PUNITIVE DAMAGES


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Proposals for Reform
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I -- Introduction

Over the last two decades, punitive damage awards in the United States have come under increasing public scrutiny. Advocates of tort reform contend that the magnitude and prevalence of punitive damage awards are unreasonably high and will remain so absent punitive damage caps. Opponents of tort reform argue, on the other hand, that many of the purported flaws related to state systems of assessing punitive damages that do not impose caps on punitive damage awards are exaggerated and that the existing rules and practices in these systems achieve appropriate results. Despite the fact that a number of claims made by tort reform advocates are indeed false, there are indeed significant problems related to current state systems of assessing punitive damage awards. However, there are reasonable reforms that, if undertaken by the states, would be likely to effectively resolve a number of these problems. For this reason, it seems that such reforms of current state systems of assessing punitive damage awards are called for. In this report, I will demonstrate the problems with current methods of assessing punitive damages and examine promising reforms for improving various state procedures and rules for awarding punitive damages.

In this report, I will define and examine several issues related to state laws and practices in connection with the assessment of punitive damage awards. I will then proceed to evaluate the benefits and drawbacks of current state systems of assessing punitive damage awards. After demonstrating the detriments of various rules and procedures in current state systems of assessing punitive damage awards, I will present meaningful reforms that can and should be undertaken by states to rectify the problems
associated with the current state systems. I will then undertake an examination of the
benefits and drawbacks that are likely to result from the adoption of these reforms.

It should be noted that this report will undertake no evaluation of the problems
and potential reforms to systems of awarding punitive damages as they relate to claims of
medical malpractice. From a preliminary examination of the issue of punitive damages in
claims of malpractice, I concluded that there are such unique considerations involved in
cases of malpractice that the issue of punitive damages in such cases would merit its own
report. Additionally, this report will not undertake an examination of the problems
associated with punitive damage awards in class action cases for similar reasons.
II – Legal Concepts Related to Punitive Damages

Definition and Purposes of Punitive Damages

According to David G. Owen, punitive or exemplary damages are monetary damages that are awarded to a plaintiff in a private civil action and are assessed against a defendant who is found to be guilty of flagrantly violating the plaintiff’s rights.¹ Punitive damages are distinct from compensatory damages and can only be awarded after a jury has determined that a defendant is liable for a plaintiff’s injuries and has set an appropriate compensatory award.² Punitive damages are awarded to a plaintiff, and assessed against a defendant, in addition to and apart from compensatory damages. Punitive damages can only be awarded in instances where the harm done to the plaintiff was “the foreseeable and probable effect’ of the defendant’s behavior.”³ Punitive damages are only awarded in cases where the defendant’s conduct is found to be of a sufficiently egregious nature and punitive damages are viewed, at least in theory, as an extraordinary remedy.⁴

The assessment of punitive damages can serve five objectives which are often interrelated. These objectives include punishment, deterrence, compensation, education, and policing. The objectives of punishment and deterrence are generally viewed as the primary purposes of punitive damages. The punishment objective is often viewed as being of a quasi-criminal nature and involves causing an offender to suffer for the offense he has committed.⁵ Stephen Salbu explains that this function “is predicated upon a sense of balance, justice and desert.”⁶ The punishment objective of punitive damages requires that truly reprehensible conduct be punished more severely than less reprehensible conduct. The reprehensibility of a wrongful act or course of action is related to the
wrongdoer’s state of mind in engaging in the act, the duration of the wrongdoing, the number of people put at risk by the wrongful conduct, and, in the case of a corporation, the degree of involvement of high level officials in the wrongful act or course of action.

The other principal objective of punitive damages, deterrence, involves making offenders less likely to repeat their offenses after being punished and, most particularly, discouraging similar future offensive behavior by the same wrongdoer or others. For deterrence to function, a potential wrongdoer must be aware that if he performs a certain type of wrongful behavior, he is subject to legally imposed sanctions. Proponents of deterrence theory in criminal law hold that deterrence functions best when punishment is swift, severe, and certain, and when the consequences of misbehavior are therefore clearly visible to potential wrongdoers. It seems likely that the deterrent objective of punitive damages would best be served when, similarly to criminal penalties, the damages are clearly linked and proportionate to the harm committed.

In addition to the objectives of punishment and deterrence, punitive damages are often said to serve a compensatory function. A number of authorities claim that an important function of punitive damages is to compensate a plaintiff for losses that are not ordinarily recoverable as compensatory damages. This may include compensation for attorney’s fees or compensation related to the stresses associated with litigation. The importance attached to the compensatory function of punitive damages has declined significantly over the last few decades. In fact, in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc*, the Supreme Court held that “as the types of compensatory damages available to plaintiffs have broadened… the theory behind punitive damages has shifted towards a more purely punitive understanding.” However, despite this shift, some
states, such as Connecticut, do place significant emphasis on the compensatory function of punitive damages.

Another important function that punitive damages serve is education, which is closely related to deterrence. Punitive damages serve an educational function by notifying the public of the existence of a judicially protected right and the consequences that result from egregious breaches of society’s rules.\textsuperscript{xii} Punitive damages also serve an educational function by notifying the public of potential dangers such as bad doctors and faulty products.\textsuperscript{xiii} Of course, the efficacy of the educational function of punitive damages is related to the degree to which the public is made aware of cases in which punitive damage awards are assessed.

The last notable function of assessing punitive damage awards, which is often analogized to public law enforcement, is to encourage individuals and their attorneys to bring lawsuits against wrongdoers in situations where the wrongdoers’ behavior is of an egregious nature. While the law enforcement function of punitive damage awards is closely intertwined with each of the other aforementioned functions, its relationship to deterrence is of particular importance. Since many significant wrongdoings are beyond the reach of the criminal law and public prosecutors, the impetus that punitive damage awards give to a victim to pursue a lawsuit against the person who wronged him benefits society as a whole by ensuring that such wrongful actions can be more effectively deterred. As observed earlier, the efficacy of deterrence is related to the notoriety and certainty of punishment. Owen explains that to the extent that potential wrongdoers who are acting rationally perceive an increase in the likelihood that they will be punished and the related diminution of the profitability of their potential wrongdoing, violations of the
substantive rules of law should be more effectively deterred. Thus, the law enforcement function of punitive damages is integrally related to the function of deterrence.

*Conduct Required For Awarding Punitive Damages*

Having discussed the definition of punitive damages and the purposes that punitive damage awards serve, it is now appropriate to consider what constitutes egregious conduct on the part of a defendant that may render him susceptible to a claim for punitive damages. Some states, such as Mississippi, require only a showing of gross negligence for punitive damages to be assessed. For a finding of gross negligence to be merited, the injured party must prove that the defendant was unusually careless in his disregard for the possible injurious consequences which could result from his conduct. Black’s Law Dictionary holds that ordinary and gross negligence differ in degree of inattention while both differ from intentional conduct “which is or ought to be known to have a tendency to injure.” However, it should be noted that in some states gross negligence is defined in such a manner that it is virtually indistinguishable from reckless conduct.

Most states, on the other hand, require proof of conduct that is more egregious than gross negligence in order for punitive damages to be awarded. The minimum levels of culpability required for assessments of punitive damages in these states generally include willful indifference, wanton conduct, or reckless conduct. According to *Punitive Damages: How Juries Decide*, a finding of recklessness requires that four factors be present. The defendant must be conscious of a particular risk or danger, and
this danger must be the foreseeable and probable effect of the defendant’s behavior. The particular risk or danger must have been eventuated. The defendant must have disregarded the risk in deciding how to act. The defendant’s decision to ignore the danger or risk must have constituted a gross deviation from the level of care an ordinary person would use.\textsuperscript{xix} The definition of wanton misconduct in Black’s Law Dictionary is essentially equivalent to that of recklessness, as is the definition of willful indifference to the rights of others.\textsuperscript{xx} It will be noted that a finding of recklessness generally requires a higher degree of awareness than is normally associated with negligence, even gross negligence.

A number of states require that the defendant’s conduct be characterized as malicious in order for an award of punitive damages to be considered. A finding of malice requires that the defendant be shown to have acted with the intention of harming the injured party.\textsuperscript{xxi}

In other states, the conduct required for a punitive damage award to be merited is established by statutes. In these states, the various statutes will specify a situation or situations for which a punitive damage award would be merited and the conduct requirement applicable to that situation. Most states in this category specify different conduct requirements for different types of torts.\textsuperscript{xxii}

\textit{Burden of Proof}

In addition to having different standards of conduct required for a punitive damage award to be assessed, states requirements concerning the burden of proof that a plaintiff must meet in order for punitive damages to be assessed also vary. Most states
that allow for the assessment of punitive damage awards employ a “preponderance of the evidence” standard or a “clear, satisfactory, and convincing proof” standard. In order for a claim to meet the “preponderance of the evidence” standard, the plaintiff must demonstrate that the fact which he seeks to prove is more probable than not. For a claim to meet the “clear, satisfactory, and convincing proof” standard, the plaintiff must demonstrate that the truth of the facts he seeks to prove is highly probable. The “clear, satisfactory, and convincing proof standard” falls between the less demanding “preponderance of the evidence” standard and the more demanding “proof beyond a reasonable doubt” standard that is used in criminal trials.

**Split-Recovery Statutes**

In addition to the variation in the burden of proof requirements employed by different states with respect to punitive damage claims, there is also variation among the states with regard to the amount of a punitive damage award that a plaintiff may collect. Some states have recently enacted legislation that allocates a specific portion of a punitive damage award to the state instead of allowing the injured party to receive the entire punitive damage award. This type of legislation has generally been motivated by criticism of the current system and the so-called windfall that plaintiffs receive from punitive damage awards after having, in theory, been fully compensated for their losses through a compensatory damage award. According to Robbennolt, the portion of a punitive damage award that is allocated to the state is generally deposited in either a state general revenue fund or a specific fund, such as a fund to compensate tort victims.
Vicarious Liability

State laws governing punitive damage awards also differ with regard to the circumstances in which punitive damages can be imposed on a defendant in cases involving vicarious liability. Black’s Law Dictionary defines vicarious liability as “the imposition of liability on one person for the actionable conduct of another, based solely on the relationship between the two persons” and “indirect or imputed legal responsibility for acts of another.”

Some states allow the imposition of vicarious liability for punitive damages on a principal for the acts of his agent as long as the agent is acting “within the scope of his employment.” In some jurisdictions following this rule, it is possible that it may only be applied when the principal is a corporation rather than a private individual.

However, the majority of the states that allow for imposition of vicarious liability for punitive damages on a principal for the acts of his agent, require more than that the agent was acting in the scope of his employment for liability to be imposed on the principal. A large group of these states have adopted the following provisions in the Restatement (Second) of Torts with respect to vicarious liability for punitive damages.

According to the Restatement (Second) of Torts, punitive damages should only be assessed a principal for the actions of an agent if “the principal authorized the manner and doing of the act, or the agent was unfit and the principal was reckless in employing him, or the agent was employed in a managerial capacity and was acting in the scope of his employment, or the principal or managerial agent of the principal ratified or approved the act.”
Insurability of Punitive Damages

An additional aspect of variation in state laws regarding punitive damage awards involves the insurability of punitive damage awards. According to *Punitive Damages: A State-By-State Guide to Law and Practice*, the issue of whether punitive damage awards are insurable in a particular jurisdiction generally depends on the importance of various public policy considerations that bear significant relation to punitive damage awards. The three principal considerations that bear on the question of the insurability of punitive damage awards are the economic impact of insuring such awards, the impact that insurance has on the deterrence purpose of punitive damages, and the danger that insurance coverage will defeat the object of punitive damages to punish wrongful conduct. With respect to insurance, states make distinctions between directly assessed punitive damages and vicariously assessed punitive damages. Some states allow insurance coverage for both directly assessed punitive damages and vicariously assessed punitive damages, others prohibit insurance coverage for both, still other states prohibit insurance coverage for directly assessed punitive damages but permit insurance coverage of vicariously assessed punitive damages.

I will now turn to a consideration of trial and appellate procedures associated with punitive damage cases as well as Constitutional limitations on the imposition of punitive damage awards.
III – Procedural Aspects of Punitive Damages Proceedings

Constitutional Limitations on Punitive Damage Awards

In recent decades the constitutionality of punitive damage awards has been successfully challenged on First and Fourteenth Amendment grounds. In Gertz v. Robert Welch, Inc. (1974), the United States Court of Appeals for the Seventh Circuit recognized First Amendment limitations on the assessment of punitive damage awards. The Court held that punitive damages could not be assessed against publishers or broadcasters in either state or federal courts for claims of defamation in which the defendant’s conduct was less egregious than malice. \( \text{xxxvi} \) The Court explained that allowing punitive damages to be assessed against publishers and broadcasters in defamation cases where the conduct of the defendant was less egregious than actual malice would “unnecessarily exacerbate the dangers of media self-censorship.” \( \text{xxxvii} \)

In addition to the First Amendment limits on punitive damages recognized in Gertz by the Seventh Circuit Court, the Supreme Court has affirmed Fourteenth Amendment challenges to punitive damage awards. In Pacific Mutual Life v. Haslip (1991), the Supreme Court first recognized that punitive damage awards could be held to have been assessed in violation of the requirement of due process, though the Court held that the award in Haslip did not violate the requirements of due process. \( \text{xxxviii} \) In the Haslip decision, the Court implied that the failure to provide acceptable review processes and safeguards to constrain jury discretion in assessing punitive damage awards would be particularly likely to expose such awards to due process attack. \( \text{xxxix} \)

Judge’s Instructions Regarding Punitive Damages
Priest holds that the instruction on punitive damages that the judge gives to the jury is often the only meaningful explanation the jury will receive with respect to punitive damages.\textsuperscript{xl} After instructing the jury on compensatory damages, the judge provides the jury with oral instructions concerning punitive damages.\textsuperscript{xli} In some jurisdictions, such as Wyoming, the jury is provided with a written copy of these instructions; however, in a number of jurisdictions, such a practice is not followed.\textsuperscript{xlii}

Typical punitive damage instructions will state the types of conduct for which a punitive damage award can appropriately be assessed, provide definitions of such conduct, state that the harm to the plaintiff must have been the foreseeable and probable effect of the defendant’s behavior in order for punitive damages to be merited, include an explanation of the burden of proof, and state that punitive damages serve the purposes of punishment and deterrence.\textsuperscript{xliii} Priest explains that the jury is also often given a suggestion of the connection between reckless behavior and punitive damages.\textsuperscript{xliv}

In \textit{State Farm Mutual Automobile Insurance Company v. Curtis B. Campbell and Inez Preece Campbell}, the Supreme Court required that instructions given to the jury concerning punitive damages include an explanation of relevant constitutional restraints on punitive damage awards.\textsuperscript{xlv} The Court held that, at minimum juries, must be instructed on certain constitutional rules relating to the assessment of punitive damage awards and that due process requires that juries’ discretion to award punitive damages be confined to considerations of deterrence and punishment which are the state policy considerations that are sought to be advanced by such awards. The Court held that juries must be instructed that a defendant in a case tried by a State Court cannot be punished for misbehavior outside the trial court’s jurisdiction and that juries must be instructed that
punitive damage awards are to be confined to the interests of citizens in their state. The Court further stated that juries should be advised that punitive damages are to be assessed in proportion to the gravity of the alleged transgression rather than the defendant’s wealth. In this connection, the instructions to the jury should discuss the proper role, if any, that a defendant’s wealth can play in determinations of punitive damage awards.\textsuperscript{xlv}

In addition to these minimum requirements, standard jury instructions in some states also provide jurors with additional guidance concerning other factors jurors should consider in assessing punitive damage awards. For instance, standard jury instructions in Minnesota specify various factors that jurors are to consider in their assessment of the amount of a punitive damage award including the profitability of misconduct to the defendant and the duration of such misconduct.\textsuperscript{xlvi}

\textit{Tort Reform and the Jury Selection Process}

With the exceptions of Kansas and Connecticut, punitive damage awards are assessed by juries in all the states that allow such damages to be assessed against a defendant. According to Sunstein, jurors that are selected to hear cases involving punitive damage awards often have a minimal understanding of punitive damages and their function.\textsuperscript{xlvii} Sunstein explains that, in recent years, many courts have allowed attorneys to ask potential jurors general public policy questions concerning the civil litigation system, such as “Do you favor tort reform?” or “Are you in favor of limitations on punitive damages.”\textsuperscript{xlix} However, it should be noted that what Sunstein means by “many courts” is open to question and it is possible that a number of states do not allow such questioning. Sunstein states that a juror who demonstrates a developed view on the
issue of punitive damages and tort reform is likely to be dismissed by the one side that disagrees with his views. Furthermore, if a prospective juror has previous experience with punitive damages, such as having served on a jury in which the issue of punitive damages was considered, then the prospective juror is also likely to be dismissed by one side or the other.

Unitary Procedure

At trial, the jury usually only hears mention of the issue of punitive damages in the opening and closing statements of the plaintiff’s lawyer. In a unified procedure, the plaintiff’s attorney will typically explain that punitive damages are necessary “to punish and deter the defendant’s conduct” and suggest an appropriate amount of punitive damages to achieve this. The defendant’s attorney generally focuses on why the defendant should be exonerated in both his opening and closing statements.

Subsequent to the closing statements, the judge will provide the jury with instructions on how to deliberate and arrive at a verdict. These instructions include a statement about how the jury is supposed to evaluate evidence, how the jury is to decide whether the defendant is liable to the plaintiff, and provide general instructions regarding how the jury should calculate punitive damages. Following these instructions, the judge provides the jury with instructions regarding punitive damages. In a unified procedure, the jury determines whether the defendant should be held liable for punitive damages and, if so, the amount of the award that should be assessed against him as well as the defendant’s liability for compensatory damages and the size of this award in the same trial.
**Bifurcated Procedure**

Most states have enacted statutes that are substantially similar to Rule 42 (b) of the Federal Rules of Civil Procedure, which provides for the trial of different issues or claims in the same lawsuit at different phases in a trial. In such a procedure, “different claims or issues are tried sequentially, with presentation of proof on the trailing claims or issues contingent upon the outcome of previously considered questions.” If a trial is conducted in two phases according to Rule 42 (b) or a similar state statute, then it is said to be tried according to a bifurcated procedure. Cases that involve punitive damage claims have typically been bifurcated in one of two ways. The first type of bifurcation involves the consideration of the defendant’s liability for compensatory damages, the amount of the compensatory damage award, and his liability for punitive damages in the first phase of the trial, while the amount of punitive damages assessed against a defendant who is found to be liable for punitive damages in the first phase of the trial are assessed in a later phase.

As in a unified procedure, the issue of punitive damages in this sort of bifurcated procedure is generally only mentioned in the first phase of such trials in the opening and closing statements of the plaintiff’s attorney. In the first phase of a bifurcated procedure, the judge will present the jury with instruction concerning liability for punitive damages, and the jury will be asked to determine whether or not the defendant is liable for punitive damages but not to determine the amount of this award. In the second phase of the trial in states where the jury determines the punitive damage award, the jury would hear any evidence that was related only to the issue of the amount of the punitive
damage award that should be assessed. This has generally included evidence of the defendant’s net worth. Following the presentation of this evidence and arguments from both the plaintiff and the defendant, the jury assesses the punitive damage award. In Kansas, the second phase of the trial differs from that in other states in that the judge assesses the punitive damage award rather than the jury.

In addition to bifurcating a trial in the manner described above, trials involving the issue of punitive damages have also been bifurcated in such a way that liability for compensatory damages and the amount of the compensatory award are decided in the first phase of the trial and liability for punitive damages and the amount of the punitive damage award are determined in the second phase of the trial. In this sort of bifurcated procedure, the issue of punitive damages is not addressed during the first phase of the trial. During this second phase of the trial, the jury hears additional evidence that was not relevant to the issue of compensatory damages, but is relevant to the determination of the defendant’s liability for punitive damages and the amount of such an award if it is found to be merited. This would include any evidence concerning the reprehensibility of the defendant’s actions.

*Unanimity*

Punitive damage awards are either assessed by juries under conditions of unanimity or according to a majority verdict. As of 2002, Robbenholt asserts that more than half of the states do not require civil juries to come to unanimous decisions.

*Appeals*
The verdict in a case involving a punitive damages claim can be appealed by either the plaintiff or the defendant on the grounds of an “error or injustice committed by a lower tribunal, in which the error or injustice is sought to be corrected or reversed.”

In general, appellate courts only review questions relating to law and do not disturb the factual determinations of a lower court except in extraordinary cases. The most common standards for review on appeal are the abuse of discretion standard and de novo review. The abuse of discretion standard is used in reviewing a discretionary decision of a trial court. An abuse of discretion is “synonymous with a failure to exercise, a sound, reasonable, and legal discretion.” Under this standard of review, a decision made by the trial court is presumed to be correct and the appellant has the burden of proving that the decision made by the court was an error. The most stringent standard of review on appeal is de novo review. This type of review cannot be used in examining determinations of fact and is only applied in cases where it is believed that the appellate court is in as good a position as the trial court to examine the issue at hand. In this type of review, the appellate court does not defer to the judgment of the trial court. It is generally accepted that the appellant has the best chance of success when the issue which he brings before an appellate court is reviewed according to the de novo standard.

Remittitur

If a defendant believes that a punitive damage award assessed against him is excessive, then he has the option to move for a new trial, judgment non obstante verdicto, or remittitur. The jury’s verdict will not be set aside unless it is found to exceed the punitive damage award claimed in the complaint, it is determined to be based on
prejudice, it was based on a mistake of law or fact, it lacks evidentiary support, or it shocks the judicial conscience.\textsuperscript{lxix}

If the defendant alleges that the award assessed against him is excessive, the trial court will apply “substantive standards to evaluate the excessiveness of the award.”\textsuperscript{lxx}

Though these standards differ between jurisdictions, the Supreme Court’s decision in \textit{State Farm} required that judges must, at a minimum, use the guideposts articulated in \textit{BMW of North America v. Gore} in their evaluation of an award for excessiveness and the Court further made it quite clear that the wealth of the defendant could not override these considerations and be used to justify a larger punitive damages award than would be appropriate according to the three guideposts in \textit{BMW}.\textsuperscript{lxxi} The \textit{BMW} guideposts require, first, that the punitive damage award is commensurate with the reprehensibility of the defendant’s conduct, second, that there be a reasonable relationship between the compensatory and punitive damages awarded in a given case, and third, that the punitive damage award bear a reasonable relationship to civil or criminal sanctions imposed in similar cases.\textsuperscript{lxxii}

Generally, if the trial court finds an award to be excessive but a new trial is not necessary, the court offers the plaintiff the option of remitting the amount of his award that is deemed excessive or submitting to a new trial; this is referred to as “remittitur.”\textsuperscript{lxxiii} If the judge chooses to reduce the amount of the punitive damage award assessed by the jury, he must state on record his reasons for doing so; however, a trial court is not always required to state its reasons for declining to reduce a jury award on record.\textsuperscript{lxxiv} The generally accepted common law rule is that if a plaintiff agrees to remittitur instead of opting for a new trial, the plaintiff is precluded from appealing that choice.\textsuperscript{lxxv}
defendant seeks remittitur, then he is unable to appeal the judgment on any other ground.\textsuperscript{lxvi}

If the remittitur issue reaches appeal, then an appellate court “has the authority to review a trial court’s determination on that issue.”\textsuperscript{lxvii} Prior to the Supreme Court’s decision in \textit{Cooper Industries Inc., Petitioner v. Leatherman Tool Group, Inc.}, the excessiveness of punitive damage awards was evaluated on appeal according to the abuse of discretion standard. However, in \textit{Cooper}, the Supreme Court ruled that review of a punitive damages award is not review of a fact, though the Court did acknowledge that it was a fact sensitive undertaking, and that de novo review on appeal did not amount to a violation of the Seventh Amendment’s prohibition against retrying of a fact.\textsuperscript{lxviii}

In \textit{Cooper}, the Court ruled that the appropriate standard for review of the excessiveness of a punitive damage award where the defendant raises constitutional objections to the excessiveness of an award is de novo review.\textsuperscript{lxix} However, the Court did specify that the abuse of discretion standard is more appropriate than de novo review of the excessiveness of an award in jurisdictions that have enacted caps on punitive damages and in instances where the defendant does not raise a credible constitutional challenge to the excessiveness of an award.\textsuperscript{lxx} Though this is not explicitly specified in the \textit{Cooper} decision, it does not seem that this ruling will require jurisdictions that do not have caps on punitive damage awards to review the excessiveness of awards on appeal according to the de novo standard absent a credible constitutional issue.

\textit{Additur}
While awards may be reviewed for excessiveness in most jurisdictions, some jurisdictions that permit remittititur review of an award refuse to allow a jury award to be reviewed on the grounds of inadequacy or the failure to award punitive damages; however, other courts that allow for remittititur review do permit these other types of review of jury awards. Additur is the process by which a trial court conditions the denial of the motion of a plaintiff for a new trial on the defendant’s agreement to an increase in the plaintiff’s award. It should be noted that, while additur review is available in many jurisdictions with respect to compensatory damages, it is only rarely used in the context of punitive damages. The reason for this, as has been expressed by the Supreme Court of Alabama, is that punitive damages are not “a matter of right” that the plaintiff is entitled to.

Having examined the theories and procedural application of punitive damages, I turn now to a critique of the policies underlying punitive damages and to a defense of the usefulness of punitive damages despite the criticisms, often unfounded or exaggerated, that have been made of them.
IV – Evaluation of Punitive Damages Systems

Benefits of Uncapped Punitive Damages

There are a number of advantages to systems of assessing punitive damages without caps. By not restricting the size of awards in cases of punitive damages to an arbitrary amount, this system allows juries to assess punitive damage awards at a level that is severe enough to deter a culpable defendant from future misconduct and to deter others from engaging in similar misconduct. Nader explains that punitive damages are one of the few effective deterrents to misconduct perpetrated by multi-billion dollar corporations. The outcome of Stella Liebeck v. McDonald’s Restaurants, P.T.S., INC. and McDonald’s International, Inc. provides some anecdotal support for this contention. Though McDonald’s had been sued multiple times for injuries that resulted from burns from the coffee it served at excessively high temperatures, the corporation did not stop producing coffee at scalding temperatures until it was faced with the very real possibility of having to pay a $4 million punitive damage award. While the amount of the punitive damage award in this case was later reduced on appeal and the final settlement in this case is unknown, the fact that McDonald’s only stopped producing coffee at such high temperatures and started warning customers of the danger that could result from drinking or spilling McDonald’s coffee testifies to the belief that corporations will not refrain from profitable wrongful conduct unless they are faced with the possibility of paying a substantial punitive damage award.

Systems of assessing punitive damage awards without caps also serve the purpose of deterrence by ensuring that the punishment for particularly egregious and/or profitable wrongdoing can be substantial enough to render engaging in future similar wrongdoing
considerably undesirable to the wrongdoer and other rational actors. Furthermore, the current state systems of assessing punitive damages that have not enacted caps (which I will hereinafter refer to as traditional systems) provide motivation for citizens to pursue claims against those whose wrongful actions have harmed them by enabling them to collect punitive damages. This motivation increases the chance that a victim will pursue claims against a wrongdoer, particularly where the plaintiff is able to collect a substantial portion of this award, and in so motivating plaintiffs to pursue punitive damage claims, traditional systems increase the certainty that a wrongdoer will be punished for his actions and deterrence will be promoted.

Another benefit of traditional systems of assessing punitive damages is that they serve the function of punishment where a defendant is found to be liable for punitive damages. This is principally achieved by causing the defendant to realize a financial loss as a result of his wrongful actions that is not measured solely by the injury caused to a single plaintiff. The defendant is also punished in the sense that he is likely to endure some social disapproval to the extent that the outcome of the trial and the instance of his wrongdoing are known. Finally, the traditional systems also serves the purpose of punishment in that it allows for variation of punitive damage awards in accordance with the reprehensibility of a defendant’s conduct. In this sense, the system of punitive damages allows the realization of the cliché that the punishment should fit the crime.

An additional advantage of the various uncapped state systems of assessing punitive damage awards is that, by allowing juries to assess large punitive damage awards, the current system serves the education function at least in big cases. McCann, Hathom, and Bloom, explain that the newsworthiness of the outcome of a given case is
affected by the size of the overall verdict in the case.\textsuperscript{lxxvi} A significant punitive damage award is more likely to be reported by the media than a less significant one.\textsuperscript{lxxvii} By promoting the education function of punitive damages, the traditional systems also strengthens the deterrent function of punitive damages to the degree that individuals who were previously unaware of a legally protected right are made aware of its existence in learning of the punishment imposed on a given wrongdoer who violated this right.

\textit{Fictional Problems with Uncapped Punitive Damages In The United States}

While the traditional system of assessing punitive damages does have some substantial benefits, it also has undeniable drawbacks. However, the actual problems with the traditional systems of awarding punitive damages are generally not those alleged by tort reform advocates that the public is most aware of. Perhaps the best known claim by tort reformers with respect to punitive damages that has been proven false is that punitive damages are awarded frequently. Studies conducted by the Bureau of Justice Statistics and the National Center for State Courts both found that, at least in the nation’s forty-five most populous counties, juries awarded punitive damages in only about 3% of civil cases overall and 6% of cases in which the plaintiff prevailed.\textsuperscript{lxxxviii} Furthermore, in the area of products liability litigation, where punitive damage awards are thought to be particularly out of control, the Bureau of Justice Statistics and the National Center for State Courts both found that punitive damages are awarded in only about 2% of products liability cases in the forty-five most populous counties in the country.\textsuperscript{lxxxix} Thus, it does not seem that punitive damage awards are at all frequently awarded.
Another problem alleged with the tort system is that the average size of punitive damage awards has increased considerably and that the awards of punitive damages that plaintiffs receive are often disproportionate to any private or potential public harm. While there has been a notable increase in the size of punitive damage awards in recent decades, it should be noted that this increase was built on a very small base. For example, as of 1955, the largest punitive damage award in California’s history was $75,000. Additionally, the Bureau of Justice Statistics has found that less than 25% of punitive damage awards in the nation’s forty-five largest counties exceeded $250,000 and that less than 12% of punitive damage awards exceeded $1,000,000. Furthermore, Peterson, Sarma, and Shanley found that punitive damage awards were reduced post-trial in about 50% of the cases examined. Thus, it seems that punitive damage awards are not as large as they are often claimed to be by the advocates of tort reform. However, the fact that about 50% of the punitive damage awards examined in post-trial proceedings are reduced does imply that the punitive damage awards assessed by juries are too often excessive.

Tort reform advocates also claim that another problem with punitive damages is that this type of award is sought and collected by plaintiffs in a significant number of cases for which it is not merited. However, the accuracy of this contention is called into question by Koenig and Rustad’s study of punitive damage awards in products liability cases. Koenig and Rustad found that, for the cases they examined, the typical victim of wrongful conduct for which a punitive damage award was assessed had either been permanently disabled or killed by a product known by the manufacturer to be unnecessarily hazardous. Thus, it seems that, at least in the majority of product
liability cases in which punitive damage awards are assessed, it would be inaccurate to characterize plaintiffs’ claims as frivolous.

While many of the criticisms of tort reformers are thus unfounded, the traditional systems for awarding punitive damages have undeniable shortcomings, to which I turn now.

Problems with Traditional Systems

Variability of Awards

One of the grave problems with the current systems of awarding punitive damages is that they allow for significant variation in the size of punitive damage awards that are assessed in similar cases. Priest explains that the magnitude of punitive damage judgments in the United States seems to vary substantially across juries even in the same state and there seems to be significant unpredictability in jury verdicts even for very similar cases. For instance, he notes that in Alabama two virtually identical lawsuits brought against BMW resulted in similar verdicts for compensatory damages, but substantially different punitive damage verdicts. In the first case, which would later be reviewed by the Supreme Court, the jury awarded four million dollars in punitive damages while no punitive damage award was assessed in the second case. However, Priest explains that it is difficult to make judgments on the variability of punitive damage awards in real world circumstances because in a sense, as he explains, no two cases are alike.
While evaluating variability in actual punitive damage awards is problematic, experimental findings show that mock jurors and mock juries demonstrate substantial variability in their assessments of punitive damage awards. In a study he conducted, Sunstein found that there was substantial variability between the dollar awards favored by individual mock jurors and even significant variability between the median awards of synthetic juries (i.e. twelve participants in the study). Sunstein hypothesizes that the main reason for the variability in punitive damage awards assessed by jurors is that jurors are given little guidance about what is meant by various “points” on the dollar scale and thus have trouble translating their intent to punish into a money award.

In addition to the variability Sunstein’s study demonstrated, Schkade, Sunstein, and Kahneman found that collective deliberation amongst the mock jurors in their study had the effect of increasing the unpredictability of jury dollar awards. The researchers found that the median awards of statistical juries (i.e. the median awards favored by a set of twelve mock jurors individually prior to their deliberation together), for cases in which the median award was not $0, tended to be significantly less variable than the awards assessed by deliberating juries. Furthermore, this study found that the median dollar verdict amongst statistical juries, for each of the cases in which the median punitive damages award favored by jurors was higher than $0, was lower than the punitive damage verdicts of deliberating juries and often quite significantly lower. The researchers have hypothesized that the reason for this difference in the dollar verdicts favored by statistical and deliberating juries is that there is a systematic rhetorical advantage held by those favoring higher punitive damage awards. It should be noted that a study performed by Kaplan and Miller also produced similar results when
participants deliberated under conditions of unanimity. However, Kaplan and Miller found that when participants deliberated under conditions of majority rule, there was no significant difference between the median awards of statistical juries and the median awards of deliberating juries. This may suggest that deliberation only has a substantial effect in increasing unpredictability in punitive damage awards when juries deliberate under conditions of unanimity.

The variability in assessments of punitive damage awards in similar cases that is indicated in the studies described above and in others is significant because it is an indication that punitive damage awards are not sufficiently governed by the rule of law. As Priest explains, “our society is deeply committed to employing the force of government with reason and consistency” and the existence of largely discrepant punishments for similar acts is inconsistent with this commitment. It should be noted that the variability of punitive damage awards is not so much a problem in itself as an indication of significant problems in current practices of assessing punitive damage awards. These problems include an insufficient grounding of punitive damage awards in principles of law and the inability of juries to consistently assess punitive damage awards that will appropriately serve the purposes of punishment and deterrence.

Punitive damage awards that are inappropriately high have the effect of promoting excessive deterrence. The level of punishment that I would consider to promote excessive deterrence would be one that exceeds the amount required to appropriately punish the defendant and deter him and others from engaging in similar wrongdoing in the future. Excessive deterrence, like inadequate deterrence, can be problematic because it may result in the exercise of “wasteful precautions and the
withdrawal of socially valuable products and services from the marketplace. Thus, while punitive damage awards that are too low to serve as an effective deterrent are undesirable, awards that serve to promote excessive deterrence are also problematic.

Though remittitur review can serve to ensure that awards will not be excessively high, the key failing of this type of review is that judges do not need to disturb awards that while too high are not so high that they can be considered excessive. This tendency towards judicial inaction is especially strong when awards are evaluated according to an abuse of discretion standard. However, the Supreme Court asserts that review according to a de novo standard is unlikely to affect judges’ rulings in a significant number of cases involving punitive damage awards that are reviewed on appeal.

Additionally, while remittitur review may serve to prevent defendants from having to actually pay excessive punitive damages where an excessive punitive damage award is assessed by a jury, instances when juries assess such awards can have detrimental social consequences even if the jury award is later significantly reduced or remanded. Because newspapers are likely to report cases in which high punitive damage awards are assessed and rarely report subsequent reductions in these awards, the public is led to believe that punitive damage awards are out of control. Such a belief has given rise to the widespread acceptance of tort reform myths, has caused widespread support for misguided measures to control the supposedly great prevalence of punitive damage awards and the exaggerated prevalence of unreasonably high punitive damage awards, and may even have had the effect of persuading jurors to favor unreasonably low punitive damage awards as I will discuss later in this paper.
In addition to the problems caused by unreasonably high awards, the variability in punitive damage awards may also result in unreasonably low awards. Since additur review is very uncommonly exercised, there are no significant institutional means of adjusting a punitive damage award upward so that such an award will serve to deter the same actor from engaging in future wrongdoings and deter others from engaging in similar wrongful behavior. Thus, it is evident that if, as research indicates, there is substantial variability among juror and jury assessments of punitive damage awards, this constitutes a quite significant problem with current systems of awarding punitive damages.

Problems With Jury Instructions

While evidence on this problem is sparse, it does seem that another significant problem with current states systems of assessing punitive damages is the failure of many jurors to heed or understand the instructions they receive from judges regarding the determination of liability for punitive damages. Unfortunately, this issue has not been very extensively studied and there is little reliable data on this subject. However, there is additional support for the likelihood of low comprehension and insufficient attention of jurors to punitive damage instructions in research on jury instructions in respect to general damages in torts and other types of civil litigation.

A study conducted by Hastie, Schkade, and Payne yielded data indicating the possibility of a significant failure of jurors to heed or comprehend instructions on punitive damages. In this study, participants watched one of four videotaped stimulus cases, were given a written copy of the stimulus case which they were assigned to
consider, and a written copy of actual judge’s instructions of punitive damages that were
given to real jurors for the case which the stimulus was based on. After studying their
case materials, filling out an individual predeliberation verdict questionnaire, and
deliberating with other mock jurors, the participants in this study were asked for their
personal post-deliberation verdicts, probed to provide reasons for these verdicts, and
tested on the amount of information from judge’s instructions that they recalled. The
researchers found that over 49% of the participants in the study made no reference at all
to the judge’s instructions in their post-deliberation explanations of their verdict. This
seems to be a significant indication that many mock jurors did not pay significant
attention to or understand judge’s instructions and do not seem to have relied heavily on
them in determining the verdict they favored.

Additionally, Bradley Saxton conducted a study of the degree to which actual
jurors in Wyoming understood the instructions given to them during trial. Saxton, in
cooperation with eighteen of Wyoming’s district and county courts, presented the jurors
in a total of forty-nine cases with questionnaires that in part tested their comprehension of
the instructions presented and read to them by the judge before the jurors were discharged
after completing their deliberation. Of the jurors in civil trials that completed the
questionnaires, the mean score that jurors earned on their questionnaire was 57% and the
median score was 60%. It should be noted that the questions about civil procedure
were presented in a multiple choice format with some questions also asking jurors to rate
their confidence in their answers. On such a test, a median score of 60% does seem to
indicate a significant problem in juror comprehension of or attention to judges
instructions. Additionally, while this study does not indicate that any of the cases
involved claims for punitive damages, it seems likely that juror comprehension and attention to instructions concerning other aspects of civil litigation may be quite similar to juror comprehension and attention to instructions concerning punitive damages.

Both of the above studies were conducted subsequent to jury deliberation and, thus, reflect any improvements in juror understanding of the instructions that deliberation might have produced. It should also be noted that while deliberation may serve to increase juror comprehension of punitive damage instructions, this is unlikely to occur if jurors fail to discuss the instructions during deliberation. Hastie, Schkade, and Payne found that the average deliberating jury in their study only discussed 3.13 of the 5 factors necessary for a defendant’s conduct to be categorized as malicious or reckless (1 factor for malice and 4 for recklessness). The failure of juries to discuss such factors may result in a finding that is inconsistent with the rule of law.

The problem of juror inattention to or inability to comprehend punitive damage instructions that is implied in these studies is likely to relate to the various complexities of the punitive damage instructions that are evident in instructions on other issues in civil litigation. This may be due in part to the failure of those who draft model jury instructions and the particular instructions in a given case to employ various principles of psycholinguistics. For instance, social scientists have found that instructions that include the use of passive voice, long sentences, complex sentence structure, and the use of uncommon words or words with multiple interpretations, are less likely to be understood.

The failure of jurors to heed or comprehend punitive damage instructions is not only problematic to the degree that jury determinations of liability for punitive damages
may not be based on the rule of law. It is quite possible that jurors who do not use punitive damage instructions, for whatever reason, to guide their determinations of a defendant’s liability for punitive damages may reach different verdicts than those that do. Hastie, Schkade, and Payne found, in their above mentioned study, a significant correlation between high levels of reliance on jury instructions in individual explanations of their verdict and being part of a jury that found that the defendant in the scenario under consideration was not liable for punitive damages. Furthermore, the study also stated that jurors who found that the defendant was not liable for punitive damages performed significantly better on a recall-comprehension test that the jurors completed after providing justifications for their verdict. While these studies only provide evidence of a correlation and not causation, it does seem quite likely that attendance to and understanding of jury instructions did have a substantial impact on verdicts of liability. If this is in fact the case and comprehension and attention to jury instructions does have a significant impact on a juror’s verdict, at least in some cases (possibly those where legal notions of liability may be out of sync with social norms of blame), then the problem of inattention to and comprehension of instructions is quite significant.

_Anchoring_

Researchers explain that because people lack standards to select a particular amount for a punitive damage award they are drawn to arbitrary anchors. *Punitive Damages: How Juries Decide* defines an anchor as “a starting point or reference amount used in reasoning to a quantity or other magnitude.” *Punitive Damages: How Juries Decide* explains that in determining punitive damage awards jurors generally use an
anchor-and-adjust strategy, meaning that they select a salient and anchor and adjust the awards from this amount by factoring in other considerations. Support for the view that jurors use this strategy can be found in a study conducted by Hastie, Schkade, and Payne entitled “Do Plaintiffs Requests and Plaintiff’s Identities Matter?” These researchers found that juror ratings of their judgment strategies and their open-ended reports on the strategies they employed in assessing punitive damages support the theory that the anchor-and-adjust strategy is the most common method by which individual jurors determine an appropriate punitive damage award.

Though anchoring may appear to be a sound strategy for determining an appropriate punitive damage award without any substantial guidance, there are two significant problems associated with the anchor-and-adjust strategy. The first of these problems is that, while the anchor-and-adjust strategy was common among jurors, the researchers found that the selection of an anchor “appears to be a somewhat haphazard event that injects greater variability into the award-setting process.” Though the most common anchor mentioned by mock jurors in their post-study report was the compensatory damage award, a number of the participants selected other anchors for their awards that were much less appropriate for the determination of a punitive damage award, such as the plaintiff’s suggestion of an appropriate punitive damage award. In fact, the mean and median awards favored by participants who were presented with a scenario in which the plaintiff requested punitive damages in the range of $50,000,000-$150,000,000 were about two and a half times greater than the mean and median awards assessed by mock jurors in whose scenario the plaintiff requested punitive damages in the range of $15,000,000-$50,000,000. Additionally, the results of a study conducted by
Viscusi suggests the possibility that mock jurors may employ the value-of-life figure used by companies in cost-benefit analyses as an anchor for their punitive damage award and, in doing this, impose more severe punishments on those companies that place a higher value on safety. Thus, it is evident that the anchor-and-adjust strategy has extremely problematic consequences where jurors are drawn to inappropriate anchors.

A second significant problem with the anchor-and-adjust strategy that Hastie, Sckade, and Payne found in their study was that jurors failed to make significant adjustments in the punitive damage award from the original anchor they were drawn to. The researchers explain that this inflexibility has the effect of increasing the influence that an arbitrary anchor value has on the juror’s final judgment. Additionally, the failure of jurors to significantly adjust the level of the award from their original anchor makes it unlikely that their punitive damage verdicts will serve to appropriately punish the defendant or deter the defendant and others from future misconduct because appropriate verdicts, that serve to promote the purposes for which punitive damage awards are assessed, generally involve considerations of a number of factors all of which any one particular anchor is unlikely to reflect.

_Hindsight Bias_

Another notable problem with current systems of awarding punitive damages stems from the influence of hindsight bias. Hindsight bias occurs when a jury thinks that an outcome is more probable in retrospect than was the prospect of its occurrence in reality. Since one of the conditions for finding that a defendant acted with reckless disregard is that there was a grave danger or risk of harm that was the foreseeable and
probable effect of the action and that the defendant decided to act with conscious indi-

cence to the consequences, it is evident that if jurors exhibit a hindsight bias, it could create a significant bias towards inflation of punitive damage awards.\textsuperscript{cxxi}

Hastie, Schkade, and Payne performed an experiment that would enable them to determine the influence of hindsight bias on the decisions of jurors to award punitive damages in a given case. They found that over two-thirds of the participants in the foresight condition approved a request by a given railroad to continue operations that had been halted by the National Transportation Safety Board.\textsuperscript{cxxxii} On the other hand, they found in the hindsight conditions that two-thirds of the participants judged that the railroad acted recklessly in its decision to continue operations.\textsuperscript{cxxxiii} Additionally, the researchers explain that other studies have shown that warning of hindsight bias in instructions given to mock jurors had no significant effect on the jurors’ judgments.\textsuperscript{cxxxiv}

Unfortunately, there does not seem to be any significant remedy to counteract the influence of hindsight bias on juror determinations of a defendant’s liability for punitive damages. One suggested possibility for ameliorating the effects of hindsight bias on juror judgments of liability has been a warning instruction about the possible effects that hindsight bias may have on determinations of liability. However, data from Kamin and Rachlinksi’s study on the effects of warning instructions on juror determinations of liability showed that a warning instruction had no significant effect on jurors’ judgments.\textsuperscript{cxxxv}

\textit{The Impact of the Tort Reform Movement on Jurors}
An additional potential defect in the present system of awarding punitive damages is that juror beliefs regarding the presence of a civil litigation crisis seem to affect their assessments of damage awards. Hans and Lofquist interviewed jurors following their jury service and found that jurors exhibited strong negative views of the frequency and legitimacy of civil lawsuits and that negative views of the civil justice system were correlated with lower damage awards. Though this study cannot be said to demonstrate that it is certain that negative perceptions of the civil litigation system affect determinations of punitive damage awards partly because the study was not devoted exclusively to cases where the issue of punitive damages were even considered, it does seem likely that in instances where jurors with negative perceptions of the civil litigation system sit on juries that consider the issue of punitive damages, similar effects would be observed. Thus, belief in the fictitious civil litigation crisis may have undue influence over jurors’ determinations regarding punitive damage awards. The effects of negative perceptions about the civil justice system would be particularly likely to influence jury determinations of punitive damages in cases where lawyers for both sides are not allowed to ask potential jurors about their views on the civil justice system and tort reform.

Vicarious Liability

Another significant problem in various state systems is that a principal can be held vicariously liable for punitive damages as long as his agent was acting within the scope of his employment. The problem of allowing a principal to be held vicariously liable for punitive damages on account of the acts of his agent, so long as they were done within the scope of his employment, is that the principal may not have directed,
participated in, or approved of the wrongful acts of his employee. Furthermore, the principal may not have had any reasonable means of predicting that his agent would engage in a wrongful act. If a principal has not directed, participated in, approved, or even reasonably been able to predict the possibility that his agent will engage in any or a given type of wrongful conduct, there is no logical reason that the principal should be liable for more than compensatory damages. Punishing a principal for the wrongful conduct of an agent of which he was not aware and had no reasonable means of predicting is unlikely to serve any reasonable deterrent purpose. It may even cause the principal or others like him to take unnecessary measures in order to prevent being held liable for punitive damages as the result of his agent’s actions in the future. In such a case, the imposition of vicarious liability for punitive damages on a principal for acts of his agent that he was not aware of and had no means of predicting would be likely to result in excessive deterrence. Thus, it is evident that imposing vicarious liability on a principal for punitive damages in such cases will clearly not serve the principal purposes of punitive damage awards and is therefore mistaken policy.

It should be noted that the above does not mean that employers should never be held liable for punitive damages as a result of the acts of their agents. In fact, in each of the four situations mentioned in the Restatement (Second) of Torts in which it is contemplated that a principal will be held liable for punitive damages for the acts of his agent, it seems that imposing such liability for punitive damages on the principal does serve the purposes of punishment and deterrence (see page 9).

*Insurability of Punitive Damage Awards*
Another problem with the traditional systems of assessing punitive damages is that where companies are allowed to acquire insurance coverage in the event of punitive damage awards the punishment and deterrence functions of punitive damages are undermined.\textsuperscript{xxxvii} On the other hand, in states where companies are not allowed to purchase insurance coverage for punitive damages, a substantial punitive damage award assessed against a company may adversely affect a number of people, particularly in the event that the costs of such a judgment necessitate large scale lay-offs of employees who did nothing wrong. Thus, the issue of insurance poses a very substantial problem.

While insurance coverage does undermine the purposes of punitive damages to some extent, it should be noted that companies must pay substantial insurance premiums, and that their policies may provide for very large deductibles.\textsuperscript{xxxviii} Companies which have large judgments made against them will probably suffer from the need to pay higher insurance premiums, possibly become uninsurable, and may lose business due to adverse publicity. For this reason, though I recognize that there may be some compromise in the deterrent and punishment functions of punitive damages as a result of allowing insurance, I do not recommend that states that currently allow insurance coverage for punitive damages prohibit it in the future.

\textit{Multiple Plaintiffs}

Circumstances in which multiple plaintiffs sue a single defendant for harms resulting from the same act or course of action can pose difficulties in the context of punitive damages. This was particularly true prior to the rulings of the Supreme Court in \textit{BMW} and \textit{State Farm}. However, now that the Supreme Court has ruled that judges
evaluating punitive damage awards must consider the relationship of the award to the compensatory damages awarded in the case in question, that the defendant’s actions relating to the case under consideration outside the jurisdiction where the case is being tried cannot be considered by the jury in the assessment of punitive damages, and that the wealth of a defendant is not a justification for courts reviewing punitive damage awards to overlook the three guideposts articulated in *BMW*, the potential for truly excessive punishment may have been reduced.

It seems that, under these circumstances, the problem that will result from multiple plaintiffs suing a single defendant for a single course of action is only significant to the extent that judgments in individual punitive damage claims may not bear a reasonable relation to the compensatory damage award or may be otherwise generally excessive.

*Criminal Punishment*

An additional problem with current systems of awarding punitive damages is that individuals on whom punishment has already been imposed for their wrongful conduct by criminal law may also be subject to punitive damage awards for the same act. This is clearly inappropriate because the purpose of criminal sanctions is punishment and deterrence just like the principal purposes of punitive damage awards. Thus, a person who has been sanctioned in criminal court has already been dealt a level of punishment that is considered appropriate to punish them and deter future wrongdoing. For this reason, it is clearly inappropriate that such an individual should be subject to additional
punishment in the form of punitive damages. The justice system should not allow that individuals be punished twice for the same conduct that resulted in the same harm.

Of course, in a similar vein, there arises the question of whether or not an individual who has been charged with an offense in criminal law, but found not guilty, should be exposed to liability for punitive damages in a civil court. Here, I believe that, while punitive damages might be awarded, the defendant should be able to introduce the not guilty verdict in the criminal trial to avoid or diminish punitive damages.

*Caps*

While there are some benefits of systems that cap punitive damage awards, the problems associated with punitive damage caps outweigh the benefits that caps can produce. The Black’s Law Dictionary defines a cap as a “term variously applied to statutorily imposed limits on the recovery of non-economic damages in tort actions…” Caps on punitive damages restrict the amount of the award a plaintiff may collect for punitive damages. It should be noted that the caps and multipliers that are addressed in this paper are those that result from the current state systems of limiting the amount of punitive damages that may be assessed against a defendant. Caps on punitive damage awards generally limit the maximum amount a plaintiff can collect to a set amount of money, some set multiple of the compensatory damages awarded to the plaintiff, the greater of these two amounts, or the lesser of these two amounts. It should also be noted that some states have established caps on punitive damages that are only applicable to certain types of tort actions.
While caps may serve to increase predictability in punitive damage awards and reduce the potential that punitive damage awards will result in excessive punishment, they do not provide any remedy to the other problems of punitive damage awards and, thus, state systems that employ punitive damage caps suffer from the same problems as otherwise similar systems that do not impose caps on punitive damage awards. Additionally, it should be noted that predictability in punitive damage awards is more of an indication that punitive damages appropriately reflect the rule of law and serve to promote punishment and deterrence at appropriate levels than a thing that is desirable in and of itself.\textsuperscript{+} However, caps do not actually address these underlying problems through the manner in which they promote greater predictability of punitive damage awards. Thus, the benefit of increased predictability that systems with caps provide in comparison to traditional systems is not very substantial.

Caps may actually prohibit juries from assessing an appropriate punitive damage award for achieving the purpose of deterrence and punishment in cases of highly profitable corporate misconduct.\textsuperscript{+} This is particularly likely to be a problem in systems that cap punitive damages at an arbitrary sum. It should also be noted that capping punitive damages at a relatively small multiple of compensatory damages may not serve to achieve an appropriate level of deterrence in cases where there is a low probability that the wrongdoer’s actions will be discovered or traced back to the wrongdoer.\textsuperscript{+}

Another significant problem with systems involving the use of caps and multipliers relates to the fact that members of certain segments of society would generally receive lower levels of compensatory damages than would members of other segments for the same level of harm, when the award is at the cap maximum. Members
of populations that are likely to receive higher compensatory awards, because, for example, they earn higher salaries, will generally receive higher punitive damage awards in systems where punitive damages are capped at a multiple of the compensatory award. In the aforementioned circumstances, men would generally receive higher punitive damage awards than women since men typically have higher salaries than women. It might be considered appropriate that punitive awards should be greater for individuals who earn more to the degree that punitive damages are supposed to be related to the harm that was actually done. However, where compensatory damages are the sole consideration for a cap, certain segments of the population may be particularly at risk for injuries resulting from wrongful conduct that may be profitable to a company marketing to these less prosperous segments of the population.
V -- Toward a Better System for Imposing and Quantifying Punitive Damages

While punitive damage caps fail to meaningfully address the underlying problems related to the variability of awards that have existed in traditional methods of assessing punitive damages, there are potential reforms that could be undertaken by the states to significantly reduce the potential for problematic levels of variability in the assessment of punitive damage awards. There are also reform possibilities that would be likely to facilitate increased juror comprehension of and reliance on jury instructions related to the determination of a defendants’ liability. Some of these have already been undertaken by various states. Additionally, states clearly can address the problems associated with vicarious liability and the imposition of punishment through both criminal and civil courts for the same acts resulting in the same harms. In this section of my paper, I will describe these various reform possibilities. For the purposes of maintaining some level of simplicity, I will term a system of assessing punitive damages that incorporates all these reforms a comparative system.

Clearer Instructions on Liability For Punitive Damages

One of the most important and easily undertaken reforms of the current state systems of awarding punitive damages is the creation and utilization of clearer jury instructions. Part of such an undertaking would involve the revision of jury instructions on punitive damages in accordance with principles of psycholinguistics that I have mentioned earlier.

In addition to improvements in the structure and phrasing of punitive damage instructions, research in social psychology and jury decision making has yielded evidence
that providing jurors with reasons for legal rules, in addition to simply providing the rules themselves, serves to increase compliance with instructions. In light of this research, it seems that a brief explanation of the reasoning for the legal rules involved in punitive damage determinations should be included in instructions in order to bolster compliance.

Research has also shown that when the judge provides jurors with instructions on the legal concepts that will be employed in a trial both before the trial begins (pre-instructions) and at the end of the trial, jurors’ comprehension of these instructions and their ability to apply them to the case they are examining is significantly greater than when they are only presented with pre-instructions or only presented with instructions after the closing arguments. Thus, states should seriously consider the utilization of pre-instructions in addition to instructions following the parties’ closing arguments.

These reforms of jury instructions are likely to promote juror understanding of jury instructions and help to ensure that jury verdicts regarding a defendant’s liability for punitive damages are better brought into compliance with the rule of law. For these reasons, the aforementioned reforms of the jury instructions themselves, the practice of instructing juries, and the requirement that juries explain their verdicts according to instructions, should be undertaken.

*Vicarious Liability and Previous Punishment in Criminal Courts*

States that currently allow punitive damages to be assessed against a defendant who is only vicariously liable for a harm suffered by a plaintiff should reform their statutes governing punitive damages so that a principal cannot be held accountable for the acts of his agent, except in the situations described in the Restatement rule that I have
cited earlier. Additionally, states that permit punitive damages to be assessed against a defendant who has already been punished by a criminal court should end this practice.

_Bifurcated or Trifurcated Procedure in Trials for Punitive Damages_

Another important reform of the punitive damages system would be the bifurcation or even trifurcation of punitive damage claims. Upon the request of either party, courts should allow for liability for compensatory damages and the assessment of such damages to be determined prior to the consideration of liability for punitive damages.\(^{xlvi}\) This will serve to reduce confusion amongst jurors regarding instructions because they will not be considering as many issues at one time.\(^{xlvii}\) Additionally, the separation of these issues will be particularly beneficial in states that require that a defendant’s liability for punitive damages be evaluated under a different burden of proof standard than the one employed in determining the defendant’s liability for compensatory damages. This is likely to prevent jurors from confusing the higher burden of proof standard with the lower one.\(^{xlviii}\)

In addition to the determination of compensatory damages and liability for punitive damages in different phases, liability for punitive damages and the assessment of a punitive damage award should also occur at different phases.\(^{xlxi}\) The primary reason for this measure is that judges should assess the punitive damage award in this last phase of the trial. The rationale for judicial assessment of punitive damage awards will be explained in a subsequent section.

It should be noted that to the extent that the bifurcation or trifurcation of punitive damage proceedings may add to the legal expenses that the plaintiff will incur as the
result of pursuing a punitive damages claim, states may want to rethink their existing
split-recovery statutes in order to provide victims with the appropriate incentive to pursue
punitive damages claims against wrongdoers.

*Proposed System of Assessing Punitive Damage Awards*

The system I would propose for awarding punitive damages in the second or third
phase of a trial would be one in which the trial court judge assesses the amount of the
punitive damage award with reference to other similar cases following a finding by the
jury that the defendant was liable for punitive damages. In such a system, the judge
would identify a number of cases that were comparable to the one at issue with respect to
a variety of important factors including the reprehensibility of the defendant’s conduct,
the harm to the plaintiff(s) that resulted from the defendant’s wrongful conduct, the type
of civil litigation involved in the case, the defendant’s character, various other
aggravating circumstances, and various other mitigating circumstances.\textsuperscript{1}

Baldus, MacQueen, and Woodworth explain that the defendant’s character is
relevant to determinations of appropriate punishment and the need for deterrence. They
hold that “character is generally reflected in behavior that occurred before or after the
conduct that gave rise to the punitive damages claim.”\textsuperscript{1,li} For instance, a defendant’s
decision to use a high value-of-life figure in a cost-benefit analysis related to the conduct
in question would reflect better on the defendant’s character than the use of a lower
value-of-life figure. The researchers explain that additional aggravating circumstances
might include the extent to which the defendant profited from engaging in the misconduct
at issue and additional mitigating considerations might include the degree to which the defendant’s wrongful behavior was influenced by others. In addition to this, both the plaintiff and the defendant would be afforded the opportunity to present the judge with some reasonable number of cases that support a punitive damage verdict that they believe to be appropriate. Following this, the judge would allow the plaintiff and the defendant to present arguments as to the appropriate amount of the judge’s punitive damage verdict. In making such arguments, the attorneys would identify the cases and verdicts that they believe would be the most appropriate basis for the assessment of punitive damages in the case at hand. The plaintiff would presumably argue that the cases in which higher punitive damage verdicts were awarded possessed features that made them more salient foundations than the other cases for determining the punitive damage award in the case under consideration. On the other hand, the defendant would argue that the comparable cases that resulted in low punitive damage awards would be more applicable to the determination of punitive damages in the case at hand. Following these arguments, the judge would then consider the arguments and come back with his verdict on the appropriate punitive damage award.

In comparing the cases, judges should give more weight to more recent cases, but the verdicts of all cases should be adjusted for inflation. Judges should obviously never use the original verdicts of juries for comparison if either the punitive damage award or compensatory damage award in these cases was reduced or remitted on appeal. Judges should also avoid using cases for comparison where it is known that the parties settled the cases following awards, out of court. Additionally, judges should give
preference to cases that were decided in the state, but might want to consider looking at cases from other states if there is not much precedent.\textsuperscript{clvi}

\textit{Literature In Support Of This Proposal}

While the system of assessing punitive damage awards that I propose does not seem to be discussed at all extensively in current literature on punitive damages, Sunstein seems to suggest the possibility of such a system briefly in the conclusion of \textit{Punitive Damages: How Juries Decide}.\textsuperscript{clvii} Sunstein also advances the comparative element of the system of assessing punitive damage awards that I propose in his assertion that the presentation of verdicts in prior cases to a jury that they would be encouraged to consider in their determination of punitive damages might aid their determination of a punitive damage award in the case at hand and could serve to increase predictability in punitive damage awards.\textsuperscript{clviii} Additionally, the Owen proposals assert the merits of judicial assessment of punitive damage awards.\textsuperscript{clix}

In addition to the merits of judicial assessment of punitive damage awards or the assessment of punitive damage awards in reference to similar cases, an article by David Baldus, John C. MacQueen, and George Woodworth advocates a procedure for remittitur review of punitive damage awards that involves judicial assessment of an appropriate punitive damage award with reference to prior awards in similar cases.\textsuperscript{clx}

\textit{Benefits of Method for Assessing Punitive Damage Awards in the Comparative System}

The most substantial benefit of the comparative method of assessing punitive damage awards that I propose is that it will serve to increase predictability in the
assessment of punitive damage awards in such a way that will also effectively address the underlying problems related to the variability of punitive damage awards. In reducing the variability of punitive damage awards in similar cases, punitive damage awards will be brought more significantly into compliance with “the aspirations of the rule of law.”

The comparative system is also likely to significantly reduce the number of excessive punitive damage awards, the number of awards that many would consider inappropriately high, and the number of awards that were too low to appropriately punish and deter the defendant. Certainly the number of excessive punitive damage awards is likely to be reduced in such a system because it would be inappropriate for judges to base their verdicts on prior cases where a court had held a punitive damage award to be excessive. Additionally, judges will also be less likely to render awards for punitive damages that are either inappropriately low or high because they are likely to be drawn to the middle range verdicts in the set of comparison cases they examine which are likely to be those that are most appropriate.

A related advantage of this method of assessing punitive damage awards is that it will resolve many of the problems that presently exist and can be traced to the fact that jurors and judges at present are given little guidance with respect to punitive damage awards. This system will resolve problems associated with the improper use of anchors and thus reduce much of the inordinate influence that plaintiffs’ suggestions for an appropriate punitive damage award may have on juries. Additionally, the elimination of the need for the anchor-and-adjust strategy will serve to prevent defendants who evaluate their actions in a cost-benefit analysis that employs a high value of life figure from being punished more significantly than those who use lower value-of-life figures. In fact,
judges may consider the use of a high value-of-life figure in cost-benefit analyses as reflecting favorably on a defendant’s character when they consider in determining an appropriate punitive damage award.

An additional benefit of the comparative system is that the adversarial aspect of the system of assessing punitive damage awards, in which lawyers on both sides will be allowed to present arguments regarding the most appropriate precedents for determining the punitive damage award, may serve to enhance the judge’s ability to ensure that his verdict will provide an appropriate level of punishment and deterrence. For instance, the plaintiff’s attorney may reveal in his argument regarding why the precedent favored by the defendant is less appropriate, that the award in the case that the defendant asserts to be an appropriate precedent had not prevented the defendant from engaging in wrongful conduct subsequent to the punitive damage award assessed against him.

Another advantage of the comparative method of assessing punitive damage awards is that it may reduce the prevalence of remittitur review and, in so doing, help to relieve appellate judges of part of the burden of their caseload. Appellate courts will be less likely to engage in remittitur review under the comparative system because awards that are substantially grounded in precedent are less likely to be considered by the appellate courts to merit remittitur review. Thus, appellate courts will not have to devote inordinate attention to remittitur review of punitive damage awards under the comparative system.

Objections to Comparative System
There seem to be three likely objections to the comparative system of assessing punitive damage awards that while seemingly compelling are not substantive under further examination.

*If The Comparative System Was Really Good It Would Already Have Been Adopted*

The first possible objection to the comparative system is that it is obviously not good because no state has adopted it. However, there are a number of reasons why this system has yet to be adopted or even significantly discussed in the literature regarding punitive damage reform that bear no relation to the merits of this system.

One reason why the comparative system has yet to be discussed to any extent in the literature on punitive damages reform is that it is a combination of suggestions regarding punitive damage reform. It involves judicial rather than jury assessment of the punitive damage award and it involves the assessment of punitive damage awards in reference to punitive damages assessed in similar cases. As I have already shown, the literature on reform of punitive damages involves proposals for judicial assessment of punitive damage awards, jury assessment of punitive damage awards that presents jurors with punitive damage verdicts in other cases, and the very well known proposal of comparative additur/remittitur review of punitive damage awards. However, the specific combination of these proposals that I advocate does not seem to be discussed in great detail.

The second and more significant reason that the comparative system has not gained significant attention and has yet to be adopted seems to be that there is no
powerful segment of society that has championed this proposal and whose interests would be best served by its acceptance. Interest groups that advocate tort reform are generally composed of or supported by large corporations. For instance, the American Tort Reform Association lists numerous large corporations amongst its supporters. Since the interests of many large corporations would best be served by caps on punitive damages, it should be no surprise that those who advocate tort reform generally favor punitive damage caps. On the other hand, the opponents of tort reform have had much less success in garnering opposition to tort reform. Additionally, the most prominent opponents of caps are personal injury lawyers whose interest would be served much better by current uncapped systems of assessing punitive damages. Thus, there does not seem to be any prominent interest group that has a significant stake in and ability to promote balanced punitive damages reform.

Forum Shopping

A second possible objection to the comparative method of assessing punitive damage awards is that it will promote forum shopping. However, forum shopping is endemic to the entire legal system, and the fact that plaintiffs may shop for a forum in which necessary reforms have not been made is not a convincing argument against making reforms. If it were, reforms would never be undertaken.

Impairment of the Educative Function

The third potential drawback of the system that I propose is that it may impair the educational function of punitive damages by increasing the predictability of punitive
damage awards. This is a significant possibility because if the comparative system reduces the prevalence of excessive or inordinate punitive damage awards, as it very likely will, newspapers are likely to report verdicts in punitive damage cases less frequently because there will be a lesser number that are rendered particularly newsworthy as the result of inappropriately high punitive damage awards. While it is unlikely that the plaintiff would be disposed to enter into settlement negotiations with the defendant, following a jury’s verdict in which the defendant was found liable for punitive damages, the increased predictability of punitive damage awards may render defendants more likely to settle claims against them outside of court in confidential settlements prior to the commencement of a civil trial or prior to a jury’s determination of the liability of the defendant for punitive damages. This is problematic to the degree that the public is less likely to be made aware of punitive damage verdicts and, therefore, part of the deterrent value of the punishment will be undermined. It may also be problematic in product liability cases to the extent that the media may be less likely to alert the public to unsafe products; however, it is by no means clear that the comparative system will reduce media coverage of hazardous products or services.

It should also be noted that any harm that society may experience as a result of possible compromises in the educative function of punitive damages that the comparative system may effect will be accompanied by the benefit of decreased misinformation. Since the system that I propose is likely to significantly reduce the frequency of excessive or inappropriately high punitive damage awards, the public will rarely have occasion to hear of such awards in the media and to think, due to the frequent absence of media coverage of award reductions, that the awards have withstood trial court and appellate
review. This is likely to reduce the chances that inappropriate measures to address mythical problems in the civil justice system, such as punitive damage caps, will gain widespread popularity. Thus, while the educative function may be compromised to a degree by the comparative system, any reduction in the educative function of punitive damages is likely to be accompanied by a reduction in misinformation.

Benefits of Judicial Assessment of Punitive Damage Awards

Judicial assessment of punitive damage awards is preferable to jury assessment under the comparative system for two significant reasons. The first of these relates to economy of court resources. Since jurors are likely to have already sat through two phases of the trial (considering that the defendant would be likely to have requested that the determination of the compensatory award and the determination of liability for punitive damages be made in different phases of the trial), it seems imprudent to require the jury to serve any longer. This is particularly true since the process of assessing punitive damage awards in the comparative system would take somewhat longer than it would in current state systems.

Judicial assessment is also preferable to jury assessment in the comparative system because judges are much more familiar with the task of using past cases to determine verdicts in present ones. This is rather like the discipline of precedent, which judges are familiar with employing. Furthermore, as the arguments made by the attorneys for both sides are likely to relate substantially to questions of law in addition to some questions of fact, judicial determination of punitive damage awards in the comparative system is clearly preferable to jury determination.
Is Judicial Assessment of Punitive Damage Awards Constitutional?

While the Seventh Amendment, which requires that the right of trial by jury be preserved in suits at common law, does not apply to state courts, forty-eight of the fifty state constitutions contain provisions that are essentially analogous to the seventh amendment in form and substance. The feasibility of the comparative system that I have proposed will of course rest significantly on the question of whether or not judicial assessment of punitive damage awards is likely to be found to be consistent with these state provisions where they exist. However, I should note that the merit of my reform proposal is not dependant on whether or not the judicial assessment of punitive damage awards is compatible with the constitutions of all or even most of the states that allow punitive damage awards to be assessed. In fact, if my reform proposal is feasible for even a few states, then my efforts in writing this thesis should not be thought to be in vain.

At least as of 1996, two State Supreme Courts, the Supreme Court of Ohio and the Supreme Court of Kansas, had examined whether or not judicial assessment of punitive damage awards was consistent with the provisions of their respective state constitutions that generally reflect the Seventh Amendment. The Kansas Supreme Court ruled in Smith v. Printup that the Kansas statute that permitted the judicial assessment of punitive damages did not violate the state’s guarantee of trial by jury. On the other hand, the Ohio Supreme Court ruled in Zoppo v. Homestead Insurance Company that the Ohio statute authorizing the judicial assessment of punitive damage awards violated the state’s constitution. However, it should be noted that the latter
ruling was based largely on the issue of whether “there existed a common law right [at the time when the state constitution was drafted] for a jury to assess the amount of punitive damages” and that this decision was made prior to the Supreme Court’s ruling in Cooper. It seems possible that if a similar statute came before the Ohio Court in the future, they would consider the Supreme Court’s reasoning in Cooper regarding the considerable differences in the purposes of punitive damage awards serve now as compared to the purposes they served in the past and possibly decide the issue differently.

Of course, it is difficult to determine how a given State Supreme Court would rule on this issue; however, it is very likely that state courts considering whether judicial assessment of punitive damages is consistent with the state’s constitution might look toward the federal courts’ determinations on this issue. If they did this they would find support for judicial determination in the Supreme Court’s Seventh Amendment jurisprudence. Though the Supreme Court has yet to make a definitive ruling on the constitutionality of the judicial assessment of punitive damage awards, the Supreme Court has encountered two distinct issues in interpreting the Seventh Amendment. The first of these is whether or not a particular cause of action necessitates a jury trial and the second is whether or not a particular element of a cause of action requires a trial by jury. In Tull v. United States, the Supreme Court held that the Seventh Amendment was not intended to “preserve every characteristic of the common law right of trial by jury, but only the fundamental elements of trial by jury.” Furthermore, in a footnote in Tull, the Supreme Court held that “nothing in the [Seventh] Amendment’s language suggests that the right to a jury trial extends to the remedy phase of a civil trial,… and we
have been presented with no evidence that the Framers meant to extend the right to a jury to the remedy phase of a civil trial.\textsuperscript{clxx}

\textit{Implementation of Comparative System}

It seems that all of the components of the comparative system could be implemented without legislative action through court mandated changes. According to Paul Mogin, this is even true regarding a change in who assesses punitive damages from juries to judges.\textsuperscript{clxxi} However, it seems that the change in who assesses punitive damages might be better left to the legislative branch of the state government. Of course, as I have mentioned before, the comparative system would need to become more widely publicized and explained before legislative examination of this as a possibility would be feasible. More particularly, it is likely that this system will not be examined by legislatures until the system gains a champion from some particular influential interest group. This advocacy will not arise in interest groups that are supported mainly by large corporations because it is quite evident that their interests would be better served by caps. It is also unlikely that this system will be supported by associations of personal injury lawyers who favor the status quo and concentrate on lobbying against caps.

The interest groups that may have the greatest potential for advocating balanced tort reform are consumer advocacy groups. While such groups would have a significant interest in insuring that companies are severely punished for producing hazardous products, their interest would not be as intimately bound to a system in which awards could be inordinately high. They might offer the comparative system as an alternative to caps in the midst of public outrage over some excessive punitive damage verdict.
VI -- Conclusion

This paper has presented compelling evidence that there are significant problems with current state systems of assessing punitive damage awards. In these systems, juries are provided with little guidance in their determination of liability for punitive damages and their assessments of an appropriate punitive damage award. As the result of this, jurors are drawn to inappropriate anchors in assessing punitive damages, there is evidence of significant variability even in similar cases, and jurors may not render the same verdicts on the liability of a defendant as they would if they understood and followed judges’ instructions. Additionally, defendants may be vicariously liable for punitive damages for actions of agents whom they had no potential means of controlling, and defendants who have already been punished in criminal court may be punished for the same act under civil law. Furthermore, public dissatisfaction with the civil justice system may be resulting in additional problems to the extent that jurors, influenced by tort reform hyperbole, may choose not to assess a great enough punitive damage award to achieve the purposes of punishment and deterrence or may find the defendant not liable for punitive damages when the imposition of such damages would be in the best interests of society. Those states that have sought to address the problems of excessive punitive damage awards by imposing caps on punitive damage awards have undertaken a very superficial means of remedying variability and have compromised the punishment and deterrent functions of punitive damages in doing so.

The comparative system provides a meaningful alternative to the problems in traditional systems and those with caps. It provides a meaningful method of gauging punitive damage awards and eliminates the problems that result from lack of guidance in
this area, deals with problems related to vicarious liability, and may serve to increase juror attention to or comprehension of jury instructions on punitive damage awards. It is also likely to eliminate the problem of misinformation that has allowed proposals for punitive damage caps to grow in popularity and may be affecting jury determinations of punitive damage awards in the present system.

Unfortunately, it seems that the groups most active in the tort reform debate do not have balanced and just reform as their primary goals. Interest groups that support tort reform tend to reflect the preferences of big business. Personal injury lawyers have been ineffective in persuading the public that the mythical problems don’t exist, but they often do not acknowledge the very significant problems in present systems without caps. While it certainly seems that systems without caps are preferable to those with them, reform must be undertaken to address the problems that exist in the current system and to prevent public outrage over excessive punitive damage awards that wrongly fuels support for caps. The comparative system will allow for meaningful tort reform and not allow the myth that awards are frequently out of control to dictate the outcome of the reform effort.

The comparative system needs to gain the support of at least some prominent interest group and must be put forth as a meaningful alternative to both to the flawed status quo and to so-called reforms that will undermine the legitimate social and legal purposes served by punitive damages.
Works Cited


Endnotes


ii Ibid.


iv Ibid. 8.


vi Ibid.


xiii Ibid.


xvii Ibid.

xviii Blatt, Punitive Damages: State By State, 56.


xxi Blatt, Punitive Damages: State By State, 57.

xxii Ibid., 63.


xxiv Ibid.

xxv Ibid.

xxvi Ibid.


xxviii Ibid.


Ibid.


Ibid.


Ibid.


Ibid.

Ibid.


Ibid.

Ibid.


Ibid.

Ibid.

Ibid., § 11:05 (West Group, 2000).

Ibid.

Ibid., 11.

Ibid., 8.

Ibid., 11-12.

Ibid., 12.

Ibid., 11.

Ibid., 12.

Ibid., 8.

Ibid.


Ibid., 11.

Ibid.

Ibid., 11.

Ibid., 12.

Ibid., 10.

Ibid., 11.


Ibid., s.v. “abuse of discretion.”


Kircher, “Excessive and Inadequate Awards,” §18:02.
Ibid.
Ibid.
Salbu, “Developing Punitive Damages,” under “Government Responses to the Battle Over Punitive Damages.”
Kircher, “Excessive and Inadequate Awards,” §18:02.
Ibid.
Ibid.
Ibid. Cooper v. Leatherman.
Ibid.
Ibid.
It should be noted that what I consider excessive deterrence differs from what some economists term overdeterrence.


Ibid., 82.

Sunstein, Punitive Damages: Juries, 261.


Ibid.

Sunstein, Punitive Damages: Juries, 262.

Ibid.

Ibid., 90.

Ibid., under “Aggregated Data.”

Hastie, “Judging Corporate Recklessness,” 86.


Ibid.

Hastie, “Judging Corporate Recklessness,”90.

Ibid., 91.

Ibid., 74.

Ibid.

Ibid., 73.

Ibid., 67-69.


Ibid.

Ibid., 107.

Blatt, Punitive Damages: State By State, 75.


“Shared Outrage, Erratic Awards,” in Punitive Damages: Juries, 42.

Polinsky, Punitive Damages: An Economic Analysis, 888-889.

Polinsky, Punitive Damages: An Economic Analysis, 889.

An example of such a population would young children.
If a trial is separated into three phases, then it is said to be trifurcated.

These are some of the circumstances that Baldus, MacQueen, and Woodworth recommend that judges take into account in assessing an appropriate award with reference to other cases during additur/remitittur review in “Improving Judicial Oversight of Jury Damage Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages.”

While the proposal for comparative additur/remitittur review has substantial merits, it may not serve to ensure that the public does not wrongly believe that punitive damage awards are often excessive and is, for this and other reasons, less desirable than the system I propose.

While Mogin explains that legislative action is not required for Federal Courts to switch from jury determination of punitive damage awards to judicial determination of punitive damage awards, it is obvious that his reasoning on this subject can also probably be applied in the cases of courts in some states. Paul Mogin, “Why Judges, Not Juries, Should Set Punitive Damages,” 65 University of Chicago Law Review 179 (Winter, 1998), under “Implementing the Change” [journal online—subscription only]; available from: http://web.lexis-nexis.com/universe; LexisNexis Academic Universe.