suffering.²³⁸

In contrast to non-economic damages, special damages are “objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment, and loss of business or employment opportunities.”²³⁹ Special economic damages compensate the plaintiff for injuries to his person or property and may include medical bills, past and future earnings, and other direct economic expenses.²⁴⁰ Special damages such as lost past or future income, lost earning capacity, business economic losses, and diminished value of property are almost never the target of tort reforms.

In contrast, a non-economic loss or injury taking the form of general damages has long been controversial. Plaintiffs' attorneys complain that non-economic damages are sometimes difficult to recover because they are perceived as intangible losses.²⁴¹ Non-economic damages include compensation for pain

238. Ellen S. Pryor, *The Challenge of Noneconomic Damages in Civil Litigation: Noneconomic Damages, Suffering, and the Role of the Plaintiff's Lawyer*, 55 DEPAUL L. REV. 563, 563 (2006).

239. *Scalice v. Performance Cleaning Sys.*, 57 Cal. Rptr. 2d 711, 716 (Cal. Ct. App. 1996).

240. Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 VA. L. REV. 1401, 1417 (2004) (“without rational criteria or defined limits, the pain and suffering award becomes the same arbitrary deprivation of property as . . . punitive damage awards”); see also Ellen Pryor, *Rehabilitating Tort Compensation*, 91 GEO. L.J. 659, 660 (2003) (For impairment, mental anguish, and pain and suffering, juries inevitably are given vaguer standards, such as to ‘fairly and reasonably compensate’ the plaintiff, or to use “good discretion” or “enlightened conscience.”)

241. As the author stated in DAVID BALL ON DAMAGES:

Intangible damages are hard to get partly because jurors do not

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and suffering, inconvenience, emotional stress, physical impairment or disfigurement, and impairment of the quality of life.²⁴² Twenty-eight million of Rachel Barton's thirty million dollar award by an Illinois jury was composed of non-economic damages for her past, present, and future pain, suffering, and disfigurement.²⁴³

Ninety-three percent of Rachel's award was classifiable as non-economic damages rather than special damages.²⁴⁴ It is difficult to monetize the pain and suffering Rachel Barton sustained. You never just lose a leg. Should the monetary value of an award to a promising young violinist who lost a limb in a devastating accident be greater or less than a young child whose face was flesh-fused by a drain cleaner? Should it matter that Rachel had the determination to learn how to play the violin from a sitting position? Further, caps on non-economic damages have a disparate impact on women plaintiffs who have lower wages than men do.²⁴⁵

Measuring the mental pain of losing a limb or other disfigurement defies easy measuring sticks and it is unclear why the U.S. Supreme Court would be in any better position than a jury hearing all the evidence in deciding what is just and fair.

always see what purpose the money can serve, and also because jurors do not know how to figure out how much to give . . . Jurors have less trouble calculating tangible damages. Jurors see worthwhile purpose in paying medical expenses and lost wages, and the amounts can be easily determined.

DAVID BALL, DAVID BALL ON DAMAGES: A PLAINTIFF'S ATTORNEY'S GUIDE FOR PERSONAL INJURY AND WRONGFUL DEATH CASES 27 (2001).

242. See COLO. REV. STAT. ANN. § 13-64-302 (2006) (defining non-economic damages). Hawaii's tort damages statute, for example, is even more expansive including "damages for pain and suffering, mental anguish, disfigurement, *loss of enjoyment of life*, loss of consortium, and all other nonpecuniary losses or claims." HAW. REV. STAT. ANN. § 663-8.5 (LexisNexis 2007) (emphasis added).

243. *Barton v. Chi. & Nw. Transp. Co.*, 757 N.E.2d 533, 549 (Ill. App. Ct. 2001).

244. *Id.* at 549.

245. See Thomas Koenig and Michael L. Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1, 80-82 (1995) (documenting that women plaintiffs had a higher percentage of non-economic damages than men in a subsample of products liability and medical malpractice cases).

Courts have recognized diverse methods for measuring non-economic damages but it is unclear whether any method should serve as the gold standard. The Reporters of the Second Restatement summarize the traditional techniques of counsel in proving non-economic damages:

Efforts to provide suggestions or formulas for measuring with more certainty the amount of damages for pain and suffering have met with varying degrees of success. It is consistently held to be improper to suggest to the jury that they place themselves in the position of the injured person and determine the sum of money that they would require to incur his injuries. Substantial disagreement has developed among the courts, however, on the so-called “per-diem argument”—asking the jury to estimate the value of the pain and suffering for a day (or some other short period of time) and then to multiply that figure by the length of time that the pain may be expected to continue. Three views are taken: (1) some courts forbid the practice on the ground of its potential prejudice in giving the jury an illusion of precision in calculation and in substituting a formula for evidence; (2) other courts find the practice not unfair or unjust in providing a mathematical formula to aid the jury in making a reasonable award since the parties should have the opportunity to explain the components of the lump sum; and (3) still other courts treat the matter as in the sound discretion of the trial judge so long as he gives appropriate cautionary instructions that the formula is not proof and should be treated merely as suggestive. There is also a division of authority on whether counsel may state to the jury the amount of damages claimed or expected by the plaintiff, but a substantial majority of the courts do not treat this as improper.²⁴⁶

A young girl who loses a limb endures past, present, and future physical and mental pain and suffering as well as lost self-esteem. A jury is in the best position to set non-economic damages based upon the totality of the facts, not some artificial measuring stick. Non-economic damages do covary with the severity of injuries. Professor Neil Vidmar and his colleagues found a correlation between non-economic damages and severity

246. RESTATEMENT (SECOND) TORTS, § 912, cmt. b.

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of injury in an empirical study of medical malpractice awards in New York, Florida, and California:

[T]he general damages portion of awards was positively related to severity of plaintiff injury. That is, the more serious the injury the higher the mean and median levels of general damages. The exception to this trend was that in cases involving death the mean and median awards tended to be substantially lower than in cases of very serious permanent disabilities. That finding is consistent with [other empirical research]. While these verdict statistics provide no information on the actual basis of the jury's decisions, there is no evidence that these decisions result from caprice or unwarranted sympathy.²⁴⁷

If the Court finds the constitutionalization of non-economic damages cert-worthy, it is likely to affect recovery in future cases. In the railway's reply brief for Rachel Barton's case, the railway contended that excessiveness should be measured against awards in prior cases where there were similar injuries.²⁴⁸ However, the commuter railway defendants challenged the jury's non-economic damages award as "excessive to an extreme."²⁴⁹ The plaintiff presented overwhelming evidence of great pain and suffering. Not only did she endure scores of surgeries and hundreds of medical appointments, she thought about "stump care issues on a daily basis, as her removable

247. Neil Vidmar, *Medical Malpractice Lawsuits: An Essay On Patient Interests, The Contingency Fee System, Juries, And Social Policy*, 38 LOY. L.A. L. REV. 1217, 1242 (2005).

248. In particular, the railway's reply brief stated:

Then there is the astounding damage award of \$30,090,208.97, \$28 million of which was for non-economic damages. Plaintiff offers no answer to the question defendants posed in their opening brief: What is it that distinguishes this case from *Ziarko v. Soo Line R.R.* where the plaintiff was awarded \$7.1 million for strikingly similar injuries? The answer lies in the trial error and unfair adversarial tactics.

Reply Brief of Defendants-Appellants, *Barton v. Chi. & Nw. Transp. Co.*, No. 1-99-2285, 2000 WL 34213448 (Ill. App. 1 Dist. December 1, 2000) (No. 1-99-2285).

249. *Barton v. Chi. & Nw. Transp. Co.*, 757 N.E.2d 533, 563 (Ill. App. Ct. 2001).

prosthesis depended on her skin for suction and various factors can cause her skin to change or break down.”²⁵⁰ She will endure lifelong problems with painful skin breakdowns including “embarrassing ones [with] the raw open stuff right in the bikini area.”²⁵¹ Rachel will eventually need a knee replacement in order to address pain and reduced mobility because she will suffer progressive arthritis as a result of the accident.²⁵²

One of the plaintiff’s medical experts testified that Rachel will “require further surgery on the stump of her right foot and possibly her right ankle.”²⁵³ She will “need supervised physical therapy four days a week, along with a daily program, for the rest of her life” in addition to daily assisted care for the remainder of her life.²⁵⁴ As she grows “older, she will need emotional support, ideally professional support.”²⁵⁵ The Illinois appeals courts that considered the entire record found an ample basis for the jury award of non-economic damages on these facts.²⁵⁶ The appellate court concluded that it did not have an adequate record or basis for revisiting whether the jury’s award of non-economic damages was excessive.²⁵⁷ The reviewing court noted that the jury was in the best position to observe Barton and make an assessment as to non-economic damages after viewing photographs of tissue expansion, numerous surgeries, and disfigurement.²⁵⁸ Non-economic damages were also based upon the jury viewing a “day in the life” videotape to demonstrate the extent of Barton’s injuries and resulting limitations on her normal life activities.²⁵⁹ The transcript discloses that plaintiff’s counsel used such material during closing argument.²⁶⁰

250. *Id.* at 543.

251. *Id.* (internal quotations removed).

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* at 543.

256. *Id.* at 563.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

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In a 2003 law review article, Paul DeCamp argues that current standards for measuring non-economic damages are inadequate.²⁶¹ The clear thrust of this critique of non-economic damages is that these are not real damages—but just ask Rachel Barton how negligence changed her life.²⁶² Attorney DeCamp proposes that the Supreme Court’s punitive damages jurisprudence be expanded to non-economic compensatory damages.²⁶³ He contends that the same principles animating procedural and substantive due process apply equally to pain and suffering damages.²⁶⁴ DeCamp’s proposal is that awards for pain and suffering beyond that range established in prior similar cases be considered presumptively excessive.²⁶⁵ His entire proposal is to “bring the law of noneconomic compensatory damages into line with current punitive damages jurisprudence.”²⁶⁶

The U.S. Supreme Court’s two-decade project of rewriting punitive damages will soon expand at the request of tort reformers to constitutionalize non-economic damages. The movement to cap non-economic damages in the states has already gained steam. In 2005 alone, roughly half of the states capped non-economic damages in medical liability cases: Alaska,

261. Paul DeCamp, *Beyond State Farm: Due Process Constraints on Noneconomic Compensatory Damages*, 27 HARV. J.L. & PUB. POL’Y 231, 234 (2003-04).

262. Judge Posner contends that non-economic damages, like special damages, represent the true costs imposed by tortfeasors. Even though there may not be solid, objective standards for measuring such damages, they are part of making the plaintiff whole again under our system of civil justice. According to Judge Posner:

We disagree with those students of tort law who believe that pain and suffering are not real costs and should not be allowable items of damages in a tort suit. No one likes pain and suffering and most people would pay a good deal of money to be free from them. If they were not recoverable in damages, the cost of negligence would be less to the tortfeasors and there would be more negligence, more accidents, more pain and suffering, and hence higher social costs.

Kwasny v. United States, 823 F.2d 194, 197 (7th Cir. 1987).

263. See *DeCamp*, *supra* note 261.

264. *Id.* at 235.

265. *Id.*

266. *Id.*

California, Colorado, Florida, Georgia, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, West Virginia, and Wisconsin.²⁶⁷ Hawaii, Idaho, Kansas, and Maryland have capped non-economic damages in all substantive fields.²⁶⁸

If the states perceive a problem with either excessive or “standardless” non-economic damages, the legislature or courts are capable of forging solutions responsive to local conditions.²⁶⁹ The states are in the best position to adopt specialized rules of evidence and procedure restricting non-economic damages.²⁷⁰ As the late Chief Justice Rehnquist observed, “[t]he essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold.”²⁷¹ Non-economic damages are particularly vulnerable to

267. See ATRA, *supra* note 234.

268. See *id.*

269. Twenty-five states, for example, cap non-economic damages in medical malpractice actions. Michael L. Rustad, *Neglecting the Neglected: The Impact of Noneconomic Damage Caps on Meritorious Nursing Home Lawsuits*, 14 ELDER L.J. 331, 334 (2006). Efforts have been under foot at the federal level as well. President George W. Bush has proposed a hard cap of \$250,000 on all non-economic damages awarded in medical malpractice lawsuit awards and the “Senate is considering capping non-economic damages awards against all health care providers, including those who treat nursing home patients, also at \$250,000.” *Id.* at 332. States are enacting caps on non-economic damages in the absence of reliable empirical data on the actual growth, size, ratio, plaintiff-defendant characteristics, factual foundation, and proportions of awards allocated to non-economic damages. For this and other reasons, some, though certainly not all, state supreme courts have struck down caps on non-economic damages on diverse state and federal constitutional grounds. See *e.g.*, *Moore v. Mobile Infirmary Ass’n*, 592 So. 2d 156, 158 (Ala. 1991) (striking down cap on state right to jury grounds); *Lakin v. Senco Prods., Inc.*, 987 P.2d 463, 473 (Or. 1999) (striking down \$1 million cap on health care liability on right to jury grounds); *Brannigan v. Usitalo*, 587 A.2d 1232, 1232-36 (N.H. 1991) (striking down statute on state equal protection grounds).

270. The states have constructed rules as to what kind of evidence or arguments must be made about non-economic damages. The “Golden Rule” argument, asking the jury to put themselves into the position of the plaintiff in order to determine what would be fair compensation, is not permitted. See DAN B. DOBBS, *supra* note 144, at §8.1(4).

271. *Allen v. Illinois*, 478 U.S. 364, 375 (1986) (citing *Addington v. Texas*,

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the charge that they are “standardless” in that there is no clear test for measuring pain and suffering. Pain and suffering damages, like capital sentencing, inevitably reflect human judgments, and “buil[d] discretion, equity, and flexibility into a legal system.”²⁷² If the Court does expand its constitutional analysis to non-economic damages, it can begin by simply applying federal excessiveness rules and standards to non-economic damages.²⁷³

IV. CONCLUSION

In my 2005 *Maryland Law Review* article²⁷⁴ written shortly after *State Farm*, I expressed concern regarding the Court’s federal takeover of punitive damages. *State Farm* only confirms my thesis that the Court’s formalistic retributive punishment model ignores the reality that corporations do not reach out and injure individual consumers, but rather make products and devise policies that cause patterned harm. The reality is that corporate wrongdoing is largely about risks of harm to the public

441 U.S. 418, 431 (1979)).

272. *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987) (observing that jury decisions in capital sentencing involve great discretion and require flexibility) (quoting H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 498 (1966)).

273. States vary significantly on what types of non-economic damages are recoverable. If the Court opens the door by accepting cert in non-economic damages, there is no shortage of possible areas for review. *See also* Andrew Jay McClurg, *It’s a Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases*, 66 *NOTRE DAME L. REV.* 57 (1990) (arguing that wrongful death statutes should be amended to include the recovery of loss of enjoyment of life damages). Professor McClurg surveyed the states and found:

Courts in twenty-one states and the District of Columbia have now interpreted their wrongful death statutes to allow for the recovery of loss of society and companionship-type damages, although the statutes do not expressly provide for such recovery . . . Contrarily, while nearly all states allow society and companionship-type damages, only a minority of states allow recovery for grief or mental anguish Twenty-eight states and the District of Columbia appear to have rejected grief damages in wrongful death cases.

Andrew J. McClurg, *Dead Sorrow: A Story About Loss and a New Theory of Wrongful Death Damages*, 85 *B.U. L. REV.* 1, 24-28 (2005).

274. *Happy No More*, *supra* note 57.

and that reprehensibility is the decisive test for how many punitive damages dollars a defendant should pay. Companies do not have individual consumers in mind when they market a defective product or fail to respond to a developing profile of danger such as dangerous children's toys. Since the age of the railroad, corporate punishment through punitive damages has been primarily employed to deter systematic harms, and rarely for acts against individual litigants. The dual state and federal schizoid standards of review are at the root of why the Supreme Court should never have entered the arena of state tort remedies.

As the history of punitive damages confirms, the remedy evolved to address widespread social harms such as predatory insurance settlement practices, dangerously defective products, and toxic tort risks to the environment with a multi-jurisdictional reach. If jurors may only consider the individual harm done to the individual plaintiff, they will truly fail to consider the impact of corporate wrongdoing on the larger society. Retribution justifies punishment because every wrong deserves punishment.²⁷⁵ *Philip Morris* makes it clear that the Court is not ready to exit the tort hell highway any time soon.

The Court's strained efforts to force a complex remedy like punitive damages into a constitutional strait jacket is like the television commercial in which two mechanics are trying to fit an oversized automobile battery into a car too small to accommodate it. The car owner looks on with horror as the mechanics hit the battery with mallets, trying to drive it into place. The owner objects and the mechanics say, "We'll make it fit!" The car owner says, "I'm not comfortable with making it fit." State courts are in the unenviable position of making substantive and procedural standards fit a complex federalized remedy. The U.S. Supreme Court's reduction of complex tort remedies into a federal standard is comparable to the mechanics in the aforementioned television advertisement trying to make diverse tort law fit a common mold.²⁷⁶ Similarly, judges are required to apply

275. Jason S. Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law*, 87 COLUM. L. REV. 1385, 1431 (1985); see generally Jeffrie Murphy, *Does Kant Have a Theory of Punishment?*, 87 COLUM. L. REV. 509 (1987).

276. Punitive damages are not just one thing.

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individuated federalized rules for punitive damages trials that do not mesh well with the reality of corporate punishment.

Forcing non-economic damages into a common constitutional mold assumes that the Court is in a better position than the jury to determine how much to award Rachel Barton and other plaintiffs. Non-economic damages are an attractive target for judicial tort reform because, like punitive damages, awards have risen in recent years. If the Court decides to constitutionalize non-economic damages, it will then likely have been persuaded that tort doctrines such as joint and several liability or the collateral source rule are cert-worthy. The Court should take the next exit off the due process highway because there is no “torts crisis” justifying their intervention in the common law of torts.²⁷⁷

The entire concept of punitive damages has been subjected to attack from some sources. Some states decline to award these damages in the absence of a statutory provision. Others insist that there must be significant compensatory damages in order to warrant their award and still others hold that they must be proportioned to compensatory damages in some appropriate ratio. In many states there has been a tightening of control by the appellate courts over discretion of the trier of fact.

RESTATEMENT (SECOND) TORTS, § 908, cmt. f.

277. *E.g.*, Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, WIS. L. REV. 15, 54-55 (1998) (summarizing empirical research on punitive damages); Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1 (1992).