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Victor E. Schwartz
Shook, Hardy & Bacon LLP

Leah Lorber
Shook, Hardy & Bacon LLP

TWISTING THE PURPOSE OF PAIN AND SUFFERING AWARDS: TURNING COMPENSATION INTO "PUNISHMENT"

VICTOR E. SCHWARTZ*
LEAH LORBER**

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* Victor E. Schwartz is a partner in the law firm of Shook, Hardy & Bacon L.L.P. in Washington, D.C. Mr. Schwartz is co-author of the most widely used torts casebook in the United States, PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS (10th ed. 2000), and author of COMPARATIVE NEGLIGENCE (3d ed. 1994 & Supp. 1999). He served on the Advisory Committee of the American Law Institute's RESTATEMENT OF THE LAW OF TORTS: PRODUCTS LIABILITY project and has been appointed to the Advisory Committees of the RESTATEMENT OF THE LAW OF TORTS: APPORTIONMENT OF LIABILITY and GENERAL PRINCIPLES projects. Mr. Schwartz obtained his B.A. *summa cum laude* from Boston University in 1962 and his J.D. *magna cum laude* from Columbia University in 1965.

** Leah Lorber is of counsel to the law firm of Shook, Hardy & Bacon L.L.P. in Washington, D.C. She obtained her B.A. in Journalism and English from Indiana University in 1989 and her J.D. *magna cum laude* from Indiana University in 1994, where she was a member of the Order of the Coif and served as Articles Editor of the *Indiana Law Journal*.

I. INTRODUCTION

In the last quarter of the 20th Century, punitive damages were diverted from their intended purpose of reasonably punishing and deterring wrongful behavior. The United States Supreme Court noted in 1974 that "juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused."[1] Subsequently, the misuse and abuse of punitive damages created a system of "jackpot justice" in which some plaintiffs get windfall awards and their lawyers get lucrative fees. Companies go into bankruptcy and leave some plaintiffs with reduced claims or nothing.

Because of these and other problems, "legal controls" slowly but surely have been placed on punitive awards by forward-thinking judges and elected lawmakers at the federal and state levels. These controls place constitutional and statutory limits on the amount of punitive damages and create procedures for assessing and reviewing the awards.

Plaintiffs' lawyers know that efforts to curb punitive damages "run wild"[2] will eventually eat into their profits. They recognize that punitive damages are

1. Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).
2. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

taxable under federal law, while compensatory awards are not.[3] They appreciate the need for an alternative, safer, and surer path to obtaining very high awards that will be upheld by trial and appellate courts. The path leading to punitive damages is an old one. Consequently, plaintiffs' lawyers, as this Article will show, have poured new wine of punishment evidence, once used to obtain punitive damages, into old bottles of pain and suffering awards.

Pain and suffering awards are intended to do exactly what their name implies: provide reasonable compensation to an injured person for past and future pain and suffering caused by the defendant.[4] These damages are inherently subjective. Generally, courts will not second-guess the jury's decision-making. State legislative efforts to enact statutory limits on the amount of pain and suffering awards have been nullified in many cases by activist judges.[5] As a result, "[j]uries are left with nothing but their consciences to guide them."[6]

This "hands off" approach has created the opportunity for plaintiffs' lawyers to manipulate the system by using the defendant's alleged "bad acts" to augment pain and suffering awards. Without proper oversight by trial courts, plaintiff's counsel can direct the jury away from the needs of his client toward the wrongdoing of the defendant. As a result, the fundamental purpose of pain and suffering awards—to compensate the plaintiff—is upended. The defendant is "punished," but the award is not subject to the extensive legal controls that help assure real punitive awards do not cross the constitutional line.

To fully understand this new and challenging trend, Part II discusses the history of the rise in punitive damages awards and the recent trend of tightening legal controls governing them. Part III shows how the trend toward judicial nullification has supplanted legislative efforts to place commonsense limits on pain and suffering awards. Part IV demonstrates that pain and suffering awards in asbestos, pharmaceutical, and other cases have been escalating, sometimes reaching hundred-million dollar levels. Part V shows how some courts have either wittingly or unwittingly permitted plaintiffs' lawyers to use a defendant's "wrongdoing" as a basis for driving up pain and suffering awards. Finally, Part VI discusses the true nature of pain and suffering damages and suggests procedural and legislative solutions to help assure pain and suffering awards return to their fundamental compensatory role.

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3. 26 U.S.C. § 104(a)(2) (2000) (Gross income does not include "the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness.").

4. *See* 4 RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (1979) (defining compensatory damages).

5. *See* Victor E. Schwartz & Leah Lorber, *Regulation Through Litigation Has Just Begun: What You Can Do to Stop It*, BRIEFLY (Nat'l Legal Ctr. for the Pub. Interest, Washington, D.C.), Nov. 1999, at 20-23.

6. Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 778 (1985).

II. LAWMAKERS ACT TO CURB EXCESSIVE PUNITIVE DAMAGES AWARDS

Punitive damages are intended to punish a defendant's wrongful conduct and deter him and others from engaging in similar misconduct in the future.[7] Punitive damages have nothing to do with "making the plaintiff whole."[8] That purpose is served by compensatory damages which compensate tort victims for economic losses and personal injuries, including awards for "pain and suffering."[9]

A. The Historical Role of Punitive Damages

Until the mid-20th century, punitive damages were available only for a relatively small group of torts involving conscious and intentional harm inflicted by one person on another. These "intentional torts" included assault and battery,[10] libel and slander,[11] malicious prosecution,[12] false imprisonment,[13] and intentional interferences with property.[14] In general, at that time, punitive

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7. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (noting that punitive damages "are not compensation for injury" but "are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence").

8. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 9 (5th ed. 1984) (explaining that punitive damages are awarded to punish the defendant, teach him not to "do it again," and deter others from similar behavior).

9. *See* 1 MARILYN MINZER ET AL., DAMAGES IN TORT ACTIONS § 1.03, at 1–14 (1989) (noting the definition of compensatory damages includes compensation for physical and emotional harm).

10. *See, e.g.*, Ward v. Blackwood, 41 Ark. 295 (1883) (noting that "vindictive or exemplary damages" may be awarded "[i]f the assault was committed without fault in the part of the plaintiff in a wanton and wilful manner, and under circumstances of outrage, cruelty and oppression, or with malice"); Lyon v. Hancock, 35 Cal. 372 (1868) (allowing punitive damages in assault and battery actions when malice can be shown); Trogden v. Terry, 90 S.E. 583 (N.C. 1916) (finding sufficient evidence of malice to sustain jury's punitive damages award in assault action).

11. *See, e.g.*, Sheik v. Hobson, 19 N.W. 875 (Iowa 1884) (noting that punitive damages may be awarded in slander actions, though not in this case because the defendant's death ceased the punitory powers of the law); Louisville & Nashville R.R. Co. v. Ballard, 3 S.W. 530 (Ky. 1887) (discussing the standard of conduct sufficient to authorize exemplary damages).

12. *See, e.g.*, Brown v. McBride, 52 N.Y.S. 620 (Sup. Ct. 1898) (finding no error where trial court instructed the jury to award "smart money" in wrongful prosecution action if "they found that the defendant instituted the action in wanton or reckless disregard of the rights of the plaintiff").

13. *See, e.g.*, Lake Shore & Mich. S. Ry. Co. v. Prentice, 147 U.S. 101 (1893) (noting that punitive damages may be awarded "if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations"); Green v. S. Express Co., 41 Ga. 515 (1871) (affirming grant of new trial because evidence did not sustain an award of more than nominal damages).

14. These included trespass and conversion, for example, Dorsey v. Manlove, 14 Cal. 553 (1860); Singer Mfg. Co. v. Holdfodt, 86 Ill. 455 (1877); malicious attachment, for example, Yazoo & Miss. Valley R.R. Co. v. Sanders, 40 So. 163 (Miss. 1905), Schumacher v. Shawhan Distillery Co., 178 Mo. App. 361 (1914); and destruction of property, private nuisance, or similar wrongful conduct, for example, Linsley v. Bushnell, 15 Conn. 225 (1842); Whipple v. Walpole, 10 N.H. 130 (1839); Pickett v. Crook, 20 Wis. 377 (1866) (allowing exemplary damages generally but

damages "were rarely assessed and likely to be small in amount,"[15] only slightly exceeding compensatory awards.[16]

B. Punitive Damages Awards Depart From Their Intended Purpose

In the late 1960s, American courts began to depart from the historical "intentional tort" moorings of punitive damages.[17] Lesser misconduct could now merit punitive damages. The amorphous terms "reckless disregard" became a popular standard for punitive damages liability.[18] A lower standard, namely "gross negligence," became sufficient to support a punitive damages award in some states.[19] Furthermore, a number of states instituted the "triple trigger" approach of willful or wanton or gross misconduct. The triple trigger approach gave plaintiffs three separate paths to obtain punitive damages.

Changes in punitive damages law and practice impacted both the frequency and size of punitive damages awards. Until 1976, for example, there were only three reported appellate court decisions upholding awards of punitive damages in products liability cases. The punitive damages award in each case was modest in proportion to the compensatory damages award.[20] Then, in the late 1970s and 1980s, the size of punitive damages awards "increased dramatically,"[21] and "unprecedented numbers of punitive awards in product liability and other mass tort situations began to surface."[22] The advent of mass

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reversing court's award here because of over-broad jury instructions).

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

16. *See, e.g.*, S. Kan. Ry. Co. v. Rice, 16 P. 817, 818 (Kan. 1888) ($35 costs and fees, $10 injury to feelings, $71.75 punitive); Fay v. Parker, 53 N.H. 342, 397 (1873) ($150 actual, $331.67 exemplary reduced to "no more than $150"); Woodman v. Nottingham, 49 N.H. 387, 389 (1870) ($578 actual, $100 exemplary); Taylor v. Grand Trunk Ry. Co., 48 N.H. 304, 308 (1869) ($500 actual damages, $858.50 exemplary).

17. In 1967, a California appellate court held for the first time that punitive damages were recoverable in a strict products liability action. Toole v. Richardson-Merrell Inc., 60 Cal. Rptr. 398, 418 (Ct. App. 1967).

18. *See, e.g.*, UTAH CODE ANN. § 78-18-1(1)(a) (1996) (punitive damages may be awarded if the tortfeasor acts willfully and with malice or intentional fraud or "reckless indifference toward, and a disregard of, the rights of others").

19. *See, e.g.*, Wisker v. Hart, 766 P.2d 168, 173 (Kan. 1988) (stating the standard to be "gross negligence").

20. *See* Gillham v. Admiral Corp., 523 F.2d 102, 104 (6th Cir. 1975) ($125,000 compensatory damages, $50,000 attorneys' fees, $100,000 punitive damages), *cert. denied*, 424 U.S. 913 (1976); *Toole*, 60 Cal. Rptr. at 403 ($175,000 compensatory damages, $250,000 punitive damages); Moore v. Jewel Tea Co., 253 N.E.2d 636, 638 (Ill. App. Ct. 1969) ($920,000 compensatory damages, $10,000 punitive damages), *aff'd*, 263 N.E.2d 103 (Ill. 1970).

21. George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. CAL. L. REV. 123, 123 (1982).

22. John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 142 (1986) ("Many of these awards were also unprecedented in amount."); *see also* PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988) (describing tort liability as a ubiquitous tax which was set in place in the 1960s and 1970s); WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED

tort litigation led to an increase in punitive damages claims against manufacturers, including the possibility of repeated imposition of punitive awards for essentially the same conduct. Along with these changes came a dramatic increase in the size and frequency of punitive awards. As one respected commentator noted in 1989, "hardly a month goes by without a multimillion-dollar punitive damages verdict in a product liability case."[23]

C. The United States Supreme Court Places Constitutional Restrictions on Punitive Awards

While the United States Supreme Court expressly acknowledged the adverse impacts of excessive punitive awards several times in the 1980s, it still "rejected or deferred"[24] several constitutional challenges to them. Either the Court ruled the constitutional provision invoked was inapplicable to civil litigation, such as the Eighth Amendment's Excessive Fines Clause,[25] or the defendant failed to raise more promising constitutional arguments earlier in the litigation.[26]

A major change occurred in 1991 when the Court recognized in *Pacific Mutual Life Insurance Co. v. Haslip* that punitive damages awards had "run wild" in this country and should be subject to constitutional due process limitations.[27] Since then, the Court has increasingly placed legal controls on both the amount and procedures for exemplary awards while reemphasizing its concern that excessive punitive damages may infringe upon fundamental constitutional rights. These legal controls include substantive due process restrictions on the amount of punitive awards, procedural due process requirements for the assessment of punitive damages and for meaningful judicial review, and Commerce Clause limitations on a state's ability to use activity outside its jurisdiction as a basis for punitive awards.

THE LAWSUIT (1991) (terming the litigious 1960s and 1970s a "unique experiment" and modern jury verdicts "guesswork").

23. Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 ALA. L. REV. 919, 919 (1989).

24. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 12 (1991).

25. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 260 (1989) (rejecting Eighth Amendment challenge to punitive award on ground that the Excessive Fines Clause was not intended to apply to civil cases).

26. *Id.* at 277 (refusing to address 14th Amendment challenge to punitive award where due process violation was not raised below); Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 76 (1988) (refusing to reach federal constitutional claims, based on the Due Process Clause and the Contract Clause since those claims were not raised in state court); *cf.* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 829 (1986) (disposing of unrelated issue makes it unnecessary to reach federal constitutional challenges to punitive award).

27. 499 U.S. at 18.

1. Procedural Due Process Governs Punitive Awards

The Supreme Court took its first step in curbing punitive damages awards when it made clear in *Haslip* that the Due Process Clause of the Fourteenth Amendment places restraints on these awards.[28] The Court explained that the procedures for imposing the award and the court's review of punitive damages must provide sufficient checks on unlimited jury discretion to protect procedural due process rights.[29] While declining to establish bright-line boundaries, the Court stated that "general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus."[30]

In *Haslip* the Court explained, "the full panoply of . . . procedural [due process] protections" had been applied.[31] These protections included "reasonable constraints" placed on the jury's discretion by the trial court's jury instructions.[32] The "trial court expressly described for the jury the purpose of punitive damages, namely, 'not to compensate the plaintiff for any injury' but 'to punish the defendant' and 'for the added purpose of protecting the public by [deterring] the defendant and others from doing such wrong in the future.'"[33] The trial court also instructed the jury "if punitive damages were to be awarded, the jury 'must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong.'"[34] Thus, the Court found the trial court's instructions to be a "reasonable constraint"—preventing inappropriate, unfettered decision making by the jury.[35] The Court also found that procedural due process was served by the trial court's post-verdict hearing, which satisfied state law standards for "meaningful and adequate review" of punitive awards, and by the Alabama Supreme Court's scrutiny of the punitive damages award on review.[36]

In sum, while recognizing the severity of the alleged misconduct,[37] the Court in *Haslip* established a constitutional baseline for exemplary awards.[38]

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28. *Id.*

29. *Id.* at 18-20 ("As long as the [jury's] discretion is exercised within reasonable constraints, due process is satisfied.").

30. *Id.* at 18.

31. *Id.* at 23.

32. *Id.* at 20.

33. *Haslip*, 499 U.S. at 19 (alterations in original) (citations omitted).

34. *Id.* (citations omitted).

35. *Id.* at 20.

36. *Id.* at 20-21.

37. The Court noted that "the trial court specifically found that the conduct in question 'evidenced intentional malicious, gross, or oppressive fraud.'" *Id.* at 23.

38. *See id.* at 18.

2. Procedural Due Process Requires Meaningful Judicial Review

In two subsequent cases, the Court emphasized the important role meaningful judicial review of punitive damages played in assuring their constitutionality. In *Honda Motor Co. v. Oberg*[39] the Court undertook an extensive analysis of the common law role of judicial review in assuring that punitive awards were not arbitrary or excessive. The Court ruled that an amendment to the Oregon Constitution prohibiting judicial review of the punitive damages awarded by a jury "unless the court can affirmatively say there is no evidence to support the verdict"[40] violated the Due Process Clause.[41] In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*[42] the Court ruled that constitutional concerns required federal appeals courts to take a "thorough, independent review" of the constitutionality of a punitive damages award and required de novo review of exemplary awards.[43] A less exacting standard of review may, for practical purposes, result in the appeals court's deferring to the trial court's decision.

3. Substantive Constitutional Limits Placed on Punitive Awards

The Supreme Court hinted in *Haslip* that substantive due process limits the amount of punitive awards.[44] The Court made this explicit two years later in *TXO Production Corp. v. Alliance Resources Corp.*[45] The Court indicated in *TXO* that punitive damages awards cannot be "grossly excessive" or they will run afoul of the Due Process Clause.[46] While the Court upheld the award before

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39. 512 U.S. 415 (1994).

40. *Id.* at 427 n.5 (quoting OR. CONST. art. VII, § 3).

41. *Id.* at 432. In holding Oregon's denial of judicial review of the amount of punitive awards unconstitutional, the Court explained:

> Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences. Judicial review of the amount awarded was one of the few procedural safeguards which the common law provided against that danger. Oregon has removed that safeguard without providing any substitute procedure and without any indication that the danger of arbitrary awards has in any way subsided over time.

Id.

42. 532 U.S. 424 (2001).

43. *Id.* at 436, 441.

44. The Court noted that the punitive damages awarded to Mrs. Haslip—four times the amount of compensatory damages—came "close to the line" of constitutional impropriety. 499 U.S. at 23-24.

45. 509 U.S. 443, 453-54 (1993) (plurality opinion).

46. *Id.* at 462. In *TXO* the Court considered a $10 million punitive award that was 526 times greater than the actual damages of $19,000 awarded in a common law slander of title case. *Id.* at 451, 453.

it on a 6-3 plurality vote, the majority could not agree on the proper constitutional analysis to be used.[47] Consequently, the Court's "splintered decision"[48] provided little practical guidance to practitioners and commentators.[49]

Three years later the Court established a three-part constitutional test to determine whether punitive awards were "grossly excessive." That test, set forth in *BMW of North America, Inc. v. Gore*,[50] requires consideration of the reprehensibility of the misconduct, the relationship between the penalty and the harm to the plaintiff, and the civil and criminal penalties for comparable misbehavior.[51] In *Gore* a doctor filed suit after an automobile distributor, following BMW's nationwide procedures, failed to disclose that his new automobile had been repainted due to slight damage before delivery.[52] A jury awarded Dr. Gore $4,000 in actual damages and $4 million in punitive damages.[53] The Alabama Supreme Court reduced the punitive award to $2 million[54]—resulting in a 500-to-1 ratio of punitives to actual damages. The Court found that BMW did not receive adequate notice of the magnitude of the

47. Justice Stevens, joined by Chief Justice Rehnquist and Justice Blackmun, reaffirmed *Haslip*'s determination that the Court "'need not, and indeed . . . cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.... [H]owever,... a general concern of reasonableness properly enters into the constitutional calculus.'" *Id.* at 458 (Stevens, J., concurring in part and concurring in the judgment) (quoting *Haslip*, 499 U.S. at 18). The plurality found that while there was a "dramatic disparity" between the actual damages and punitive award, appropriate procedural safeguards had been followed and the award was not "grossly excessive" in light of the defendant's misconduct and wealth and the potential harm to the plaintiff. *Id.* at 462. Justice Kennedy's concurrence focused on the jury's behavior rather than the amount of the award. "When a punitive damages award reflects bias, passion or prejudice by the jury, rather than a rational concern for deterrence and retribution, the Constitution has been violated, no matter what the absolute or relative size of the award." *Id.* at 467. Justice Scalia, joined by Justice Thomas, wrote a concurring opinion stating that federal judges should stay entirely out of this area. *TXO Prod. Corp.*, 509 U.S. at 472 (Scalia, J., concurring). Justice O'Connor sharply dissented, joined by Justices Souter and White. She described the award as a "dramatically irregular, if not shocking, verdict by any measure." *Id.* at 481 (O'Connor, J., dissenting).

48. *Review of Supreme Court's Term: Business Law and Taxation*, U.S.L. WK., Aug. 10, 1993 ("The problem in the wake of the [C]ourt's splintered decision is not whether there are substantive due process limits on punitive damages, but how to determine what they are.").

49. *See, e.g.*, Nancy G. Dragutsky, Comment, *Walking the Invisible Line of Punitive Damages*: TXO Production Corp. v. Alliance Resources Corp., 21 PEPP. L. REV. 909, 959 (1994) ("[I]nstead of clarifying the standards set forth in *Haslip*, the *TXO* Court actually created more confusion") (citations omitted); Andrew L. Frey & Evan M. Tager, *Stopping the Deluge of Costly Punishment*, LEGAL TIMES, Aug. 9, 1993, at 20 (terming the TXO decision "a cacophony of opinions").

50. 517 U.S. 559 (1996).

51. *Id.* at 575.

52. *Id.* at 563.

53. *Id.* at 565.

54. *Id.* at 567.

potential sanction and set forth the aforementioned three factors for consideration.[55]

4. Commerce Clause Implicated by Punitive Awards

In *Gore* the Court ruled that punitive damages awards should not be based on conduct that is lawful in another state.[56] The *Gore* award punished BMW's nationwide policy of not disclosing pre-sale repairs to vehicles if the repairs' cost fell below a specified threshold. Because BMW's threshold complied with statutory disclosure thresholds in many states, the Court held Alabama could not set punitive damages based on the number of vehicles sold nationwide but must instead, at a minimum, apportion the award to Alabama sales alone.[57]

The Court held that principles of state sovereignty embedded in the structure of the United States Constitution dictated that "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States."[58] Each state may regulate only within its borders no matter how wise a uniform policy might be.[59] Congress is the appropriate legislative body to regulate interstate business practices that may have adverse effects on the American public.[60]

While the parameters of the Supreme Court's punitive damages jurisprudence are still being worked out, several practical effects emerge from these cases. They include the following: First, adequate procedures must be used for the assessment and award of punitive damages to ensure that jury discretion is reasonably constrained. Second, the amount of punitive damages should have some reasonable relationship to actual damages; in extreme cases the ratio may rise to 10-to-1. Third, the amount of the award should be comparable to the amount of corresponding criminal fines. Fourth, punitive awards cannot be predicated on conduct that is lawful in other states. Fifth, meaningful judicial review is required to help assure the constitutionality of punitive awards.

D. States Act To Control Punitive Damages

In light of the rampant nature of excessive punitive damages awards, a number of state lawmakers sought to control them.[61] Some state legislatures enacted statutes that limited the amount of exemplary awards, either by

55. *Id.* at 574-75.
56. *Gore*, 517 U.S. at 573-74.
57. *Id.*
58. *Id.* at 572.
59. *Id.* at 570-71.
60. *Id.* at 571.
61. *See, e.g.*, Leo M. Stepanian II, Comment, *The Feasibility of Full State Extraction of Punitive Damages Awards*, 32 DUQ. L. REV. 301, 302-03 (1994) (describing various statutory curbs on punitive damages awards).

creating fixed dollar limits or by limiting the ratio of punitive to total compensatory damages.[62] Some states diverted a portion of the punitive damages award to state coffers.[63] States prohibiting punitive damages decided to keep their bans in place.[64]

More than half the states increased the level of proof required to obtain punitive damages from "preponderance of the evidence" to "clear and convincing evidence."[65] A number of states chose to require bifurcated trials

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62. *See* David Baldus et al., *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV. 1109, 1121 (1995).

63. This approach is likely to have the opposite effect from curbing excessive punitive damages awards. If jurors learn that a portion of punitive awards goes to the state, they may be more likely to award punitive damages or increase the amount of an award rather than focus on the defendant's wrongful behavior toward the plaintiff. Currently, seven states have such provisions although they vary in their details. *See* ALASKA STAT. § 09.17.020(j) (Lexis 2000) ("50 percent of the award [shall] be deposited into the general fund of the state."); GA. CODE ANN. § 51-12-5.1(e)(2) (2000) (requiring 75 percent of punitive damages awards in product liability cases, less costs and fees, to be paid into the state treasury); 735 ILL. COMP. STAT. 5/2-1207 (West 2002) (giving trial court discretion to apportion punitive damages awards to the Illinois Department of Rehabilitation Services); IOWA CODE ANN. § 668A.1(2)(b) (West 2002) (paying to trust fund administered by the state the residual amount of punitive damages after payment of costs, fees, and an amount not to exceed 25% to the plaintiff); MO. ANN. STAT. § 537.675(2) (West 2002) (awarding 50% of punitive damages after fees and costs to the state); OR. REV. STAT. § 18.540(1)(b) (2001) (paying 60% of punitive damages awards to State Department of Justice); UTAH CODE ANN. § 78-18-1(3) (2001). *See also* Michelle Riley Stephens, *Punitive Damages: Making the Plaintiff Whole or Making the State Wealthy?*, 19 AM. J. TRIAL ADVOC. 699, 701 (1996) (collecting statutes). Six other states, Colorado, Indiana, New York, Florida, Kansas, and Alabama, had similar requirements which have been repealed by the legislature, or declared unconstitutional or abandoned by the judiciary. *See, e.g.*, FLA. STAT. ANN. § 768.73 (repealed in 1997); N.Y. C.P.L.R. § 8703 (expired 1994); Kirk v. Denver Publ'g Co., 818 P.2d 262, 273 (Colo. 1991) (en banc) (statute declared unconstitutional); Cheatham v. Pohle, 764 N.E.2d 272, 281 (Ind. Ct. App. 2002) (same). A Kansas statute applicable only to punitive damage awards in medical malpractice cases was declared unconstitutional on other grounds and expired in 1989. *See* KAN. STAT. ANN. § 60-3402(e); Kan. Malpractice Victims Coalition v. Bell, 757 P.2d 251, 264 (Kan. 1988). In Alabama, the state supreme court decided on its own initiative to require the sharing of punitive damages with the state in 1996. *See* Life Ins. Co. of Ga. v. Johnson, 684 So. 2d 685, 702 (Ala. 1996), *vacated*, 519 U.S. 923 (1996). One year later, following the United States Supreme Court's decision in *Gore*, the Supreme Court of Alabama reconsidered and abandoned the allocation requirement. *See* Life Ins. Co. of Ga. v. Johnson, 701 So. 2d 524, 534 (Ala. 1997).

64. All jurisdictions except Louisiana, Nebraska, Massachusetts, Michigan, and Washington State permit the award of punitive damages. New Hampshire only allows punitive damages when expressly provided for by statute. *See* N.H. REV. STAT. ANN. § 507:16 (1997). Michigan permits "exemplary damages" as compensation for "mental suffering consisting of a sense of insult, indignity, humiliation, or injury to feelings," but does not permit punitive damages for purposes of punishment. PRODUCT LIABILITY DESK REFERENCE: A FIFTY-STATE COMPENDIUM 312 (Morton F. Daller ed., 2000) (citations omitted).

65. *See* ALA. CODE § 6-11-20(a) (1993); ALASKA STAT. § 09.17.020(b) (Michie 1998); CAL. CIV. CODE § 3294(a) (Deering 1997); FLA. STAT. ANN. § 768.73(1)(b) (West 1997) (requiring higher standard for punitive damage awards exceeding three times the compensatory award); GA. CODE ANN. § 51-12-5.1(b) (1999); IOWA CODE ANN. § 668A.1 (West 1998); KAN. STAT. ANN. § 60-3701(c) (1998); KY. REV. STAT. ANN. § 411.184(2) (Lexis 1998); MINN. STAT. § 549.20(1)(a) (1998); MISS. CODE ANN. § 11-1-65(1)(a) (1998); MONT. CODE ANN.

to keep potentially prejudicial evidence relevant to punitive damages out of the liability and compensatory phase of the trial.[66]

A number of state courts introduced similar changes as well.[67] Perhaps most importantly, as a practical matter, judges at both the trial and appellate level began to use their inherent power to reduce large awards.

E. Punitive Damages Become Taxable

Congress amended federal tax law in 1989 to provide that, unlike compensatory damages, punitive damages are taxable gross income.[68] Federal

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§ 27-1-221(5) (1998); NEV. REV. STAT. ANN. § 42-005(1) (Lexis 1998); N.J. STAT. § 2A:15-5.12(a) (Lexis 2000); N.C. GEN. STAT. § 1D-15(b) (1999); N.D. CENT. CODE § 32-03.2-11.1 (2001); OHIO REV. CODE ANN. § 2307.80(A) (Anderson 2002); OKLA. STAT. tit. 23, § 9.1(B) (1998); OR. REV. STAT. § 18.537(1) (1997); S.C. CODE ANN. § 15-33-135 (Law. Co-op. Supp. 1998); S.D. CODIFIED LAWS § 21-1-4.1 (Michie 1999); TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(b) (Vernon 1999); UTAH CODE ANN. § 78-18-1(1)(a) (2001). *See also* Victor E. Schwartz & Mark A. Behrens, *Punitive Damages Reform—State Legislatures Can and Should Meet the Challenge Issued by the Supreme Court of the United States in* Haslip, 42 AM. U. L. REV., 1365, 1381 nn.98-99 (1993) (citing jurisdictions adopting heightened burden of proof).

66. *See* ALASKA STAT. § 09.17.020(a) (Lexis 2001); CAL. CIV. CODE § 3295(d) (Deering 2001); CONN. GEN. STAT. ANN. § 52-240(b) (West 2001); GA. CODE ANN. § 51-12-5.1(d) (2001); KAN. STAT. ANN. §§ 60-3701(a), -3702(a) (2001); KY. REV. STAT. ANN. § 411.186(1)-(2) (Lexis 2001); MD. CODE ANN., CTS. & JUD. PROC. § 10-913(a) (2001); MISS. CODE ANN. § 11-1-65(1)(b)-(c) (2001); MO. REV. STAT. § 510.263(1) (2001); MONT. CODE ANN. § 27-1-221(7)(a) (2001); NEV. REV. STAT. ANN. 42.005(3) (Lexis 2001); N.J. STAT. ANN. § 2A:15-5.13 (Lexis 2001); N.C. GEN. STAT. §§ 1D-25(a), -30 (2001); N.D. CENT. CODE § 32-03.2-11 (2001); OKLA. STAT. ANN. tit. 23, § 9.1(B) (West 2001); TEX. CIV. PRAC. & REM. CODE § 41.009 (Vernon 2001); VA. CODE ANN. § 8.01-374.1(B) (Lexis 2001).

67. *See, e.g.*, Gamble v. Stevenson, 406 S.E.2d 350, 353-55, 305 S.C. 104, 109-12 (1991) (adopting more detailed post-verdict review process to comply with *Haslip*); Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 900-02 (Tenn. 1992) (reforming Tennessee's system because of *Haslip* by raising burden of proof, developing review criteria, and tightening standard for assessing punitive damages). For a number of courts that unilaterally raised the burden of proof for punitive damages from a preponderance of evidence standard to a clear and convincing standard, see Linthicum v. Nationwide Life Ins. Co., 723 P.2d 675, 681 (Ariz. 1986) (in banc); Jonathan Woodner Co. v. Breeden, 665 A.2d 929, 938 (D.C. 1995); Masaki v. Gen. Motors Corp., 780 P.2d 566, 575 (Haw. 1989); Travelers Indem. Co. v. Armstrong, 442 N.E.2d 349, 363 (Ind. 1982); Tuttle v. Raymond, 494 A.2d 1353, 1363 (Me. 1985); Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633, 657 (Md. 1992); Rodriguez v. Suzuki Motor Corp., 936 S.W.2d 104, 111 (Mo. 1996) (en banc); *Hodges*, 833 S.W.2d at 901; Wangen v. Ford Motor Co., 294 N.W.2d 437, 458 (Wis. 1980). Courts also adopted a bifurcation procedure. *See, e.g.*, W.R. Grace & Co. v. Waters, 638 So. 2d 502, 506 (Fla. 1994) (allowing for bifurcated trial upon proper motion); *Hodges*, 833 S.W.2d at 901 (same); Campen v. Stone, 635 P.2d 1121, 1132 (Wyo. 1981) (same).

68. *See* Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2379 (codified at 26 U.S.C. § 104(a) (1994)). Confusion over the tax treatment of damages received in cases not involving physical injury had led to substantial litigation. *See* H.R. REP. NO. 104-586, at 43 (1996). Thus, the amendment was questioned as vague, and Congress later clarified § 104(a)(2) and added § 104(c), which excluded punitive damages from gross income in one narrow situation. *See* Small Business Job Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1838 (codified as amended in 26 U.S.C. § 104(a), (c) (2002)). Section 104(c) addressed an issue created by a quirk of Alabama state law. Under Alabama law, punitive damages are the only

appeals courts had been split as to whether punitive damages were the type of damages received "on account of personal injuries" so as to be excluded from gross income under the Internal Revenue Code.[69] Congress explained: "Punitive damages are intended to punish the wrongdoer and do not compensate the claimant for lost wages or pain and suffering. Thus, they are a windfall to the taxpayer and appropriately should be included in taxable income."[70]

However, pain and suffering damages remain untaxed. This fact can make a major difference in how much money a plaintiff actually receives. The tax-exempt status of pain and suffering damages has not gone unnoticed by plaintiffs' lawyers.

III. PAIN AND SUFFERING AWARDS LACK CONSTITUTIONAL AND LEGAL GUIDEPOSTS

Pain and suffering damages are intended to compensate the plaintiff for physical suffering and anguish. In some jurisdictions, they may encompass loss of enjoyment of life and other intangible damages. However categorized, their function is to compensate plaintiffs and not to punish defendants.[71] Whatever pain and suffering damages encompass in a given jurisdiction, the law does not

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damages available in wrongful death actions. The amendment allowed the recovery of punitive damages in such situations. *See id.*

69. Prior to the 1989 amendments, § 104 of Title 26 provided that gross income does not include "the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness." 26 U.S.C.A. § 104(a)(2) (West 1988). Appeals courts in four circuits had held that punitive damages were not received "on account" of personal injuries or sickness because Congress had intended to exclude only those damages that compensated for tort-like injuries and punitive damages were intended to deter and punish, not to compensate the plaintiff. O'Gilvie v. United States, 66 F.3d 1550, 1557 (10th Cir. 1995) (discussing cases).

70. H.R. REP. NO. 104-586, at 143.

71. *See* McDougald v. Garber, 524 N.Y.S.2d 192, 196-201 (App. Div. 1988) (discussing distinctions between damages for pain and suffering and loss of enjoyment of life). The American Law Institute has observed that pain and suffering damages reflect concerns with a variety of types of nonpecuniary loss, including:

> (1) Tangible physiological pain suffered by the victim at the time of injury and during recuperation . . . .
> (2) The anguish and terror felt in the face of impending injury or death, both before and after an accident. . . .
> (3) The immediate emotional distress and long-term loss of love and companionship resulting from the injury or death of a close family member.
> (4) Most important, the enduring loss of enjoyment of life by the accident victim who is denied the pleasures of normal personal and social activities because of his permanent physical impairment, ...

2 AM. L. INST., REPORTERS' STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 199-200 (1991).

provide an objective formula for valuing them.[72] It is difficult to assess another person's pain and suffering and then translate that into its financial equivalent.[73] In fact, "Courts have usually been content to say that pain and suffering damages should amount to 'fair compensation' or a 'reasonable amount,' without any more definite guide."[74] As a result, jurors can be improperly influenced by the presentation of "guilt evidence."[75] The amount of pain and suffering awards can, and does, fluctuate markedly.[76]

A. State Legislatures Seek to Curb Excessive Pain and Suffering Awards

During the 1980s, state legislators sought to provide some predictability in the amount awarded for pain and suffering as a way of lending stability to dropping insurance markets. Excessive losses during that decade caused insurance companies to raise premiums and cancel, or refuse to issue, policies for certain high-risk activities. This made it difficult for businesses and professionals engaged in risky activities, such as obstetric medicine, to get liability insurance. Policymakers believed that limits on noneconomic damages would render damages awards more predictable and help stabilize the insurance industry.[77] As a result, lawmakers in a number of states enacted statutory limits either directly on noneconomic damages[78] or on total damages.[79]

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72. The process for awarding pain and suffering awards has been called "procedurally simple but analytically impenetrable. The law provides no guidance, in terms of any benchmark, standard figure, or method of analysis, to aid the jury in the process of determining an appropriate award." David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. REV. 256, 265 (1989).

73. A number of courts and commentators have offered alternatives. *See, e.g.*, Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFSTRA L. REV. 763 (1995) (discussing various reform proposals).

74. DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 8.1, at 545 (1973).

75. *See, e.g.*, Randall J. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908, 913-14 (1989) ("This imprecision in the substantive law forces the jury to rely on the presentations of the parties when computing losses.").

76. STATE OF MARYLAND, REPORT OF THE GOVERNOR'S TASK FORCE TO STUDY LIABILITY INSURANCE 11 (Dec. 1985) (finding that noneconomic damages are "impossible to ascertain with precision and are subject to emotional appeals to a jury") [hereinafter MARYLAND GOVERNOR'S TASK FORCE].

77. *See, e.g.*, MARYLAND GOVERNOR'S TASK FORCE, *supra* note 76, at 10 (concluding that a $250,000 cap would "help contain awards within realistic limits"); Bovbjerg, *supra* note 75, at 924-27 (discussing problems associated with "variability" of damage awards).

78. *See* ALASKA STAT. § 9.17.010 (Michie 2001) ($1 million or person's life expectancy multiplied by $25,000); CAL. CIV. CODE § 3333.2(b) (West 2001) ($250,000 limit on noneconomic damages); COLO. REV. STAT. § 13-64-302(1) (2001) ($250,000 limit on noneconomic damages); FLA. STAT. ANN. §§ 766.207(7)(b), 766.209(4)(a) (2001) (capping noneconomic damages at $350,000 per incident if the claimant rejects voluntary binding arbitration); HAW. REV. STAT. ANN. § 663-8.7 (Lexis 2001) ($375,000 limit on damages for pain and suffering with certain classes of torts excepted); IDAHO CODE § 6-1603(1) (Lexis 2001) ($400,000 cap on noneconomic damages); KAN. STAT. ANN. § 60-1903(a) (2001) ($250,000 limit on noneconomic damages in wrongful death action); ME. REV. STAT. ANN. tit., 24-A § 4313 (2001) ($400,000); MD. CODE ANN., CTS. & JUD. PROC. § 11-108(b)(2) (2001) ($500,000 limit on

B. Plaintiffs' Lawyers and Activist Judges Undercut Statutory Curbs

These statutes quickly came under fire. Plaintiffs' lawyers in key litigation states such as Alabama, Florida, and Texas challenged statutory caps on noneconomic damages as unconstitutional. They were most successful in invalidating these statutes by challenging them under provisions of state constitutions rather than the United States Constitution.[80] State constitutions often have complex provisions that have not received much, or any, judicial attention. Consequently, a state constitutional challenge makes it easy for plaintiffs' lawyers to preclude any appeal to the United States Supreme Court.[81] Unlike some state supreme courts, the United States Supreme Court has

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nonpunitive noneconomic damages); MASS. ANN. LAWS ch. 231, § 60H (Law. Co-op. 2001) ($500,000 limit on noneconomic damages with exceptions); MICH. COMP. LAWS § 600.1483(1) (2001) ($280,000 limit on noneconomic damages with exceptions); MO. REV. STAT. § 538.210 (2001) ($350,000 cap per defendant on noneconomic damages); MONT. CODE ANN. § 25-9-411(1) (2001) ($250,000 limit on noneconomic damages in medical malpractice claim); N.D. CENT. CODE. § 32-42-02 (2001) ($500,000 limit on noneconomic damages); S.D. CODIFIED LAWS § 21-3-11 (Michie 2002) ($500,000 cap on noneconomic damages); UTAH CODE ANN. § 78-14-7.1 (2002) ($400,000 limit on nonpunitive, noneconomic damages); W. VA. CODE ANN. § 55-7B-8 (Lexis 2001) ($1,000,000 limit on noneconomic damages in medical malpractice action); WIS. STAT. § 893.55(4)(d) (2001) ($350,000 cap on noneconomic damages).

79. *See, e.g.*, IND. CODE ANN. § 34-18-14-3(a)(3) (Michie 2001) ($1,250,000 limit on total damages in malpractice action); LA. REV. STAT. ANN. § 40:1299.42B.(1) (West 2001) ($500,000 limit on total damages recoverable in medical malpractice action); TEX. REV. CIV. STAT. ANN. art. 4590i, § 11.02 (Vernon 2001) ($500,000 limit on damages in medical malpractice claim); VA. CODE ANN. § 8.01-581.15 (Michie 2001) (establishing $1,500,000 cap on total damages in medical malpractice action); N.M. STAT. ANN. § 41-5-6(A) (Michie 2001) ($600,000 limit on total damages in medical malpractice claim except for punitive damages and accrued medical expenses) (repealed 1992).

80. Courts have struck down statutes limiting noneconomic damages as unconstitutional on state law grounds in Alabama, Florida, Illinois, New Hampshire, North Dakota, Ohio, Texas, Utah, and Washington state. *See, e.g.*, Wright v. Cent. Du Page Hosp. Ass'n, 347 N.E.2d 736, 743 (Ill. 1976) ($500,000 limitation on recovery in medical malpractice actions violated state's equal protection guarantee); Brannigan v. Usitalo, 587 A.2d 1232, 1237 (N.H. 1991) (statute imposing $875,000 limitation on noneconomic damages recoverable in actions for personal injury violated state constitution's equal protection guarantee); Carson v. Maurer, 424 A.2d 825, 837 (N.H. 1980) (statute imposing $250,000 limitation on noneconomic damages recoverable in medical malpractice actions violated state constitution's equal protection guarantee); Arneson v. Olson, 270 N.W.2d 125, 136 (N.D. 1978) (statute imposing $300,000 limit on damages recoverable in medical malpractice action violated state and federal equal protection guarantees); Morris v. Savoy, 576 N.E.2d 765, 770-71 (Ohio 1991) (statute imposing $200,000 limit on "general" damages recoverable in medical malpractice action violated state due process guarantee); Condemarin v. Univ. Hosp., 775 P.2d 348, 366 (Utah 1989) (statute limiting medical malpractice liability of state hospital to $100,000 violated provisions of state constitution).

81. For a more thorough discussion of this issue, see Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 32 RUTGERS L. J. 907 (2001) [hereinafter *Judicial Nullification*]; Victor E. Schwartz et al., *Fostering Mutual Respect and Cooperation Between State Courts and State Legislatures: A Sound Alternative to a Tort Tug of War*, 103 W. VA. L. REV. 1, 5 (2000); Schwartz & Lorber, *supra* note 5, at 20-23.

historically been reluctant to overturn economic legislation that does not violate fundamental rights.[82]

Often "open courts" provisions in state constitutions are used to attack limits on noneconomic damages.[83] As a practical matter, these provisions are intended to provide citizens of a state with justice and reasonable access to the courts. However, open courts provisions have been broadly stretched by some courts that have suggested any time a legislature limits a person's rights to sue, it is violative of the open courts provision.[84]

The Alabama Supreme Court is among those courts that invalidated statutory limitations on noneconomic damages on the ground that the state statute violated the plaintiffs' right to a jury trial under the state constitution's open courts provision.[85] The court explained that "[b]ecause the statute caps the jury's verdict automatically and absolutely, the jury's function, to the extent the verdict exceeds the damages ceiling, assumes *less* than an advisory status."[86]

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82. *See, e.g.*, Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 93 (1978) (Price-Anderson Act, which preempted state tort law in order to promote the nuclear power industry, does not violate the Due Process or Equal Protection Clauses of the United States Constitution); *see also* Victor E. Schwartz et al., *Federalism and Federal Liability Reform: The United States Constitution Supports Reform*, 36 HARV. J. ON LEGIS. 269 (1999) (discussing a century of congressional enactments changing state liability law and the numerous decisions consistently holding those statutes constitutional).

83. *See, e.g.*, Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156 (Ala. 1991) (attacking statutory cap on various grounds, including state's right-of-access-to-courts provision); Smith v. Dep't of Ins., 507 So. 2d 1080, 1095 (Fla. 1987) (statute imposing a $450,000 cap on noneconomic damages recoverable in actions for personal injury violated open courts provision); Lucas v. United States, 757 S.W.2d 687, 690 (Tex. 1988) (statute limiting liability to $500,000 for damages in medical malpractice actions violated open courts provision); Sofie v. Fibreboard Corp., 771 P.2d 711, 723 (Wash. 1989) (en banc) (statute imposing a cap on noneconomic damages for personal injury at a rate of 0.43 x average annual wage and life expectancy violated right to jury trial under state constitution). Thirty-seven states have open courts provisions in their constitutions, although the effect of these provisions varies.

84. *See Judicial Nullification*, *supra* note 81, at 919 n.32 (collecting cases).

85. *Moore*, 592 So. 2d at 159 (Article 1, Section 11 of the Alabama Constitution provides: "That the right of trial by jury shall remain inviolate.").

86. *Id.* at 164. The Alabama Supreme Court further explained that the court's role in reducing jury awards was limited to those situations *only* where the verdict is so "flawed by bias, passion, prejudice, corruption, or improper motive" as to lose its constitutional protection. *Id.* at 171. The court also noted that the plaintiff had not raised a federal constitutional issue and that its "analysis and conclusions regarding the constitutionality of [the statute]" were "based entirely on adequate and independent state law grounds." *Id.* at 158.

Other state courts rejected these arguments.[87] For example, the Indiana Supreme Court refused to find that a statutory limit on noneconomic damages in medical malpractice cases violated the open courts provision of the Indiana Constitution.[88] The Indiana court said:

> [T]here is no indication in the cases relied upon by appellants that the right to have a jury assess the damages in a case properly tried by jury constitutes a limitation upon the authority of the Legislature to set limits upon damages. The Legislature may terminate an entire valid and provable claim through a statute of limitation. It may validly cause the loss of the right to trial by jury through failure to comply with the requirement to assert the right by procedural rule. It is the policy of this Act that recoveries be limited to $500,000, and to this extent the right to have the jury assess the damages is available. No more is required . . . .[89]

Statutory limits on noneconomic damages remain in several states. But for the most part, in the overwhelming majority of states, juries awarding noneconomic damages awards are subject to few constraints on their discretion—either substantively or procedurally. The legal standards for assessing pain and suffering damages are imprecise. Evidence of pain and suffering plays on jurors' emotions, not their sense of logic. Because jurors' judgment on these issues is believed to represent the very sense of the community that justifies the jury system in the first place, trial judges are hesitant to reduce the amounts of pain and suffering awards post-trial. Of equal importance is the fact that the traditionally subjective nature of these damages makes them difficult to consider on appellate review. Finally, no constitutional guideposts help assess whether the awards are excessive.

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87. *See, e.g.*, Fein v. Permanente Med. Group, 695 P.2d 665, 686 (Cal. 1985) (holding statute limiting recovery for noneconomic loss to $250,000 in action for medical malpractice did not violate equal protection or due process guarantees), *appeal dismissed*, 474 U.S. 892 (1985); Johnson v. Saint Vincent Hosp., Inc., 404 N.E.2d 585, 599 (Ind. 1980) (statute limiting medical malpractice liability to $500,000 did not violate right-to-remedy, jury trial, equal protection, or due process provisions of state constitution); Samsel v. Wheeler Transp. Servs., Inc., 789 P.2d 541, 557-58 (Kan. 1990) ($250,000 limitation on recovery for noneconomic loss due to personal injury did not violate right-to-remedy or jury trial provisions of state constitution where legislature had provided sufficient quid pro quo); Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525, 527-34 (Va. 1989) (statute limiting total recovery against a health care provider to $750,000 did not violate right to jury trial, due process, or equal protection; nor did it violate the separation of powers provision or special legislation prohibitions).

88. *Johnson*, 404 N.E.2d at 599.

89. *Id.* at 602.

IV. PAIN AND SUFFERING AWARDS ARE ON THE RISE

Recently, pain and suffering awards and other noneconomic damages in asbestos, pharmaceutical, and other personal injury cases have been increasing. They have reached hundred-million dollar levels. Consider the following examples:

- In April 2001, a Los Angeles jury awarded $55.32 million to a driver and passenger in a tire separation case—including $49.85 million in compensatory damages to the driver.[90] Of that amount, $41 million of the damages awarded the driver was for noneconomic damages.[91] No punitive damages were awarded.

  The plaintiffs, who claimed the tire material was contaminated during manufacturing, introduced what amounted to "guilt evidence" of "intense production pressures" on workers.[92] These witnesses "said it was not unusual for floor sweepings and other contaminants to be dumped in the rubber mix."[93] The plaintiffs also introduced a 1993 memo by a plant operations manager stating: "'We are out of control . . . and as you can see, it is not one particular defect, but a conglomeration from every department.'"[94] Plaintiffs' counsel said the trial "'exposed the fact that [the defendants] had a manufacturing process that put profits ahead of safety.'"[95] The defense, which had sought to exclude this inflammatory "guilt" evidence, denied any defects and asserted that any contamination could not have caused or initiated the separation.[96]
- In February 2002, a New York jury awarded the family of a deceased brake mechanic $53 million in compensatory damages, including $17 million for pain and suffering, for asbestos-related injuries.[97] The mechanic had sued forty-eight friction product companies alleging they were negligent in exposing him to asbestos through brake linings he used at work.[98]

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90. *See Tire Separation Case Comes in at $55 Million*, NAT'L. L.J., Feb. 4, 2002, at C21, C23 (discussing Lampe v. Cont'l Gen. Tire, Inc., No. BC 173567, slip op. at 6 (L.A. Super. Ct. Apr. 20, 2001)).

91. 34 TRIALS DIG. 4th 12, 2001 WL 1005976 (T.D. Cal. Jury) (discussing *Lampe*).

92. Myron Levin, *Tire Firm Ordered to Pay $55 Million for Vehicle Crash*, L.A. TIMES, Apr. 14, 2001, at A11.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* (The case ultimately settled for a confidential amount.).

97. Brown v. Berdex, No. 120595/00, 2002 WL 481102, at *1 (N.Y. Sup. Ct. Feb. 8, 2002) (N.Y. J.V. Rep.)

98. *Id.*

- In November 2001, a plaintiff in a medical malpractice action was awarded $115 million—$100 million of that for pain and suffering.[99] The pain and suffering award was ten times greater than that which the plaintiffs' attorney requested. The plaintiff was eight months pregnant when she smoked crack cocaine, developed breathing problems, and was taken to the emergency room.[100]
- In October 2001, a Mississippi jury awarded $150 million in compensatory damages to six plaintiffs who alleged they were merely exposed to asbestos but had no actual injuries—$25 million each.[101]
- In September 2001, another Mississippi jury awarded $100 million in compensatory damages to ten plaintiffs in a lawsuit against the makers of the heartburn drug Propulsid.[102] No individual plaintiff's actual out-of-pocket damages exceeded $700.

V. CASE STUDY: THE PROPULSID VERDICT

The $100 million verdict rendered by the Mississippi jury in the Propulsid case provides a striking example of how the use of inflammatory "guilt evidence" and calculated closing arguments can spike pain and suffering awards.[103] The trial addressed claims of the first 10 of 155 Mississippi residents who said they experienced heart problems, respiratory ailments, and anxiety after taking Propulsid. The drug was withdrawn from general use in July 2000 but is still used under closely monitored circumstances.

The plaintiffs claimed that defendants Janssen and Johnson & Johnson continued to aggressively market the drug despite mounting reports of adverse reactions among those who used it and efforts by the federal government to remove it from the market. The defendants argued that Propulsid was safe when used as directed, and they had notified the government when they discovered potential problems.

Although state law required the trial to be bifurcated for separate consideration of punitive damages,[104] the plaintiffs introduced evidence during

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99. *See* Sylvia Hsich, *Jury Orders Hospital and Doctors To Pay $115 Million*, LAW. WKLY, Jan. 7, 2002, at B15 (discussing Evans v. St. Mary's Hosp. of Brooklyn, No. 4038/91, slip op. at 1 (N.Y. Co. Super. Ct. (Nov. 9, 2001))).

100. *Id.*

101. *See Miss. Jury Returns $150M Verdict Against AC&S, Dresser Industries, 3M Corp.*, 16 MEALEY'S LITIG. REP.: ASBESTOS, Nov. 9, 2001, at 4.

102. *See Nation's First Rezulin Trial Ends in Settlement*, 6 MEALEY'S EMERGING DRUGS AND DEVICES, Nov. 15, 2001, at 19 (discussing Rankin v. Janssen Pharmaceutica, Inc., No. 2000-20 (Miss. Cir. Ct., Jefferson County, Sept. 29, 2001). *See infra* notes 102-20 and accompanying text. The trial court ultimately reduced the award to $48.5 million, and the defendants are appealing. *See J&J Files Appeal Notice of $48.5 Million Mississippi Propulsid Verdict*, 9 ANDREWS MED. DEVICES LITIG. REP., Jul. 12, 2002, at 13.

103. *See* Rankin v. Janssen Pharmaceutica, Inc., No. 2000-20 (Miss. Cir. Ct., Jefferson County, Sept. 29, 2001).

104. *See* MISS. CODE ANN. § 11-1-65 (2002).

the liability phase that clearly sought to target the defendants' supposed "bad acts." Such evidence included the following:

- Evidence that even after several label changes to strengthen warnings for the drug, a Janssen official urged salespeople to "[c]ontinue to sell the hell out of Propulsid" and promote it for conditions for which the drug was not approved.[105] The defendants argued the comment was in a draft that was never distributed.[106]
- An internal Janssen document, "Propulsid, Lessons Learned," written after the drug was withdrawn, stating that "[i]t is of critical importance that we manage the FDA. Moreover, we have learned that you can proactively manage the FDA (e.g., FDA talk paper timing and content)."[107]
- A document that allegedly suggested the company attempted to manipulate the FDA, stating a company official "has been asked by U.S. Upper Management . . . to outline a preemptive strategy to preclude the presentation of cisapride at an [FDA] Advisory Committee meeting . . . . [T]he agenda of the Advisory Committee is public. Once known, this will appear in publications as the Pink Sheet, Scrip and on the FDA-website."[108]

In addition to using this evidence at trial, plaintiffs' counsel, Edward Blackmon, Jr., stressed the defendants' "guilt" in closing argument.[109] Blackmon also referred to the Bible passage where Jesus threw out money changers whose greed defiled the temple, and, thus, "made Jesus mad."[110] Blackmon stated if today Jesus "walked up to that temple, you know what would be at the top of that temple? It would be Janssen and Johnson & Johnson at the top of that temple when he walked in . . . . They still in there[sic] . . . . They in the temple[sic], and they asking you to let them keep it."[111]

Blackmon argued that the defendants were really seeking to avoid lawsuits when they set up the Propulsid limited access program allowing some patients to obtain the drug under controlled circumstances. "[W]hen the noose closed in on them when the FDA was saying put up or shut up, they went in and plea bargained," he said.[112]

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105. *See Johnson & Johnson Seeks Relief From $100 Million Verdict*, 6 MEALEY'S EMERGING DRUGS & DEVICES, Nov. 1, 2001, at 17.

106. *Id.*

107. Deposition Exhibit 154, *Rankin* (No. 2000-020).

108. Deposition Exhibit 119, *Rankin* (No. 2000-020).

109. Summation Argument by the Plaintiff, *Rankin* (No. 2000-020).

110. *Id.*

111. *Id.*

112. *Id.*

> Back in April of 2000, they went into the FDA and said, look, we are guilty, and mercy be for us[sic] . . . . If you take it off the market, there will be people in Claiborne County that will use that against us because we know we have been doing wrong and we don't want them to—we don't want to stand up and have to surrender to them."[113] Give us something to fight with. Don't take it off the market. We'll stop selling it . . . and then we can come into [c]ourt and say—when they say 'pulled from the market,' we can say, 'no, not pulled from the market. No, you are wrong. It's a limited access program.'[114]

Plaintiffs' counsel's emphasis on the need to send a message to the defendants' bosses up north regarding their guilty conduct almost certainly inflamed and influenced the jury to award extraordinarily high pain and suffering damages. After a month-long trial, jurors took only about three hours to reach their verdict. They awarded the same amount of compensatory damages ($10 million) for each plaintiff, even though the plaintiffs' complaints, medical expenses, pre-existing medical conditions, exposures, and expected life spans were vastly different.

Plaintiffs Robert Bailey and Macy Beth Johnston, for example, each received $10 million.[115] Mr. Bailey was seventy-nine years old and had been on disability since the 1960s. Macy Beth was four years old and, "according to her treating physicians," had no cardiac damage.[116] The plaintiff whose verdict was read first, Mary Williams, had only $535 in medical bills, yet she received $10 million in compensatory damages—more than $18 thousand for every $1 of medicals.[117]

The day after the jury's 10-2 verdict, the trial court conducted a hearing and decided not to have the jury consider punitive damages, because the judge did not believe the defendants acted maliciously. Instead, the court entered final judgment for the plaintiffs. The case is currently on appeal. Although the judge reduced the award to $48.5 million, the ratio of pain and suffering to actual economic damages is equal to or more than $4,500 per $1 of medical expenses for Ms. Williams, whose $10 million award was reduced to $2.5

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113. *Id.*

114. *Id.*

115. Defendants' Motion for Relief from Judgment at 10, *Rankin* (No. 2000-020). The trial court reduced Ms. Johnston's award to $7.5 million.

116. *Id.*

117. *Id.* at 2. The trial court reduced Ms. Williams' award to $2.5 million—nearly $4,700 for each $1 in actual damages. Rankin v. Janssen Pharmaceutica, Inc., No. 2000-20, slip op. at 3 (Miss. Cir. Ct. Mar. 28, 2002) (order granting remittitur).

million.[118] Mr. Bailey, who introduced *no* evidence of medical expenses, also received an adjusted award of $2.5 million.[119]

VI. RETURNING PAIN AND SUFFERING DAMAGES TO THEIR INTENDED PURPOSE

Pain and suffering damages are intended to compensate the plaintiff for past and future pain and suffering and anguish. They should not be twisted into a covert punitive damages substitute and provide the next oil well for "jackpot justice."

A number of steps can be taken to prevent noneconomic damages, unlike punitive damages, from "run[ning] wild" in the United States.[120]

A. Judges Must Act as Gatekeepers

Judges should act as gatekeepers to ensure that evidence presented in the compensatory phase of a trial is truly relevant to proof of the claim. Evidence of purported corporate wrongdoing is not relevant to establish the appropriate amount of compensation for past and future pain and suffering, particularly in medical malpractice, products liability, and premises liability actions. That evidence is not only irrelevant—it is prejudicial. While evidence of wrongdoing may be relevant to establish liability, it should not be used in closing argument to inflate noneconomic damages.

B. Jurors Must Be Properly Instructed

The difficulty in placing a value on pain and suffering does *not* mean jurors should receive no guidance from the court. To make sure pain and suffering awards return to their fundamental compensatory nature, jurors should receive clear, unequivocal instructions about the purpose of pain and suffering damages.

A lesson can be taken from the United States Supreme Court's ruling in *Haslip*. In *Haslip*, the Court ruled that proper guidance from the trial court can place "reasonable constraints" on *punitive* damages sufficient to help assure that procedural due process requirements are satisfied.[121] Proper guidance includes instructions from the trial court regarding the policy purposes punitive damages intend to serve.[122] Proper guidance also includes jury instructions about how to consider the evidence of the character and degree of wrongdoing alleged.[123]

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118. *Id.*; *see also* Transcript of Proceedings at 28-29, *Rankin* (No. 2000-20).

119. Transcript of Proceedings at 29, *Rankin* (No. 2000-020).

120. *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991); discussion *supra* notes 27-38 and accompanying text.

121. *Haslip*, 499 U.S. at 18-20.

122. *Id.* at 19.

123. *Id.*

To ensure they do not inflate noneconomic damages, jurors asked to assess pain and suffering awards should be similarly instructed about the purposes of pain and suffering awards.[124] Jurors should be instructed that the law requires them to consider only what is necessary to compensate the plaintiff for his or her pain and suffering. Jurors should be told they are *not* to consider any alleged "guilt" or "misconduct" of the defendant when setting noneconomic damages. Jurors should also be told that they must look at the specific plaintiff's situation and not base an award on what they themselves would "take" in a similar situation.[125] These instructions should accompany a description of the elements of pain and suffering damages under applicable state law.

Juries respect the leadership provided by the court. Jury instructions that properly reflect the purpose of pain and suffering damages can therefore be relied on by counsel for all parties during closing arguments.

C. *State Legislatures Can Restore the Fundamental Nature of Pain and Suffering Damages*

If a particular state court refuses to follow these fundamental rules of tort law, state legislatures should act to ensure the protection of litigants' rights. The substance of such legislation may differ from state to state, depending on each state's constitutional provisions and legal principles. Legislators should consider enacting legislation that bars consideration of "guilt" evidence when awarding pain and suffering damages.[126] They should also consider requiring trial courts to perform closer reviews of pain and suffering awards during the post-trial phase and to set forth their reasoning in writing when they uphold an award that is challenged as "excessive."[127] Legislators may also wish to consider whether to require de novo review of pain and suffering awards on appeal.[128] The viability of the final approach will likely turn on the interpretation given to that state constitution's "open courts" provision. This approach may not succeed where activist judges already have refused to uphold statutory limits on noneconomic damages.

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124. A model jury instruction about the purpose of pain and suffering damages is attached as Appendix A.

125. As one commentator wrote, "[T]here is no market in pain." Bovbjerg, *supra* note 75, at 913.

126. *See* model legislation at Appendix B.

127. *See* model legislation at Appendix C.

128. *See* model legislation at Appendix D.

VII. CONCLUSION

Punitive damages "run wild" have discouraged innovation, forced companies concerned about "bet the company lawsuits" to pull beneficial products off the market, and fostered a cottage industry of contingency-fee plaintiffs' lawyers looking for the next deep pocket. Legislators and judges should be applauded for their efforts to curb excessive punitive awards. Now, the spotlight should focus on unfair and outrageous pain and suffering awards to prevent those awards from having similar consequences. The trend of using pain and suffering damages to "punish" can be stopped in its tracks if judges do the job they have taken an oath to do.

APPENDIX A

MODEL JURY INSTRUCTION: DAMAGES FOR PAIN AND SUFFERING—PURPOSE

Pain and suffering damages are intended to reasonably compensate the plaintiff for past pain and suffering and for pain and suffering reasonably likely to occur in the future.

When fixing the amount of pain and suffering damages, you are seeking to compensate this plaintiff for the pain and suffering this plaintiff has experienced or is reasonably likely to experience. You may not consider what amount would be reasonably necessary to compensate yourself for comparable pain and suffering.

Pain and suffering damages are not to be awarded to punish the defendant or to deter future activity by the defendant. In fixing these damages, you may not consider any evidence of the defendant's alleged guilt or wrongdoing.

APPENDIX B

MODEL ACT REGARDING APPROPRIATE EVIDENCE OF PAIN AND SUFFERING DAMAGES

Evidence of a defendant's alleged wrongdoing or misconduct shall not be admissible for the purpose of fixing the amount of pain and suffering damages.

EXPLANATION: Few constitutional or legal guideposts exist for fixing the amount of pain and suffering damages. As a result, jurors may be excessively influenced by the presentations of the parties at trial. Pain and suffering damages are intended to reasonably compensate the plaintiff for his past [and future] physical [and mental] pain and suffering caused by the defendant. They are not intended as punishment for the defendant or to deter future misconduct. To ensure that pain and suffering awards are used as intended, evidence of a defendant's guilt or misconduct should not be admissible for use in the calculation of pain and suffering damages.

APPENDIX C

MODEL ACT REGARDING POST-JUDGMENT REVIEW OF PAIN AND SUFFERING DAMAGES

1. Upon post-judgment motion, a trial court shall perform a rigorous analysis of the evidence supporting a noneconomic damages awards challenged as excessive.
2. A trial court upholding a noneconomic damages award challenged as excessive shall set forth in writing its reasons for upholding the award.

EXPLANATION: Pain and suffering damages are intended to reasonably compensate the plaintiff for his past [and future] physical [and mental] pain and suffering caused by the defendant. However, few constitutional or legal guideposts exist for fixing the amount of pain and suffering damages. As a result, jurors may be improperly influenced by bias, passion, prejudice, or may inappropriately consider evidence of the defendant's alleged misconduct or guilt. To help assure that pain and suffering awards serve their fundamental compensatory purpose, the trial court should be empowered to perform a meaningful review of noneconomic damages awards. The rationale for upholding a noneconomic damages award challenged as excessive should be reduced to writing in order to facilitate appellate review of the decision.

APPENDIX D

MODEL ACT REGARDING STANDARD OF REVIEW ON APPEAL OF PAIN AND SUFFERING DAMAGES

A reviewing court shall use a de novo standard of review when considering an appeal of a noneconomic damages award on the ground of excessiveness.

EXPLANATION: Pain and suffering damages are intended to reasonably compensate the plaintiff for his past [and future] physical [and mental] pain and suffering caused by the defendant. However, few constitutional or legal guideposts exist for fixing the amount of pain and suffering damages. As a result, jurors may be improperly influenced by bias, passion, prejudice, or may inappropriately consider evidence of the defendant's alleged misconduct or guilt. To help assure that pain and suffering awards serve their fundamental compensatory purpose, and to help develop legal guideposts for the award of such damages, the reviewing court should be empowered to perform a meaningful review of noneconomic damages awards on appeal.