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Limiting Punitive Damages: A Placebo for America's Ailing Competitiveness.

Jimmie O. Clements Jr.

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COMMENTS

Limiting Punitive Damages: A Placebo for America's Ailing Competitiveness

Jimmie O. Clements, Jr.

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I. INTRODUCTION

On August 13, 1991, Vice President Dan Quayle, as head of the President's Council on Competitiveness (the Council), addressed the American

Bar Association's annual meeting by announcing a fifty-point proposal designed to improve the civil justice system.¹ Vice President Quayle proposed, *inter alia*, a cap on the amount of recoverable punitive damages not to exceed the amount of compensatory, or actual, damages.² The Vice President's recommendation of a limitation on punitive damages came in response to the decline in America's international competitiveness.³ Vice President Quayle argued that punitive damage caps would allow businesses to research and create products without fear of excessive liability.⁴ This comment will discuss Vice President Quayle's proposed legislation by reviewing the history of punitive damages and providing an overview of current state legislation. Thereafter, this comment debunks the theory of an unruly punitive damage system and analyzes the impact of a punitive damage cap on competitiveness, quality, safety, and the doctrine's underlying goals.

II. LEGAL BACKGROUND

A. *Origin and History*

Punitive damages emerged as early as the Code of Hammurabi in 2000 B.C.⁵ and other ancient systems of law.⁶ The doctrine entered the English

1. See THE PRESIDENT'S COUNCIL ON COMPETITIVENESS: AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 11-28 (1991) (enumerating each of 50 proposals); see also Andrew Blum, *Quayle's Proposal Still Making Waves*, NAT'L L.J., Sept. 16, 1991, at 3 (discussing Quayle's controversial forum for announcing proposals); "Isn't Our Legal System in Need of Reform?", LEGAL TIMES, Aug. 19, 1991, at 9, 110 (giving verbatim account of Quayle's speech).

2. See THE PRESIDENT'S COUNCIL ON COMPETITIVENESS: AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 22-23 (1991) (calling for cap on punitive damages and revealing action required); "Isn't Our Legal System in Need of Reform?", LEGAL TIMES, Aug. 19, 1991, at 9, 110 (suggesting cap to correct problems with punitive damages). Other significant recommendations made by the Council include limiting discovery, reforming rules regarding expert testimony, and implementing the "English Rule" whereby the losing party pays attorneys' fees for both sides. *Id.*

3. See *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 471 (Wis. 1980) (Coffey, J., dissenting) (arguing that punitive damages put American corporations at competitive disadvantage); CARL-LUDWIG HOLTFRERICH, ECONOMIC AND STRATEGIC ISSUES IN U.S. FOREIGN POLICY xv (Carl-Ludwig Holtfrerich ed., 1988) (concluding that America has lost competitive edge in machine tool and high-tech industries); REPORT TO THE PRESIDENT FROM THE PRESIDENT'S EXPORT COUNCIL, U.S. TRADE IN TRANSITION: MAINTAINING THE GAINS, Volume II, 162 (1988) (emphasizing need for program to reestablish U.S. industry's competitive position).

4. See *Wangen*, 294 N.W.2d at 471 (Coffey, J., dissenting) (disapproving of punitive damage system because it places American corporations at competitive disadvantage); THE PRESIDENT'S COUNCIL ON COMPETITIVENESS: AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 23 (Aug. 1991) (stressing that limiting punitive damages will add certainty to commercial transactions).

5. See *In re School Asbestos Litigation*, 789 F.2d 996, 1003 (3d Cir. 1986) (dating origin

common law in the thirteenth century.⁷ In American jurisprudence, punitive damages made their formal debut in the 1791 case of *Coryell v. Colbaugh*.⁸ In *Coryell*, a case involving a breach of a promise to marry, the New Jersey Supreme Court adopted the English common law principle of punitive damages by instructing the jury to award damages for “example’s sake” without regard to actual loss or suffering.⁹

By 1851, the jury’s discretion to award punitive damages had evolved to

of exemplary damages to Code of Hammurabi); *Woolstrum v. Mailloux*, 190 Cal. Rptr. 729, 735 (Cal. App. 1983) (citing Code of Hammurabi for proposition that punitive damages are likely to continue for some time); *Nabours v. Longview Sav. & Loan Ass’n*, 700 S.W.2d 901, 907 (Tex. 1985) (referring to Code of Hammurabi as beginning of punitive damages); see also LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 1.1, at 3 n.1 (2d ed. 1989) (giving examples of punitive remedies in Code of Hammurabi); Melvin M. Belli, Sr., *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 49 UMKC L. REV. 1, 2 (1980) (reviewing history of punitive damages beginning with Code of Hammurabi); Brian L. Lahargoue, Comment, *The Need for Federal Legislative Reform of Punitive Damages*, 20 Sw. U. L. REV. 103, 104 (1991) (citing Code of Hammurabi as one of earliest enunciations of punitive damages doctrine).

6. See 111 East 88th Partners v. Simon, 434 N.Y.S.2d 886, 889 (N.Y. Civ. Ct. 1980) (referring to Bible as early enunciation of punitive damages); *Nabours*, 700 S.W.2d at 907 (citing Mosaic, Roman, and medieval law as early support for doctrine of punitive damages); see also LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 1.1, at 3-4 (2d ed. 1989) (naming early codes with punitive damage language). Examples of these early systems include the Bible, the Hindu Code of Manu, Hittite Law, and the Babylonian empire. *Id.* Brian L. Lahargoue, Comment, *The Need for Federal Legislative Reform of Punitive Damages*, 20 Sw. U. L. REV. 103, 104-05 n.11 (1991) (describing the early systems employing punitive damage language).

7. See *Pacific Mutual Life Ins. Co. v. Haslip*, — U.S. —, —, 111 S. Ct. 1032, 1041-42, 113 L. Ed. 2d 1, 18 (1991) (citing *Wilkes v. Wood*, 98 Eng.Rep. 489 (C.P. 1763), as one of first English cases to impose punitive damages); *Browning-Ferris v. Kelco Disposal*, 492 U.S. 257, 274 (1989) (dating multiple damage awards back to thirteenth century); *Scott v. Donald*, 165 U.S. 58, 86-87 (1896) (reviewing English common law cases concerning punitive damages); see also JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE § 1, at 1-3 (Callaghan 1985) (tracing English common law on punitive damages); Melvin M. Belli, Sr., *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 49 UMKC L. REV. 1, 3 (1980) (reviewing punitive damage history in English common law).

8. See *Coryell v. Colbaugh*, 1 N.J.L. (Coxe) 77 (1791) (allowing exemplary damages for breach of promise to marry); *Pacific Mutual*, — U.S. at —, 111 S. Ct. at 1042, 113 L. Ed. 2d at 18 (1991) (citing *Coryell* as one of first American cases addressing punitive damages); *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 103 (4th Cir. 1991) (including *Coryell* as early American case discussing punitive damages); see also Melvin M. Belli, Sr., *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 49 UMKC L. REV. 1, 4 (1980) (noting that punitive damages were awarded as early as 1791 in *Coryell*); Brian L. Lahargoue, Comment, *The Need for Legislative Reform of Punitive Damages*, 20 Sw. U. L. REV. 103, 105 (1991) (citing *Coryell* as first American enunciation of punitive damages).

9. See *Coryell*, 1 N.J.L. (Coxe) at 77 (reciting instructions given to jury in relation to exemplary damage award); *Nappe v. Anshelewitz, Barr, Ansell & Bonello*, 477 A.2d 1224, 1230 (N.J. 1984) (citing language in *Coryell*); see also LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES 15 (2d ed. 1989) (reviewing jury instructions given in *Coryell*);

the point that the United States Supreme Court, in *Day v. Woodworth*,¹⁰ declared it a "well-established principle of the common law."¹¹ The Court therefore concluded that the imposition of punitive damages "will not admit of argument."¹²

Although the stability of punitive damages in America was unquestionable after *Woodworth*, the doctrine encountered some opposition in early American cases.¹³ For example, in *Fay v. Parker*¹⁴ the New Hampshire Supreme Court described punitive damages as a "monstrous heresy" and therefore set aside an exemplary damage award.¹⁵ The court, however, conceded to the vitality of the doctrine and its influence on American common law.¹⁶

Currently, punitive damage awards and the jury's discretion to impose

James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1124 (1984) (discussing jury instructions given in *Coryell*).

10. 54 U.S. (13 How.) 363 (1851).

11. *See id.* at 371 (discussing soundness of common law principle of punitive damages); *see also Pacific Mutual*, ___ U.S. at ___, 111 S. Ct. at 1042, 113 L. Ed. 2d at 18-19 (quoting *Woodworth* decision with respect to common law punitive damages); *Herald Co. v. Harper*, 410 F.2d 125, 128 (1969) (citing *Woodworth*); LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES 16 (2d ed. 1989) (citing language in *Woodworth* pertaining to common law principle of punitive damages); J. Mark Hart, *The Constitutionality of Punitive Damages: Pacific Mutual Life Insurance Company v. Haslip*, 21 CUMB. L. REV. 585, 586 n.7 (1991) (quoting language in *Woodworth*).

12. *Woodworth*, 54 U.S. (13 How.) at 371.

13. *See, e.g.,* *Murphy v. Hobbs*, 5 P. 119, 125 (Colo. 1884) (denying award of exemplary damages because compensatory damages sufficiently met demands of justice); *Roose v. Perkins*, 2 N.W. 715, 721 (Neb. 1879) (arguing that state, not individuals, should impose punishment and therefore disagreeing with concept of punitive damages); *see also* Melvin M. Belli, Sr., *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 49 UMKC L. REV. 1, 4 (1980) (noting that some early American cases disapproved of punitive damages).

14. 53 N.H. 342 (1873).

15. *Id.* at 382. The term used was couched in the following language of the court's opinion:

What kind of a civil remedy for the plaintiff is the punishment of the defendant? The idea is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law.

Id.; *see also Pacific Mutual*, ___ U.S. at ___, 111 S. Ct. at 1038 n.4, 113 L. Ed. 2d at 13 n.4 (quoting language from *Parker* regarding doctrine's propriety); JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE § 2.01, at 1 (1985) (citing language in *Fay* as example of criticism of punitive damages); Melvin M. Belli, Sr., *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 49 UMKC L. REV. 1, 4 (1980) (using *Fay* as example of early case which disapproved use of punitive damages).

16. *See Fay*, 53 N.H. at 397 (acknowledging that punitive damages are "fixed in the law"); *see also Pacific Mutual*, ___ U.S. at ___, 111 S. Ct. at 1047-48, 113 L. Ed. 2d at 25 (citing *Fay* for proposition that early opponents of punitive damages doctrine recognized its firmness in American law).

them remains firmly established in American law despite a growing movement against their use.¹⁷ In fact, only six states presently forbid punitive damage awards.¹⁸ However, even those six states employ several exceptions allowing multiple or treble damages in appropriate situations.¹⁹ This wide application of the doctrine confirms its inherent value and necessary role in the American civil justice system.²⁰

B. Purposes

In general, punitive damages are awarded to enhance compensatory, or actual, damages in cases involving reckless, malicious, willful, or wanton behavior.²¹ One of the most commonly cited purposes for the doctrine of puni-

17. See, e.g., James E. Duffy, Jr., *Punitive Damages: A Doctrine Which Should Be Abolished*, reprinted in DEFENSE RESEARCH INSTITUTE: THE CASE AGAINST PUNITIVE DAMAGES 14 (Donald J. Hirsch & James G. Poulos eds., 1969) (arguing that purpose for punitive damages is served by compensatory damages); James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origin*, 37 VAND. L. REV. 1117, 1171-72 (1984) (concluding that punitive damages have become obsolete).

18. See JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE §§ 4.07-4.12, at 8-12 (1985) (discussing states which do not permit punitive damages). The six states include Indiana, Louisiana, Massachusetts, Nebraska, New Hampshire, and Washington. *Id.*

19. See, e.g., LA. CIV. CODE ANN. art. 2315.1 (West 1979) (allowing punitive damages in certain libel, defamation, and slander actions); MASS. ANN. LAWS ch. 272, § 99(Q)(2) (Law. Co-op. 1980) (permitting punitive damage award for interception of oral or wire communications); NEB. REV. STAT. § 54-1808 (1988) (allowing double damages for violation of sale of livestock provisions); N.H. REV. STAT. ANN. § 359-B:16 (1984) (allowing punitive damages in actions for willful noncompliance with consumer credit reporting provisions); WASH. REV. CODE ANN. § 19.86.090 (West 1989) (authorizing treble damage award for violation of unfair competition provision); *Nicholson's Mobile Home Sales, Inc. v. Schramm*, 330 N.E.2d 785, 791 (Ind. App. 1975) (citing three exceptions to preclusion of punitive damages).

20. See *Pacific Mutual*, ___ U.S. at ___, 111 S. Ct. at 1054, 113 L. Ed. 2d at 33-34 (Scalia, J., concurring) (arguing that punitive damages are vigorously alive); Lisa M. Broman, Comment, *Punitive Damages: An Appeal for Deterrence*, 61 NEB. L. REV. 651, 680 (1982) (punitive damages are necessary tool in controlling undesirable conduct).

21. See *Pacific Mutual Life Ins. Co. v. Haslip*, ___ U.S. ___, 111 S. Ct. 1032, 1042, 113 L. Ed. 2d. 1, 18 (1991) (under common law approach jury must consider gravity of wrong before assessing punitive damages); *Browning-Ferris v. Kelco Disposal*, 492 U.S. 257, 261 (1989) (reviewing jury instructions which allowed punitive damages for outrageous, willful, or wanton conduct); *Sebastian v. Wood*, 66 N.W.2d 841, 849 (Iowa 1954) (exemplary damages justified if conduct willfully or wantonly committed); *Cantrell v. Amarillo Hardware Co.*, 602 P.2d 1326, 1331 (Kan. 1979) (evidence of conduct involving reckless disregard supported punitive damage award); see also Griffin B. Bell & Perry E. Pearce, *Punitive Damages and the Tort System*, 22 RICH. L. REV. 1, 9-10 (1987) (punitive damage award usually requires acts which may be called willful or wanton); Sylvia M. Demarest & David E. Jones, *Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest?*, 18 ST. MARY'S L. J. 797, 799 (1987) (exemplary damages typically applied in cases involving more than ordinary negligence).

tive damages is punishing the defendant for his wrongful conduct.²² Although the idea of punishing a defendant for outrageous conduct is normally reserved for criminal misdeeds, the civil law borrows the concept when imposing punitive damages.²³ Critics of the doctrine contend that the civil law should be limited to a compensatory function, leaving punishment to the criminal law.²⁴ However, this contention ignores the fact that many wrongful acts cannot, or will not, be pursued in a criminal proceeding.²⁵ Some conduct which does not violate a criminal provision may still justify an award of punitive damages.²⁶ Similarly, a prosecutor may ignore wrongs such as battery in favor of more serious crimes.²⁷ Thus, when the criminal

22. See *Pacific Mutual*, ___ U.S. at ___, 111 S. Ct. at 1044, 113 L. Ed. 2d. at 20-21 (reviewing, with approval, Alabama's jury instruction which gave punishment and deterrence as punitive damage goals); *Browning-Ferris*, 492 U.S. at 275 (agreeing that interests of punishment and deterrence are advanced by punitive damages); *Scott v. Donald*, 165 U.S. 58, 88 (1896) (exemplary damages serve interest of punishment); see also Melvin M. Belli, Sr., *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 49 UMKC L. REV. 1, 6-7 (1980) (discussing punishment and deterrence as justification for punitive damage awards). Other less-acknowledged theories given for awarding punitive damages include revenge, public justice, and compensation. *Id.* at 5-6; see Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 SO. CAL. L. REV. 1, 3-12 (discussing legal theories supporting use of punitive damages); Brian L. Lahargoue, Comment, *The Need for Federal Legislative Reform of Punitive Damages*, 20 SW. U. L. REV. 103, 103 (1991) (citing justifications for punitive damage awards as punishment and deterrence).

23. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 7 (5th ed. 1984) (purpose of criminal proceeding is, *inter alia*, to punish); LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 2.2(A)(1) at 25 (2d ed. 1989) (punishment concept used by criminal law to protect society).

24. See *Spokane Truck & Dray Co. v. Hofer*, 25 P. 1072, 1074 (Wash. 1891) (refusing to uphold punitive damage award since province of civil court does not include punishment); James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1162 (1984) (advocating criminal justice system as appropriate forum for punishment).

25. See *Kink v. Combs*, 135 N.W.2d 789, 798 (Wis. 1965) (explaining that punitive damage award has effect of punishing conduct which goes unpunished by prosecutor); JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE § 2.02, at 5 (1985) (punitive damages resolve problem of offenses escaping punishment in criminal law); Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 645 (1980) (advocating punitive damage award as only effective deterrent in many cases of misconduct).

26. See Lisa M. Broman, Comment, *Punitive Damages: An Appeal for Deterrence*, 61 NEB. L. REV. 651, 654 (1982) (noting that government prosecution cannot punish all outrageous conduct); Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U. L. REV. 1158, 1176 (1966) (arguing that punitive damages of great significance where society imposes no criminal sanction for misconduct).

27. See *State ex rel. Young v. Crookham*, 618 P.2d 1268, 1272 (Or. 1980) (noting that exemplary damages encourage actions arising from minor offenses going unprosecuted and citing Donald P. Hodel, *The Doctrine of Exemplary Damages in Oregon*, 44 OR. L. REV. 175, 182 (1965)); Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive*

law disregards conduct deserving prosecution, punitive damages fill the void by punishing otherwise wrongful behavior.

Closely related to the punishment goal of punitive damages, scholars cite deterrence as another major reason for the doctrine.²⁸ To the extent that imposing punishment tends to influence future behavior, deterrence provides a practical reason for punishing defendants.²⁹ Since the objectives of revenge and retaliation are irrational when imposing a sanction, many commentators regard the purposes of deterrence and punishment as inseparable.³⁰

C. Tort Reform and Its Effect on Punitive Damages

During the mid-1980s the insurance industry blamed punitive damages when it experienced a severe downturn in profits.³¹ The industry seized the opportunity to prey upon the civil justice system in order to justify its drastic premium increases, and hence, unaffordable liability insurance.³² Calling for legislative reform, interest groups armed with a well-organized and lavishly-funded campaign assailed the civil justice system and punitive damages.³³

Damages, 41 N.Y.U. L. REV. 1158, 1176 (1966) (conduct which is criminal but rarely prosecuted effectively regulated by punitive damages).

28. See Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 522 (1957) (punishment and deterrence are closely related purposes of exemplary damages).

29. See *Campus Sweater & Sportswear v. M. B. Kahn Constr. Co.*, 515 F. Supp. 64, 106 (D.S.C. 1979) (punitive damages not awarded based solely on revenge); Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 648 (1980) (arguing that punishment for past acts affects future conduct).

30. See Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 648 (1980) (arguing that punishment and deterrence cannot be separated as purposes for punitive damages); Lisa M. Broman, Comment, *Punitive Damages: An Appeal for Deterrence*, 61 NEB. L. REV. 651, 653 (1982) (explaining that deterrence and punishment serve as companion purposes of punitive damages).

31. See *Samuels v. Coil Bar Corp.*, 579 N.E.2d 558, 559 (Ohio Ct. Common Pleas 1991) (questioning whether insurance crisis existed); *Hoem v. State*, 756 P.2d 780, 783 (Wyo. 1988) (noting absence of evidence indicating insurance crisis ever existed); see also *Stephens v. Snyder Clinic Ass'n*, 631 P.2d 222, 236 (Kan. 1981) (Herd, J., dissenting) (arguing that so-called insurance crisis did not exist); LINDA L. SCHLUETER & KENNETH R. REDDEN, *PUNITIVE DAMAGES* § 9.13, at 583 (2d ed. 1989) (reviewing impact of insurance problems on tort system); David Burrow & John E. Collins, *Insurance "Crisis"—Texas Style: The Case for Insurance Reform*, 18 ST. MARY'S L. J. 759, 761 (1987) (claiming recent insurance cycle more severe than ever before).

32. See David Burrow & John E. Collins, *Insurance "Crisis"—Texas Style: The Case for Insurance Reform*, 18 ST. MARY'S L. J. 759, 761 (1987) (insurance executives blamed rate hikes on civil justice system); John W. Wade, *An Evaluation of the "Insurance Crisis" and Existing Tort Law*, 24 HOUS. L. REV. 81, 95 (1987) (discussing how insurance companies throw blame for profitability problems on substantive tort law).

33. See *Stephens*, 631 P.2d at 236 (Herd, J., dissenting) (arguing that insurance company's propaganda campaign overstated insurance industry's problems); Stephen Daniels &

Reform-minded critics argued that fundamental change in the method of imposing punitive damage awards was needed to cure the insurance industry's woes.³⁴ A widely accepted view, however, indicates the problems that occurred in the insurance industry came from within and have little to do with the civil justice system.³⁵

As a result of the campaign to cure the alleged ills of the civil justice system and in turn remedy the insurance industry's "crisis," several states enacted tort reform measures in the mid to late 1980s.³⁶ Some of these changes affect punitive damage awards by regulating the method by which they are imposed.³⁷ These regulations include capping the amount of punitive damages which may be imposed, requiring a higher standard of proof, and limiting the range of actions which will support a recovery of punitive damages.³⁸ Although these reform significantly eroded the powerful influ-

Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 10-11 (1990) (reformers characterized civil justice system as one out of control as a result of punitive damages); Ralph Nader, *The Corporate Drive to Restrict Their Victims' Rights*, 22 GONZ. L. REV. 15, 20-21 (1986) (insurance industry joined corporate defense lobbies to attack civil justice system and limit their liability).

34. See LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 9.13, at 583 (2d ed. 1989) (punitive damage critics argued that affordability of insurance depended upon legislative controls); Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 3 (1990) (reformers calling for change or abolishment of punitive damages due to their alleged effect on "insurance crisis").

35. See *Hoem*, 756 P.2d at 783 (citing poor management and bad investments as conceivable causes of insurance crisis); see also *Lankford v. Sullivan*, Long & Hagerty, 416 So. 2d 996, 1003 (Ala. 1982) (citing report that found insurance industry's problems were result of, *inter alia*, rate-making procedures); David Burrow & John E. Collins, *Insurance "Crisis"—Texas Style: The Case for Insurance Reform*, 18 ST. MARY'S L. J. 759, 761-63 (1987) (describing how pricing practices and cyclical nature of insurance industry caused decline in profits and resulting "crisis"); Ralph Nader, *The Corporate Drive to Restrict Their Victims' Rights*, 22 GONZ. L. REV. 15, 18-19 (1986) (describing how insurance problems were self-inflicted through inadequate pricing practices and downward cycle); John W. Wade, *An Evaluation of the "Insurance Crisis" and Existing Tort Law*, 24 HOUS. L. REV. 81, 95 (1987) (noting that some insurance executives admit insurance companies are responsible for "crisis due to their pricing practices").

36. See JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE app. at 97-149 (1985) (detailing statutes enacted which deal with punitive damages); see also LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 9.13, at 585 (2d ed. 1989) (noting that several states enacted legislation limiting recovery of punitive damages).

37. See JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE § 21.12, at 76-77 (1985) (arguing that precedential value of legislative changes will be tested by courts); see also LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 9.13, at 585 (2d ed. 1989) (noting that several states enacted legislation limiting recovery of punitive damages).

38. See *Folks v. Kansas Power & Light Co.*, 755 P.2d 1319, 1332 (Kan. 1988) (noting proposals resulting from legislative efforts regarding standards for awarding punitive damages). See generally JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES LAW AND

ence of punitive damages, making them more difficult to obtain, the tort reform movement continues.

III. LIMITATIONS ON PUNITIVE DAMAGES

A. Introduction

As a result of the efforts to limit punitive damage awards, the tort reform movement made significant progress in changing state legislation. As of this writing, thirty-one states have laws limiting the availability of punitive damages.³⁹ Nine of these thirty-one states, including Texas, cap the recoverable amount of punitive damage awards.⁴⁰ Although the President's Council on Competitiveness advocates limiting punitive damage awards to the amount of actual damages,⁴¹ only two of the nine states with punitive damage caps, Colorado and Oklahoma, limit them to such a degree.⁴² The other seven states employ various types of caps. These variations include setting a fixed

PRACTICE §§ 21.12-21.22, at 76-95 (1985) (highlighting legislative reforms in punitive damages).

39. See ALA. CODE § 6-11-21 (Dupp. 1991); ALASKA STAT. § 09.17.020 (Supp. 1991); ARIZ. REV. STAT. ANN. § 12-701 (Supp. 1991); CAL. CIV. CODE § 3294 (Deering Supp. 1992); COLO. REV. STAT. § 13-21-102 (1987); FLA. STAT. ANN. § 768.72 (West Supp. 1990); GA. CODE ANN. § 51-12-5.1(g) (Michie Supp. 1991); HAW. REV. STAT. § 431:10-240 (1989); IDAHO CODE § 6-1604 (1990); ILL. ANN. STAT. ch. 110 para. 2-604.1 (Smith-Hurd Supp. 1991); IND. CODE ANN. § 34-4-34-2 (Burns 1986); IOWA CODE ANN. § 668A.1 (West 1987); KAN. STAT. ANN. § 60-3701(c) (1989); KY. REV. STAT. ANN. § 411.184 (Michie/Bobbs-Merrill Supp. 1990); MD. CTS. & JUD. PROC. CODE ANN. § 10-913 (1989); MINN. STAT. ANN. § 549.191 (West 1989); MO. ANN. STAT. § 510.263 (Vernon Supp. 1992); MONT. CODE ANN. § 27-1-221 (1989); NEV. REV. STAT. ANN. § 42.005 (Michie Supp. 1989); N.H. REV. STAT. ANN. § 507:16 (Supp. 1991); N.J. STAT. ANN. § 2A:58C-5 (West 1987); N.D. CENT. CODE § 32-03.2-11 (Supp. 1991); OHIO REV. CODE ANN. § 2307.80 (Baldwin 1989); OKLA. STAT. tit. 23, § 9(A) (West 1987); OR. REV. STAT. § 41.315 (1991); S.C. CODE ANN. § 15-33-135 (Law. Co-op. Supp. 1991); S.D. CODIFIED LAWS ANN. § 21-1-4.1 (1987); TENN. CODE ANN. § 20-10-101 (Supp. 1991); TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (Vernon Supp. 1989); UTAH CODE ANN. § 78-18-1 (1990); VA. CODE ANN. § 8.01-38.1 (Michie 1987).

40. See ALA. CODE § 6-11-21 (Supp. 1991); COLO. REV. STAT. § 13-21-102 (1987); FLA. STAT. ANN. § 768.72 (West Supp. 1990); GA. CODE ANN. § 51-12-5.1(g) (Michie Supp. 1991); KAN. STAT. ANN. § 60-3701(c) (1989); NEV. REV. STAT. ANN. § 42.005 (Michie Supp. 1989); OKLA. STAT. tit. 23, § 9(A) (West 1987); TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (Vernon Supp. 1989); VA. CODE ANN. § 8.01-38.1 (Michie 1987); see generally Amelia J. Toy, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 EMORY L.J. 303, 335-39 (1991) (analyzing different caps with respect to extraordinary sanctions model).

41. See THE PRESIDENT'S COUNCIL ON COMPETITIVENESS: AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 22 (Aug. 1991) (recommending that amount of punitive damages not exceed compensatory amount).

42. See COLO. REV. STAT. § 13-21-102(1)(a) (1987) (limiting exemplary damages to actual damage amount); OKLA. STAT. tit. 23, § 9(A) (1987) (providing limitation on exemplary damages at amount of actual damages awarded).

amount,⁴³ setting a more relaxed ratio to actual damages than that recommended by the Council,⁴⁴ and extracting profit.⁴⁵ All nine of these states, except Virginia, provide exceptions to the punitive damages caps.⁴⁶ The Council, however, does not recommend the use of any exceptions to the punitive damage limitation it advocates.

B. *Limited to the Amount of Actual Damages*

The President's Council on Competitiveness recommends a cap on recoverable punitive damages at the amount of actual damages.⁴⁷ Although Colorado and Oklahoma presently provide for such a cap, each state allows exceptions to the cap in certain situations.⁴⁸ In Colorado, if the defendant willfully continues his tortious conduct or willfully aggravates the plaintiff's damages while the case is pending, an exception would allow the judge to increase the amount of punitive damages up to three times the amount of compensatory damages.⁴⁹ In Oklahoma, this restriction does not apply when the court finds, sua sponte and before the case has been submitted to the jury, clear and convincing evidence that the defendant's conduct involved a wanton and reckless disregard for the rights of another.⁵⁰

C. *Other Fixed Ratios*

Unlike the strict ratio applied by Colorado and Oklahoma that limits pu-

43. See ALA. CODE § 6-11-20(a) (Supp. 1990) (setting cap at \$250,000); GA. CODE ANN. § 51-12-5.1(b) (Supp. 1989) (setting cap at \$250,000); VA. CODE ANN. § 8.01-38.1 (1987) (setting cap at \$350,000).

44. See FLA. STAT. ANN. § 768.72 (West Supp. 1990) (setting cap at three times actual damage amount); NEV. REV. STAT. ANN. § 42.005 (Michie Supp. 1989) (setting cap at three times actual damage amount); TEX. CIV. PRAC. & REM. CODE ANN. § 41.007 (Vernon 1989) (setting cap at four times actual damage amount).

45. See KAN. STAT. ANN. § 60-3701(c) (1989) (capping damages at lesser of five million dollars or defendant's highest gross annual income in last five years).

46. See Amelia J. Toy, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 EMORY L.J. 303, 335 (1991) (criticizing Virginia's lack of exceptions since it undermines deterrent effect of punitive damages).

47. See THE PRESIDENT'S COUNCIL ON COMPETITIVENESS: AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 22 (1991) (suggesting limit on punitive damages at amount of actual damages).

48. See COLO. REV. STAT. § 13-21-102(1)(a) (1987) (limiting exemplary damages to actual damage amount); OKLA. STAT. tit. 23, § 9(A) (1987) (providing limitation on exemplary damages at amount of actual damages awarded).

49. See COLO. REV. STAT. § 13-21-102 (3)(a), (b) (1987) (providing exceptions for punitive damage limit).

50. See OKLA. STAT. tit. 23, § 9(A) (1987) (providing exception to limit on punitive damage awards); see also *Marshall v. El Paso Natural Gas Co.*, 874 F.2d 1373, 1383-84 (10th Cir. 1989) (allowing punitive damages without limitation where court made initial finding that defendant's conduct warranted such award).

nitive damages to an amount equal to actual damages, three states have enacted statutes which impose ratios allowing greater flexibility for punitive damage awards. In Texas, for example, punitive damages are limited to four times the amount of actual damages or \$200,000, whichever is greater.⁵¹ However, this cap does not apply to intentional or malicious actions.⁵² Damages resulting from gross negligence remain limited by the cap.⁵³

The limitation placed on punitive damages in Nevada is also determined by the amount of actual damages awarded.⁵⁴ If the compensatory amount exceeds \$100,000, punitive damages are capped at three times that amount.⁵⁵ However, if actual damages are less than \$100,000, a fixed limitation of \$300,000 is imposed.⁵⁶ Several actions, including defamation and products liability, remain unaffected by this statutory limitation.⁵⁷

Punitive damage awards in Florida are prohibited unless the claimant shows a reasonable basis for their use.⁵⁸ When available, however, punitive damages may not exceed three times the amount of actual damages.⁵⁹ A claimant avoids this ratio if clear and convincing evidence shows that the amount is not excessive according to the specific facts and circumstances of the case.⁶⁰ Otherwise, an award surpassing the statutory limitation is presumptively excessive.⁶¹

51. See TEX. CIV. PRAC. & REM. CODE ANN. § 41.007 (Vernon Supp. 1992) (imposing limit on punitive damages).

52. See *id.* § 41.008 (giving exception to punitive damage limitation).

53. See *id.* § 41.003 (allowing exemplary damages for gross negligence).

54. See NEV. REV. STAT. ANN. § 42.005(1)(a), (b) (1991) (limiting punitive damages according to amount of actual damages).

55. See *id.* § 42.005(1)(a) (allowing award of up to three times amount of actual damages).

56. See *id.* § 42.005(1)(b) (capping punitive damages at \$300,000 if actual damages are below \$100,000).

57. See *id.* § 42.005(2)(a), (e) (excluding certain actions from punitive damage cap).

58. See FLA. STAT. ANN. § 768.72 (West Supp. 1992) (allowing punitive damages only after reasonable basis is shown); see also *Lancer Arabians, Inc. v. Beech Aircraft Corp.*, 723 F. Supp. 1444, 1446-47 (M.D. Fla. 1989) (requiring plaintiff to demonstrate reasonable basis for punitive damage award even though case in federal court); *Will v. Systems Eng'g Consultants*, 554 So. 2d 591, 591-92 (Fla. Dist. Ct. App. 1989) (applying statute which requires plaintiff to show reasonable basis for recovery of punitive damages).

59. See FLA. STAT. ANN. § 768.73 (West Supp. 1992) (limiting punitive damages to three times amount of actual damages); see also *Smith v. Department of Ins.*, 507 So. 2d 1080, 1092 (Fla. 1987) (finding statute which limits punitive damages not violative of Florida's separation of powers clause).

60. See FLA. STAT. ANN. § 768.73(1)(a), (b) (West Supp. 1990) (allowing exception to damage cap in "light of facts and circumstances").

61. See *id.* (declaring award which exceeds limitation presumptively excessive).

D. *Fixed Amounts*

Three states limit punitive damage awards by setting a fixed amount which may not be exceeded, regardless of the amount of actual damages. For example, Virginia forbids any punitive damage award exceeding \$350,000.⁶² Moreover, the state allows for no exceptions to this strict calculation.⁶³ Therefore, all punitive damage awards exceeding that amount must be reduced, regardless of the offense or amount of actual damages.⁶⁴

Although Alabama and Georgia have also limited punitive damages to a fixed amount, several exceptions apply. Alabama forbids a punitive damage award unless the claimant shows by clear and convincing proof that the defendant engaged in conduct warranting such an award.⁶⁵ Even if the claimant satisfies this burden, however, punitive damages may not exceed \$250,000.⁶⁶ In a case involving a pattern of intentional misconduct, or when the case concerns libel, slander, or defamation, a claimant may avoid the cap.⁶⁷ Alabama also allows an exception to the punitive damage cap for offenses involving actual malice.⁶⁸ Similarly, Georgia sets its limitation on

62. See VA. CODE ANN. § 8.01-38.1 (Michie Supp. 1991) (setting punitive damage cap at \$350,000).

63. See Amelia J. Toy, Comment, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 EMORY L.J. 303, 335 (1991) (discussing, with disfavor, Virginia's lack of exceptions to punitive damage cap).

64. See VA. CODE ANN. § 8.01-38.1 (Michie Supp. 1991) (requiring judge to reduce excessive amount to comply with cap).

65. See ALA. CODE ANN. § 6-11-20(a) (Michie Supp. 1991) (requiring clear and convincing evidence before punitive damages may be awarded). Such conduct includes oppression, fraud, wantonness, or malice toward the claimant. *Id.*; see also *Tombrello v. USX Corp.*, 763 F. Supp. 541, 546 (N.D. Ala. 1991) (denying claim for punitive damages for lack of proof regarding requisite conduct).

66. See ALA. CODE ANN. § 6-11-21 (Michie Supp. 1991) (setting cap on punitive damages at \$250,000); see also *Fuller v. Preferred Risk Life Ins. Co.*, 577 So. 2d 878, 883 (Ala. 1991) (refusing to apply recognized cap because cause of action accrued before cap became effective); Robert D. Hunter, *Alabama's 1987 Tort Reform Legislation*, 18 CUMB. L. REV. 281, 299-301 (1988) (discussing debate and negotiations between Alabama Civil Justice Reform Committee and American Trial Lawyers Association over amount to set for punitive damage cap).

67. See ALA. CODE ANN. § 6-11-21(1), (3) (Michie Supp. 1991) (listing exceptions to punitive damage cap); see also *Youngblood v. Lawyers Title Ins. Corp.*, 746 F. Supp. 71, 72-73 (S.D. Ala. 1989), *rev'd on other grounds*, 923 F.2d 161 (11th Cir. 1991) (holding cap inapplicable on punitive award of \$500,000 since plaintiff satisfied burden of showing pattern of wrongful misconduct); Robert D. Hunter, *Alabama's 1987 Tort Reform Legislation*, 18 CUMB. L. REV. 281, 299-301 (1988) (referring to debate concerning proposed exceptions to include).

68. See ALA. CODE ANN. § 6-11-21(2) (Michie Supp. 1991) (providing exception to cap for actual malice); Robert D. Hunter, *Alabama's 1987 Tort Reform Legislation*, 18 CUMB. L. REV. 281, 299-301 (1988) (referring to legislative debate concerning which exceptions to include).

punitive damage awards at \$250,000.⁶⁹ However, an exception to the cap applies when the tortfeasor acts with specific intent to cause harm.⁷⁰

E. *The Expected Profit Cap*

Kansas limits punitive damages by applying the lesser of five million dollars or "defendant's highest gross annual income earned for any one of the five previous years immediately before the act for which such damages are awarded."⁷¹ An exception applies to this cap, however, if the claimant shows that the defendant expected to make a profit exceeding the maximum damage award.⁷² In such a situation, the court may set damages equal to one and one-half times the defendant's expected profit as a result of the misconduct and without reference to the limitation.⁷³

IV. CONSTITUTIONAL CHALLENGES

Although the tort reform movement achieved significant legislative success in the states, it remained defeated in the constitutional arena. At the turn of the decade, the United States Supreme Court addressed the constitutionality of punitive damages by entertaining Eighth Amendment and Due Process Clause challenges.⁷⁴ Such litigation, however, has only reinforced the stability of the common law doctrine of punitive damages.⁷⁵

69. See GA. CODE ANN. § 51-12-5.1(g) (Michie Supp. 1991) (setting punitive damage cap at \$250,000); H. Lee Pruett, Comment, *Are Excessive Punitive Damages Unconstitutional in Georgia?: This Question and More in Colonial Pipeline Co. v. Brown*, 6 GA. ST. U. L. REV. 85, 90-91 (1989) (alluding to Georgia statute limiting punitive damages to \$250,000).

70. See GA. CODE ANN. § 51-12-5.1(f) (Michie Supp. 1991) (allowing exception to cap for actions involving specific intent to harm); see also *Salsbury Lab. v. Merieux Lab., Inc.*, 735 F. Supp. 1555, 1574 (M.D. Ga. 1989) (allowing \$500,000 punitive damage award despite \$250,000 cap since conduct involved specific intent to cause harm); H. Lee Pruett, Comment, *Are Excessive Punitive Damages Unconstitutional in Georgia?: This Question and More in Colonial Pipeline Co. v. Brown*, 6 GA. ST. U. L. REV. 85, 90-91 (1989) (noting exception for intentional torts).

71. KAN. STAT. ANN. § 60-3701(e) (1991).

72. See *id.* § 60-3701(f) (providing exception if expected profitability exceeds limitation).

73. See *id.* (giving formula of one and one-half times amount of profit if limitation is exceeded).

74. See *Pacific Mutual Life Ins. Co. v. Haslip*, ___ U.S. ___, 111 S. Ct. 1032, 1038-40, 113 L. Ed. 2d 1, 14-16 (1991) (discussing constitutional challenges to punitive damages leading up to its decision to hear 14th Amendment challenge); *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 259 (1989) (noting that Supreme Court faced question of whether punitive damages violated Eighth Amendment).

75. See *Pacific Mutual*, ___ U.S. at ___, 111 S. Ct. at 1046, 113 L. Ed. 2d at 23 (rejecting due process challenge in favor of common law method of imposing punitive damages); *Browning-Ferris*, 492 U.S. at 260 (holding Eighth Amendment inapplicable to cases between private parties).

A. Eighth Amendment

The Eighth Amendment of the United States Constitution forbids "excessive fines" and "cruel and unusual punishment."⁷⁶ Although some commentators have argued that this language prohibits punitive damage awards, the United States Supreme Court disagrees.⁷⁷ In fact, the Supreme Court has consistently rejected Eighth Amendment attacks on punitive damages by holding that the provision does not apply in cases between private parties.⁷⁸ This holding was most recently enunciated by the Supreme Court in the 1989 case of *Browning-Ferris Industries v. Kelco Disposal, Inc.*⁷⁹ In *Browning-Ferris*, the Supreme Court stated that since the Eighth Amendment pertained only to direct governmental actions in setting punishments, it did not preclude an award of punitive damages in a civil case.⁸⁰ In effect, the Supreme Court limited the Eighth Amendment to criminal cases.⁸¹

B. Due Process Clause

The Due Process Clause reads: "[N]or shall any state deprive any person of life, liberty, or property without due process of law."⁸² Recently, the United States Supreme Court, in *Pacific Mutual Life Insurance Co. v. Has-*

76. U.S. CONST. amend. VIII.

77. See *Browning-Ferris Induc., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 263-64 (1989) (holding Eighth Amendment inapplicable to money damage awards in civil suits); see also Bruce Joel Hillman, Note, *Browning-Ferris Industries v. Kelco Disposal, Inc.: The Constitution and "Excessive" Punitive Damages*, 17 N. KY. L. REV. 497, 505-09 (1990) (discussing *Browning-Ferris* in relation to inapplicability of Eighth Amendment to punitive damages); Joseph C.M. Woltz, Recent Development, *The Excessive Fines Clause Revisited: Punitive Damages After Browning-Ferris Industries v. Kelco Disposal, Inc.*, 25 TULSA L.J. 337, 340-42 (1989) (reviewing holding in *Browning-Ferris*).

78. See *Ingraham v. Wright*, 430 U.S. 651, 664 (1976) (explaining that Eighth Amendment designed as safeguard for those convicted of crime); *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 217 (Colo. 1984) (holding Cruel and Unusual Punishments Clause inapplicable to punitive damages claim in civil proceeding); *Unified School District No. 490 v. Celotex Corp.*, 629 P.2d 196, 206 (Kan. App. 1981) (limiting Eighth Amendment to criminal setting).

79. 492 U.S. 257 (1989). In *Browning-Ferris*, a waste-disposal company brought action against a national disposal company for an alleged violation of federal antitrust law. *Id.* at 261. The jury awarded \$51,146 in compensatory damages and \$6 million in punitive damages to the local company. *Id.* at 262. Thereafter, the disposal company appealed to the United States Court of Appeals for the Second Circuit, claiming that the award was excessive and therefore a violation of the Eighth Amendment's excessive fines proscription. The appellate court affirmed the judgment and held that the award was not constitutionally excessive. *Id.*

80. See *id.* at 263-64. The Supreme Court reached its decision by looking to the purposes and concerns of the Eighth Amendment. *Id.* at 264-68. In doing so, the Supreme Court decided that the Excessive Fines Clause of the Eighth Amendment was only intended to limit fines payable or owed to governmental entities. *Id.* at 268.

81. See *id.* at 264 (rejecting Eighth Amendment claim in civil suits which award money damages).

82. U.S. CONST. amend. XIV.

lip,⁸³ held that a punitive damage award comports with the Due Process Clause if the proper procedural safeguards accompany such a determination of damages.⁸⁴ The Supreme Court reasoned that the jury guidance and reasonable review attendant with the punitive damages in *Haslip* resulted in an award free of constitutional impropriety.⁸⁵ The Supreme Court, therefore, upheld a punitive damage award equalling four times the amount of actual damages.⁸⁶

V. VICE PRESIDENT QUAYLE'S PROPOSAL

Echoing the concerns that propel the tort reform movement, President Bush established the President's Council on Competitiveness to address the decline in America's international competitiveness.⁸⁷ The Council, which Vice President Quayle supervises, established a special working group to address problems in the civil justice system.⁸⁸ The group, chaired by Solicitor General Kenneth W. Starr, recommends various changes to the civil justice system designed to make it more efficient.⁸⁹

Punitive damages attracted the attention of the Council as a primary area in need of reform.⁹⁰ The Council reasons that uncertainty as to the amount

83. ___ U.S. ___, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991).

84. *Id.* at ___, 111 S. Ct. at 1044, 113 L. Ed. 2d at 20-21. In *Haslip*, an insurance agent allegedly misappropriated certain health premium payments. *Id.* at ___, 111 S. Ct. at 1036, 113 L. Ed. 2d at 11. When several city employees discovered that their policies had lapsed, a suit for fraud was brought against one of the agent's employers. *Id.* at ___, 111 S. Ct. at 1036-37, 113 L. Ed. 2d at 12. The jury returned a verdict for the city employees and assessed punitive damages. *Id.* at ___, 111 S. Ct. at 1037, 113 L. Ed. 2d at 12-13. The largest amount awarded to an employee, \$1,040,000, contained a punitive damage amount of not less than \$840,000. *Haslip*, ___ U.S. at ___ n.2, 111 S. Ct. at 1037 n.2, 113 L. Ed. 2d at 12 n.2. This amount equals more than four times the amount of actual damages and 200 times the out-of-pocket expenses. *Id.* at ___, 111 S. Ct. at 1046, 113 L. Ed. 2d at 23.

85. *Id.* at ___, 111 S. Ct. at 1044, 113 L. Ed. 2d at 20-21.

86. *Id.* at ___, 111 S. Ct. at 1046, 113 L. Ed. 2d at 23.

87. See *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 471 (Wis. 1980) (Coffey, J., dissenting) (arguing against imposing punitive damages since they put American corporations at competitive disadvantage); CARL-LUDWIG HOLTFRERICH, *ECONOMIC AND STRATEGIC ISSUES IN U.S. FOREIGN POLICY* xv (Carl-Ludwig Holtfrerich ed., 1988) (contending that America has lost its competitive edge in machine tool and high-tech industries); 2 *REPORT TO THE PRESIDENT FROM THE PRESIDENT'S EXPORT COUNCIL, U.S. TRADE IN TRANSITION: MAINTAINING THE GAINS* 162 (1988) (emphasizing need for program to reestablish U.S. industry's competitive position); Richard Schmalensee, *Regulation and Antitrust in the Bush Administration*, 58 *ANTITRUST L.J.* 475, 477 (1989) (discussing establishment and functions of Council on Competitiveness).

88. See "Isn't Our Legal System in Need of Reform?," *LEGAL TIMES*, Aug. 19, 1991, at 9 (noting that Council assembled working group to deal with civil justice problems).

89. See *id.* (stating that Kenneth Starr, Solicitor General, chaired working group on civil reform that made proposals for change).

90. See *THE PRESIDENT'S COUNCIL ON CIVIL JUSTICE: AGENDA FOR CIVIL JUSTICE*

of potential liability, and the sometimes excessive nature of awards, makes it impossible for companies to predict how much exposure to liability would be incurred by a particular course of action.⁹¹ This uncertainty, according to the Council, hinders the research and development of new products.⁹² According to the Council, these issues necessitate a change in the method of imposing punitive damages.⁹³

To reduce the uncertainty surrounding punitive damage awards, and thereby increase international competitiveness, the Council recommends limiting the recoverable amount of punitive damages to the amount of compensatory, or actual, damages.⁹⁴ The Council suggests state legislatures implement this limit on punitive damages.⁹⁵ A model state code will therefore be provided to the individual states which will include provisions relating to the changes needed in order to carry out the suggested reforms.⁹⁶

VI. WHY CAPPING PUNITIVE DAMAGES IS NOT AN APPROPRIATE REMEDY

A. *Punitive Damages Are Not "Out of Control"*

The proposal presented by the President's Council on Competitiveness implies that there are serious problems with punitive damages.⁹⁷ Vice Presi-

REFORM IN AMERICA 5-6 (Aug. 1991) (citing reasons to believe there is problem with punitive damages); *"Isn't Our Legal System in Need of Reform?"*, LEGAL TIMES, Aug. 19, 1991, at 9 (referring to punitive damages as primary area of concern).

91. See THE PRESIDENT'S COUNCIL ON COMPETITIVENESS: AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 23 (1991) (reasonable boundaries on punitive damages make commercial transactions more certain).

92. See *id.* at 3 (citing percentages of manufacturers discontinuing research and withdrawing products from market as result of present liability system). *But see Wangen*, 294 N.W.2d at 456 (facts and figures give no indication to justify economic fears of punitive damages); Kenneth Jost, *Tampering with Evidence: The Liability and Competitiveness Myth*, Apr. 1992, 78 A.B.A. J. at 44, 45 (contending estimates of litigation costs are exaggerated).

93. See THE PRESIDENT'S COUNCIL ON COMPETITIVENESS: AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 22 (1991) (calling for limit on punitive damages); *"Isn't Our Legal System in Need of Reform?"*, LEGAL TIMES, Aug. 19, 1991, at 9 (noting that punitive damages were item of great concern and referring to unstructured method of assessing them).

94. See THE PRESIDENT'S COUNCIL ON COMPETITIVENESS: AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 22 (1991) (suggesting that society set punitive damages to amount of actual damages in order to provide certainty to commercial transactions).

95. See *id.* at 22-23 (encouraging state legislative action). *Contra* Brian L. Lahargoue, Comment, *The Need for Federal Legislative Reform of Punitive Damages*, 20 SW. U. L. REV. 103, 122 (1991) (arguing that solution to punitive damage problem must be federal in origin).

96. See THE PRESIDENT'S COUNCIL ON COMPETITIVENESS: AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 10 (1991) (providing for administrative drafting of model changes for state legislative reform).

97. See THE PRESIDENTS COUNCIL ON COMPETITIVENESS: AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 5-6 (1991) (citing study which found 1,500% increase in average

dent Quayle refers to them as “freakish” and “routine.”⁹⁸ These terms inaccurately represent the current status of punitive damages and should be viewed with skepticism.

Recent empirical studies regarding punitive damage awards indicate that the media accounts of large and frequent jury awards are exaggerated.⁹⁹ In fact, one recent study found that in product liability cases only 355 punitive damage awards have been returned in the last twenty-five years.¹⁰⁰ One-fourth of these awards related to only one product: asbestos.¹⁰¹ As for the size of these awards, the study found that the median for punitive damage awards actually paid in product liability cases equalled \$625,000—slightly above the \$500,000 median for compensatory damage awards.¹⁰² Therefore, the study concludes that punitive damages are not the evil that tort reformers and the Council would have the public believe.¹⁰³

punitive damage award in Cook County, Illinois from 1965-69 figures). *But see* Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 33 (1990) (arguing that punitive damages are not routinely awarded); Milo Geyelin, *Products Suits Yield Few Punitive Awards*, WALL ST. J., Jan. 6, 1992, at B1 (discussing study which found punitive damage awards infrequent and rarely paid).

98. See “Isn’t Our Legal System in Need of Reform?”, LEGAL TIMES, Aug. 19, 1991, at 9 (verbatim account of Vice President Quayle’s speech in which he characterizes punitive damage awards as routine and freakish).

99. See *Providing for a Uniform Product Liability Law: Hearings on S. 640 Before the Senate Comm. on Commerce, Science and Transportation*, 101st Cong., 1st Sess. 6-7 (1991) (finding that punitive damages are infrequently awarded and rarely collected); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 302-07 (1987) (observing infrequency of punitive damage awards in products liability cases); Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 62-63 (1990) (questioning tort reformers’ characterization of punitive damages).

100. See *Providing for a Uniform Product Liability Law: Hearings on S. 640 Before the Senate Comm. on Commerce, Science and Transportation*, 101st Cong., 1st Sess. 6-7 (1991) (finding only 355 punitive damage awards in state and federal courts); see also Kenneth Jost, *Tampering with Evidence: The Liability and Competitiveness Myth*, Apr. 1992, 78 A.B.A. J. at 44, 49 (citing study to show that punitive damage awards are rare).

101. See Milo Geyelin, *Product Suits Yield Few Punitive Awards*, WALL ST. J., Jan. 6, 1992, at B1 (referring to Rustad study and pointing out percentage of asbestos awards).

102. See *Providing for a Uniform Product Liability Law: Hearings on S. 640 Before the Senate Comm. on Commerce, Science and Transportation*, 101st Cong., 1st Sess. 6-7 (1991) (noting and comparing median amounts for compensatory and punitive damage awards).

103. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 397 (1973) (White, J., dissenting) (demanding empirical evidence of burdensome punitive damage awards before revising established common law rule); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 456 (Wis. 1980) (rejecting Ford’s claim that punitive damages are out of control since facts and figures do not support such inference); see also Sylvia M. Demarest & David E. Jones, *Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest?*, 18 ST. MARY’S L.J. 797, 805 (1987) (stating that size of jury verdicts has maintained consistent growth); Milo Geyelin, *Product Suits Yield Few Punitive Awards*, WALL ST. J., Jan. 6, 1992, at B1 (interpreting Rustad/Koenig study to disprove image of runaway juries).

The results of two other recent studies also conflict with the Council's conclusions.¹⁰⁴ After gathering empirical data from over twenty-five thousand jury verdicts rendered in eleven state courts, researchers conducting a study funded by the American Bar Foundation concluded that punitive damage verdicts remain infrequent and modest in amount.¹⁰⁵ In fact, the study indicates that punitive damages were awarded in only 4.9 percent of all jury trials which assessed money damages.¹⁰⁶ Furthermore, the study determined that juries were least likely to award punitive damages to plaintiffs in cases involving physical harm, including products liability and medical malpractice.¹⁰⁷ A study conducted by Professor William Landes and Judge Richard Posner also confirms that the punitive damage "explosion" is non-existent.¹⁰⁸ After collecting data from 359 products liability cases, the researchers found that punitive damages were awarded in only two percent of those cases.¹⁰⁹ This finding led them to conclude that in cases other than intentional misconduct, punitive damages in products liability cases are insignificant and infrequent.¹¹⁰

To support the idea of a punitive damage "explosion," the Council relies on a study conducted by the Institute for Civil Justice.¹¹¹ The study, however, actually refutes the concept that punitive damages are out of control.¹¹² The study examined twenty-four thousand civil jury trials occurring in Cook County, Illinois and San Francisco.¹¹³ In the area of products lia-

104. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 302-07 (1987) (noting insubstantial amount of punitive damage awards in products liability cases); Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 62-63 (1990) (casting doubt upon tort reformers' characterization of punitive damages).

105. See Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 43 (1990) (concluding that jury awards of punitive damages are neither frequent nor large).

106. See *id.* at 31 (discussing percentage of cases in which punitive damages awarded).

107. See *id.* at 37-38 (noting that plaintiffs are rarely successful in products liability and medical malpractice cases and do not usually receive punitive damages when successful).

108. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 305 (1987) (stating that punitive damage awards are not routine).

109. See *id.* at 305-06 (asserting punitive damages awarded in only 7 of 359 product liability cases sampled).

110. See *id.* at 305 (concluding that punitive damages are neither routine nor significant); accord NATHAN WEBER, *PRODUCT LIABILITY: THE CORPORATE RESPONSE* 11 (1987) (citing study which found only six percent success rate for plaintiffs and most awards were under \$25,000).

111. See THE PRESIDENT'S COUNCIL ON COMPETITIVENESS: *AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA* 5-6 (1991) (citing study from Institute for Civil Justice).

112. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 306-07 (1987) (reporting results of study from Institute for Civil Justice for proposition that punitive damages are infrequently awarded in products liability cases).

113. See THE PRESIDENT'S COUNCIL ON COMPETITIVENESS: *AGENDA FOR CIVIL JUS-*

bility, the study found only eight punitive damage awards between the years 1960 and 1984.¹¹⁴

B. *Competitiveness*

The theory behind Vice President Quayle's proposal is that limiting punitive damages will increase America's international competitiveness.¹¹⁵ The Vice President argues that the fear of large punitive damage awards hinders innovation and research.¹¹⁶ Recall, however, that punitive damages are intended to punish and deter intentional and malicious conduct, not mere negligence.¹¹⁷ Harm resulting from well-intentioned, but tortious conduct may warrant an award of compensatory damages only.¹¹⁸ Punitive damages therefore encourage research and innovation which, in turn, avoid con-

TICE REFORM IN AMERICA 5-6 (1991) (describing study conducted by Institute for Civil Justice); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 306-07 (1987) (describing study conducted by Institute for Civil Justice and citing its conclusions).

114. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 306-07 (1987) (noting that study revealed only eight punitive damage awards in products liability cases).

115. See *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 471 (Wis. 1980) (Coffey, J., dissenting) (arguing that punitive damages put American corporations at competitive disadvantage); THE PRESIDENT'S COUNCIL ON COMPETITIVENESS: *AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA* 3 (1991) (claiming that unless major modifications occur in liability system, United States will be competitively disadvantaged in world markets).

116. See THE PRESIDENT'S COUNCIL ON COMPETITIVENESS: *AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA* 3 (1991) (citing percentages of manufacturers discontinuing research and withdrawing products from market as result of present liability system). *But see Wangen*, 294 N.W.2d at 456 (facts and figures give no indication to justify economic fears of punitive damages).

117. See *Pacific Mutual Life Ins. Co. v. Haslip*, ___ U.S. ___, 111 S. Ct. 1032, 1042, 113 L. Ed. 2d 1, 18 (1991) (under common law approach jury must consider gravity of wrong before assessing punitive damages); *Browning-Ferris v. Kelco Disposal, Inc.*, 492 U.S. 257, 261 (1989) (reviewing jury instructions which allowed punitive damages for outrageous, willful, or wanton conduct); *Cantrell v. Amarillo Hardware Co.*, 602 P.2d 1326, 1331 (Kan. 1979) (evidence supported punitive damage award where conduct involved reckless disregard); *Sebastian v. Wood*, 66 N.W.2d 841, 849 (Iowa 1954) (exemplary damages justified if conduct was willfully or wantonly committed); see also Griffin B. Bell & Perry E. Pearce, *Punitive Damages and the Tort System*, 21 U. RICH. L. REV. 1, 9-10 (1987) (punitive damage award usually requires acts which may be called willful or wanton); Sylvia M. Demarest & David E. Jones, *Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest?*, 18 ST. MARY'S L. J. 797, 799 (1987) (exemplary damages typically applied in cases involving more than ordinary negligence).

118. See *In re Innovative Constr. Sys., Inc.*, 793 F.2d 875, 889 (7th Cir. 1986) (breach of faith in trade secret claim insufficient by itself to justify punitive damage award); Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 648 (1980) (noting that compensatory damages may be adequate when misconduct is well-intentioned).

sciously wrongful behavior.¹¹⁹

In fact, punitive damage awards actually enhance overall competitiveness.¹²⁰ Punitive damages promote an awareness of public safety and therefore encourage a strong desire to produce the quality product demanded by the international marketplace.¹²¹ Limiting punitive damages allows a corporation to predict potential liability and reduce investments in safety accordingly.¹²² An ethical corporation thoroughly testing its product before placing it on the market would therefore be competitively disadvantaged by devoting more resources to safety than did its unprincipled competitors.¹²³

Foreign corporations doing business in America are also subjected to the threat of punitive damages.¹²⁴ Yet, such exposure does not appear to discourage their interest in competing in this country.¹²⁵ Similarly, when American corporations compete in other countries, they operate under a for-

119. See *Acosta v. Honda Motor Co.*, 717 F.2d 828, 838 (3d Cir. 1983) (manufacturers making stronger efforts toward improved quality and design as result of punitive damages); *Providing for a Uniform Product Liability Law: Hearings on S. 640 Before the Senate Comm. on Commerce, Science and Transportation*, 101st Cong., 1st Sess. 6-7 (1991) (reporting that research indicates punitive damages rarely penalize or limit corporation which takes reasonable precautions).

120. See *Providing for a Uniform Product Liability Law: Hearings on S. 640 Before the Senate Comm. on Commerce, Science and Transportation*, 101st Cong., 1st Sess. 6-7 (1991) (noting that punitive damage awards are consistent with business community's self-interest of long-run competitiveness).

121. See *Acosta*, 717 F.2d at 838 (manufacturers making stronger efforts toward improved quality and design as result of punitive damages); *Drayton v. Jiffee Chem. Corp.*, 591 F.2d 352, 374 (6th Cir. 1979) (Keith, J., concurring in part and dissenting in part) (arguing that deterrence is especially needed when industry markets dangerous product without attempt to make it safer); *Providing for a Uniform Product Liability Law: Hearings on S. 640 Before the Senate Comm. on Commerce, Science and Transportation*, 101st Cong., 1st Sess. 6-7 (1991) (discussing how America's interest in safety and avoidance of punitive damages encourages manufacture of quality products).

122. See *Wangen*, 294 N.W.2d at 450 (refusing to prohibit punitive damages in products liability actions since some businesses recklessly disregard public safety); *Providing for a Uniform Product Liability Law: Hearings on S. 640 Before the Senate Comm. on Commerce, Science and Transportation*, 101st Cong., 1st Sess. 6-7 (1991) (noting that punitive damages keep ethical companies from being competitively disadvantaged).

123. See *Providing for a Uniform Product Liability Law: Hearings on S. 640 Before the Senate Comm. on Commerce, Science and Transportation*, 101st Cong., 1st Sess. 6-7 (1991) (asserting that ethical corporations disadvantaged by limited punitive damages).

124. See *Dorsey v. Honda Motor Co., Ltd.*, 673 F.2d 911, 912 (5th Cir. 1982) (upholding punitive damage award against foreign car manufacturer); Kenneth Jost, *Tampering with Evidence: The Liability and Competitiveness Myth*, Apr. 1992, 78 A.B.A. J. at 44, 45 (recognizing that Japanese and German companies are frequently subjected to product liability suits in American courts).

125. See *State Farm Mut. Auto. Ins. v. Department of Transp.*, 680 F.2d 206, 226 (D.C. 1982). According to *State Farm*, out of the five car manufacturers with the greatest amount of sales in the United States, three are foreign companies: Toyota, Nissan, and Volkswagen. *Id.*

eign punitive damage system.¹²⁶ Therefore, whether competing domestically or abroad, American companies compete on the same terms as other international corporations with regard to punitive damages.

Surprisingly, the price of a product has increased by a mere one percent as a result of the expense a majority of companies incur for product liability, and punitive damages compose only a small percentage of that expense.¹²⁷ This fact indicates that the impact punitive damages have on the price of a product, even in the current products liability scheme, is relatively insignificant in terms of international competitiveness.

C. *Safety and Quality*

By deterring conduct which could cause harm, punitive damages encourage companies to take safety precautions to prevent liability.¹²⁸ For example, a recent study determined that punitive damages prompted safety measures in the products of eighty-two percent of the businesses in which punitive damages were assessed.¹²⁹ Limiting the amount of punitive damages fosters predictability in the manufacture and sale of a product.¹³⁰ Therefore, a stable and predictable scheme of liability encourages companies to accept the risk of eventual liability as a cost of doing business.¹³¹

For example, in the classic case of *Grimshaw v. Ford Motor Co.*,¹³² a thir-

126. See PETER REUTER, *THE ECONOMIC CONSEQUENCES OF EXPANDED CORPORATE LIABILITY* 36-37 (1988) (noting that American corporations subject to punitive damage system of consumers' country).

127. See NATHAN WEBER, *PRODUCT LIABILITY: THE CORPORATE RESPONSE* 13 (1987) (stating that although companies raise prices due to product liability, actual increase relatively small).

128. See *Acosta v. Honda Motor Co.*, 717 F.2d 828, 838 (3d Cir. 1983) (concluding that products liability litigation forced companies to increase safety measures); *Campus Sweater & Sportswear v. M. B. Kahn Constr. Co.*, 515 F. Supp. 64, 107 (D.S.C. 1979) (stating that greatest function of punitive damages is deterring marketing of defective product); *Metropolitan Atlanta Rapid Transit Auth. v. Boswell*, 405 S.E.2d 869, 873 (Ga. 1991) (Smith, J., dissenting) (asserting that punitive damage award gives impetus to implement safety measures).

129. See NATHAN WEBER, *PRODUCT LIABILITY: THE CORPORATE RESPONSE* 2 (1987) (finding that most notable impact of product liability has been increased quality of products); Bob Gibbins, *Propositions Built on Myth*, NAT'L L.J., Oct. 7, 1991, at 17 (citing study which found improvements, such as product recalls and improved warnings, in companies in which punitive damages were assessed).

130. See Amelia J. Toy, Comment, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 EMORY L.J. 303, 325 (1991) (cap on punitive damages reveals maximum expected costs of wrongful conduct).

131. See *Puppe by Puppe v. A.C. & S., Inc.*, 733 F. Supp. 1355, 1362 (N.D. 1990) (punitive damages make certain conduct unprofitable); Amelia J. Toy, Comment, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 EMORY L.J. 303, 326 (1991) (limits on punitive damages allow corporations to regard them as cost of doing business).

132. 174 Cal. Rptr. 348 (Cal. App. 1981).

teen-year-old boy was seriously burned when the Pinto in which he was riding burst into flames upon impact.¹³³ During the trial, the jury heard evidence regarding Ford Motor Company's knowledge of the car's defective design and the possibility of a serious accident upon impact.¹³⁴ Instead of installing preventive safety measures, Ford included the estimated cost of an adverse judgment in a cost-benefit analysis which indicated that it would be more profitable to omit the safety measures.¹³⁵ The jury awarded \$125 million in punitive damages, but on appeal the judge remitted the award to \$3.5 million.¹³⁶ Punitive damages are designed to prevent such business decisions.¹³⁷ They discourage companies from willfully pursuing a course of unethical but seemingly profitable conduct.¹³⁸

D. *Deprivation of Purpose*

For an award of punitive damages to serve its avowed purposes of punishment and deterrence, uncertainty as to the possible amount imposed is essential.¹³⁹ The effect of setting a cap on such awards makes them predictable and therefore ineffective.¹⁴⁰ Limiting a punitive damage award eliminates the deterrent effect and nullifies any punishment intended by such an award.¹⁴¹ Without a degree of uncertainty in the amount awarded as pun-

133. *Id.* at 359.

134. *Id.* at 361-62.

135. *Id.* at 376.

136. *Grimshaw*, 174 Cal. Rptr. at 388.

137. See *Drayton v. Jiffee Chem. Corp.*, 591 F.2d 352, 374 (6th Cir. 1979) (Keith, J., concurring in part and dissenting in part) (arguing for punitive damages in cases where unethical corporations market products which put profit before safety); *Campus Sweater & Sportswear*, 515 F. Supp. at 107 (punitive damages help prevent decisions to ignore safety measures); Sylvia M. Demarest & David E. Jones, *Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest?*, 18 ST. MARY'S L.J. 797, 822 (1987) (significant liability exposure of exemplary damages affects decision-making of businesses).

138. See *Metropolitan Atlanta Rapid Transit Auth.*, 405 S.E.2d at 873 (Smith, J., dissenting) (punitive damage claims promote safety, accountability, and efficiency); *Drayton*, 591 F.2d at 374 (Keith, J., concurring in part and dissenting in part) (asserting need for punitive damages in cases which a company places profit before safety); *Puppe by Puppe*, 733 F. Supp. at 1362 (punitive damages make certain conduct unprofitable).

139. See *Campus Sweater & Sportswear v. M. B. Kahn Constr. Co.*, 515 F. Supp. 64, 107 (D.S.C. 1979) ("open-ended" aspect of punitive damages must be considered by company officials before marketing defective products); Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 649 (1980) (temptation to engage in misconduct stifled by uncertainty of punitive damage amount).

140. See Amelia J. Toy, Comment, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 EMORY L.J. 303, 325 (1991) (cap on punitive damages reveals maximum expected costs of tortious behavior to potential tortfeasor).

141. See *Acosta v. Honda Motor Co., Ltd.*, 717 F.2d 828, 837 (3d Cir. 1983) (expressing doubt that limited punitive damages will provide effective deterrent); *Leimgruber v. Claridge Assoc., Ltd.*, 375 A.2d 652, 656 (N.J. 1977) (noting that ratio between actual and punitive

ishment, a company has no incentive to cease malicious actions which necessitate punitive damages.¹⁴²

Although Vice President Quayle argued that limiting punitive damage awards to the amount of actual damages would continue to meet the needed goals of punishment and deterrence, his assertion is erroneous.¹⁴³ An amount which deters some companies may have little impact on larger ones and thus have no deterrent effect.¹⁴⁴ Likewise, if a judge or jury views the cap as a guideline for the amount which should be imposed, the punitive damage award may encourage a large and disproportionate award according to the size of a given small business.¹⁴⁵ Thus, a limitation on punitive damages creates disproportionate results for everyone.¹⁴⁶

Blind adherence to a statutory limitation eviscerates the deterrent goal of punitive damages.¹⁴⁷ As evidenced by the exclusions to the ratios provided by both Colorado and Oklahoma, there exists an inherent danger that the

damages contradicts punishment and deterrence purposes of punitive damages); *see also* James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1162-63 (1984) (discussing how ratios and punishment rationale of punitive damages are not compatible); Lisa M. Broman, Comment, *Punitive Damages: An Appeal for Deterrence*, 61 NEB. L. REV. 651, 676 (1982) (ratios undermine punitive damages' deterrent effect).

142. *See* *Campus Sweater & Sportswear*, 515 F. Supp. at 107 (impetus to change company's behavior depends largely on prospect of punitive damages); Amelia J. Toy, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 EMORY L.J. 303, 325-26 (1991) (statutory cap reveals expected costs of tortious behavior and fails to deter if expected profit exceeds that amount).

143. *See* *Acosta*, 717 F.2d at 837 (expressing doubt that limited punitive damages will provide effective deterrent); "Isn't Our Legal System in Need of Reform?," LEGAL TIMES, Aug. 19, 1991, at 9, 110 (reporting claim by Vice President Quayle that limitation on punitive damages will continue to meet purposes of punishment and deterrence).

144. *See* Sylvia M. Demarest & David E. Jones, *Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest?*, 18 ST. MARY'S L.J. 797, 825 (1987) (pointing out that even a multi-million dollar limit neglects to deter some large corporations); Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37, 56 (1983) (noting that large corporations may not be deterred by five million dollar verdict).

145. *See* *John A. Henry & Co. v. T.G. & Y. Stores Co.*, 941 F.2d 1068, 1073 (10th Cir. 1991) (considering argument that punitive damage cap influences jury to award that amount); Sylvia M. Demarest & David E. Jones, *Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest?*, 18 ST. MARY'S L.J. 797, 825 (1987) (caps pose danger for small businesses if seen as test for excessiveness).

146. *See* Sylvia M. Demarest & David E. Jones, *Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest?*, 18 ST. MARY'S L.J. 797, 825 n.156 (1987) (arbitrariness of caps affects everyone involved).

147. *See* *Acosta*, 717 F.2d at 837 (expressing doubt that limited punitive damages will provide effective deterrent); Lisa M. Broman, Comment, *Punitive Damages: An Appeal for Deterrence*, 61 NEB. L. REV. 651, 676 (1982) (arguing that ratios undermine punitive damages' deterrent effect).

most egregious actions would be free from sufficient deterrence and punishment.¹⁴⁸ The Council, however, overlooks this concern by neglecting to provide exceptions to its arbitrary cap. By comparison, the punitive damage cap espoused by the Council follows the Virginia model of refusing to allow exceptions to the limitation.¹⁴⁹ This type of limitation disregards the need for punitive damage assessments which are tailored to the particular defendant's reprehensible conduct.¹⁵⁰

By setting the cap at the amount of actual damages, the Vice President assumes that actual harm is the best indicator of how much the defendant should be punished.¹⁵¹ Such a presumption leads to anomalous results. In a situation in which the plaintiff proves only a minimal amount of actual damages, an act of especially wanton or malicious conduct escapes essentially unpunished and undeterred.¹⁵² In contrast, a large amount of actual damages awarded could incorporate some aspects of deterrence and punishment.¹⁵³ However, a judge or jury might assume that the punitive damage limit serves as a guideline on the amount which should be imposed.¹⁵⁴

148. See COLO. REV. STAT. § 13-21-102 (3)(a), (b) (1987) (providing exceptions for punitive damage limit); OKLA. STAT. tit. 23, § 9(A) (1987) (providing exception to limit on punitive damage awards); see also Amelia J. Toy, Comment, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 EMORY L.J. 303, 338 (1991) (exceptions to caps tend to allow some room for deterrent effect of punitive damages).

149. See VA. CODE ANN. § 8.01-38.1 (Michie Supp. 1991) (setting punitive damage cap at \$350,000 without exceptions); see also Amelia J. Toy, Comment, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 EMORY L.J. 303, 335 (1991) (disapproving Virginia's strict adherence to punitive damages cap).

150. See *Vasbinder v. Ambach*, 926 F.2d 1333, 1344 (2d Cir. 1991) (punitive damages need to be tailored to ability of defendant to pay); *McArthur v. Bockman*, 256 Cal. Rptr. 522, 525 (Cal. App. 1989) (upholding award of punitive damages since amount was tailored to defendants' conduct); *Vossler v. Richards Mfg. Co.*, 192 Cal. Rptr. 219, 227 (Cal. App. 1983) (punitive damage award must be tailored to reprehensibility of conduct and defendant's wealth).

151. But see Lisa M. Broman, Comment, *Punitive Damages: An Appeal for Deterrence*, 61 NEB. L. REV. 651, 676 (1982) (actual harm bears little, if any, relationship to optimal punitive damage award).

152. See *Puppe by Puppe v. A.C. & S., Inc.*, 733 F. Supp. 1355, 1362 (N.D. 1990) (when plaintiff's actual damages are small, larger amount of punitive damages may be necessary to punish defendant); Jeffrey T. Infelise, Comment, *Punitive Damages and the Reasonable Relation Rule: A Study in Frustration of Purpose*, 9 PAC. L.J. 823, 840 (1978) (describing how limiting punitive damages thwarts their purpose when plaintiff suffers minor injury as result of especially malicious conduct).

153. See Lisa M. Broman, Comment, *Punitive Damages: An Appeal for Deterrence*, 61 NEB. L. REV. 651, 677 (1982) (some compensatory awards may be sufficient to deter defendant); Jeffrey T. Infelise, Comment, *Punitive Damages and the Reasonable Relation Rule: A Study in Frustration of Purpose*, 9 PAC. L.J. 823, 840 (1978) (large compensatory award may also serve purposes of punishment and deterrence).

154. See *John A. Henry & Co.*, 941 F.2d at 1073 (recognizing argument that punitive damage cap suggests to jury that such amount would be proper award); Lisa M. Broman,

Therefore, the cap operates to promote the evils its proponents intend to eliminate—excessive and arbitrary punishment.¹⁵⁵

VII. CONCLUSION

The devastating impact of caps on punitive damage awards far outweighs any potentially beneficial aspects of such limitations. Punitive damage caps dilute, if not eliminate, the essential and long-standing goals of punitive damages—punishment and deterrence. Additionally, such limitations encourage companies to make unscrupulous decisions between the safety and quality of their products and the potential cost of liability. In contrast to Vice President Quayle's assertions, punitive damages are not out of control. In the area most likely to affect international competitiveness, products liability, studies show that punitive damage awards remain infrequent and insignificant.

Punitive damages are intended to punish and deter only the most egregious conduct. Therefore, companies have little to fear if they observe the necessary precautions with respect to safety and quality when manufacturing a product. Punitive damages therefore enhance competition by encouraging companies to manufacture products of a higher quality. If punitive damages hinder the development of products which have the potential for disastrous results, the doctrine has served its purpose.

Comment, *Punitive Damages: An Appeal for Deterrence*, 61 NEB. L. REV. 651, 677 (1982) (in cases awarding large compensatory damages, punishment may be too severe if jury feels it must award punitive damages in compliance with cap).

155. See Jeffrey T. Infelise, Comment, *Punitive Damages and the Reasonable Relation Rule: A Study in Frustration of Purpose*, 9 PAC. L.J. 823, 840 (1978) (relation rule causes results which it is designed to prevent).