PUNITIVE DAMAGES REFORM—STATE LEGISLATURES CAN AND SHOULD MEET THE CHALLENGE ISSUED BY THE SUPREME COURT OF THE UNITED STATES IN *HASLIP*

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INTRODUCTION

In *Pacific Mutual Life Insurance Co. v. Haslip*,[1] now commonly known as the *Haslip* case, the Supreme Court of the United States in 1991 addressed for the first time whether the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution places restraints on punitive damages awards.[2] *Haslip* involved a claim of insurance fraud by an Alabama municipality and its employees against Pacific Mutual Life Insurance Company (Pacific Mutual) and one of its agents.[3] By agreement, the municipality made deductions from its employees' paychecks and sent to Pacific Mutual's agent premiums for Pacific Mutual life insurance and group health insurance issued by another insurer.[4] Instead of procuring health coverage, the agent kept the money, leaving Mrs. Haslip, a municipal employee, without coverage when she was hospitalized for an illness.[5] Mrs. Haslip and three other municipal employees sued the agent and his employer, Pacific Mutual.[6] A jury awarded Mrs. Haslip $1,040,000, of which at least $840,000 was attributed to punitive damages, more than four times the amount of compensatory damages and more than 200 times her out-of-pocket expenses (which amounted to less than $4,000).[7]

The Supreme Court upheld Mrs. Haslip's punitive damages award, noting that Pacific Mutual knew its agent had previously engaged in an identical "pattern of fraud."[8] Nevertheless, the Court

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1. 111 S. Ct. 1032 (1991).

2. Prior to *Haslip*, the Court had accepted for review at least two cases in which it was asked to determine the constitutionality of punitive damages awarded in civil tort cases. In each case, however, the Court avoided definitive rulings, finding that the parties had not properly preserved their constitutional challenges for review. *See* Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 76 (1988) (declining to reach conclusion that excessive punitive damages award violated due process because claim was not raised or passed upon in state court); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828-29 (1986) (refusing to address issue of whether lack of sufficient standards regarding punitive damages awards violated Due Process Clause of Fourteenth Amendment because Court's disposition of "recusal-for-bias" issue made it unnecessary to reach due process issue); *see also* Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 276-77 (1989) (stating that issue of whether due process acts as check on punitive damages awards must "await another day" because issue had not been raised below or mentioned in petition for certiorari).

3. Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1036-37 (1991).

4. *Id.* at 1036.

5. *Id.*

6. *Id.* at 1036-37.

7. *Id.* at 1037 & n.2.

8. *Id.* at 1041 (noting that Pacific Mutual received several complaints about absence of coverage purchased through agent).

emphasized "once again"[9] its concern about punitive damages that "run wild"[10] and indicated that due process puts limitations on punitive damages awards.[11] The Court declined to express those limitations with precision, but suggested that the punitive damages award in *Haslip*, four times greater than Mrs. Haslip's compensatory damages, was "close to the line" of constitutional impropriety.[12]

As this Article went to press, the Supreme Court was deciding another case, *TXO Production Corp. v. Alliance Resources Corp.*[13] In that case, involving the business tort of slander of title, the West Virginia Supreme Court upheld a $10 million punitive damages award where Alliance Resources suffered damages of not more than $19,000 for legal fees.[14] What the Court will do is, of course, mere speculation, but the Supreme Court's decision to hear the case is further evidence that unbridled punitive damages awards raise untoward consequences.

The *Haslip* case itself provides an important impetus for reform of the common law of punitive damages.[15] State legislators can and should be responsive to the confidence vested in them by the Court. This Article will suggest some areas that are appropriate for reform in keeping with both the black letter and spirit of the Supreme Court's decision in *Haslip*. But first, by way of background, this Art-

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9. *Id.* at 1043; *see also* Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 280-82 (1989) (Brennan, J., concurring, O'Connor, J., concurring in part and dissenting in part) (emphasizing potentially devastating and detrimental effect of excessive punitive damages awards); Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 87 (1988) (O'Connor, J., concurring in part and concurring in the judgment) (expressing concern for lack of objective standard limiting punitive damages because possibility of "windfall recoveries" exists); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 270-71 (1981) (warning that punitive damages awards are often unpredictable and substantial).

10. Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1043 (1991).

11. *Id.*

12. *Id.* at 1046. In the short period since the March 4, 1991 *Haslip* decision, the Court has demonstrated its concern about excessive punitive damages awards many times, vacating and remanding 11 punitive damages cases "in light of *Haslip*." *See* Fleming Landfill, Inc. v. Garnes, 111 S. Ct. 2882 (1991); Transamerica Occidental Life Ins. Co. v. Koire, 111 S. Ct. 2253 (1991); Southern Life & Health Ins. Co. v. Turner, 111 S. Ct. 1678 (1991); InterContinental Life Ins. Co. v. Lindblom, 111 S. Ct. 1575 (1991); International Soc'y for Krishna Consciousness v. George, 111 S. Ct. 1299 (1991); Pacific Lighting Co. v. MGW, Inc., 111 S. Ct. 1299 (1991); Portec, Inc. v. Post Office, 111 S. Ct. 1299 (1991); Clayton Brokerage Co. v. Jordan, 111 S. Ct. 1298 (1991); Reserve Life Ins. Co. v. Eichenseer, 111 S. Ct. 1298 (1991); Hospital Auth. v. Jones, 111 S. Ct. 1298 (1991); Church of Scientology v. Wollersheim, 111 S. Ct. 1298 (1991).

13. 419 S.E.2d 870 (W. Va.), *cert. granted*, 113 S. Ct. 594 (1992).

14. TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870, 877, 890 (W. Va.), *cert. granted*, 113 S. Ct. 594 (1992).

15. *See* Ruth Marcus, *Justices Reject Limit on Punitive Damages: Ruling, Seen as Consumer Victory, Appears To Leave Issue with States*, WASH. POST, Mar. 5, 1991, at A1 (discussing how *Haslip* leaves issue of limiting punitive damages for state courts to develop); Victor E. Schwartz & Mark A. Behrens, *Haslip May Alter Tort-Claim Strategies*, NAT'L L.J., Feb. 17, 1992, at 23 (reviewing cases that have applied *Haslip* and suggesting ways in which states should change their laws through legislation to comport with Supreme Court's guidelines).

icle will describe the purpose and history of punitive damages, the political considerations involved in reform, and the respective roles of legislators and courts in implementing reform.

I. THE PURPOSE AND HISTORY OF PUNITIVE DAMAGES

Punitive damages are often misunderstood, although much has been written about them.[16] Primarily, confusion exists about the purpose of punitive damages.[17] Punitive damages are intended to punish the defendant and deter that individual and others from engaging in similar wrongful conduct in the future.[18] Generally, punitive damages have nothing to do with "making the plaintiff whole."[19] That purpose is served by compensatory damages, which compensate tort victims for personal injuries and economic losses.[20]

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16. *See, e.g.*, Dorsey O. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 3 (1982) (analyzing legal theories and background supporting punitive damages liability); John C. Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 139 (1986) (assessing "out of control" nature of modern punitive damages awards); Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233, 1234-40 (1987) (asserting that Eighth Amendment should apply to punitive damages awards); Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1173 (1931) (discussing role of punitive damages in civil liability cases); David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 7 (1982) (examining problems and limitations associated with punitive damages awards in product liability context); David G. Owen, *Punitive Damages in Product Liability Litigation*, 74 MICH. L. REV. 1257, 1262-99 (1976) (exploring concept of punitive damages and compatibilities with theories of product liability); James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1159-65 (1984) (arguing for abolition of punitive damages concept); James B. Sales, *The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on the Citadel*, 14 ST. MARY'S L.J. 351, 351 (1983) (discussing past and present role of punitive damages); Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 ALA. L. REV. 919, 921 (1989) (suggesting need for more common law and statutory development in area of punitive damages); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 517 (1957) (engaging in general discussion of punitive damages in tort law).

17. *Cf.* WILLIAM PROSSER ET AL., CASES AND MATERIALS ON TORTS 529 (8th ed. 1988) (discussing various rationales underlying punitive damages).

18. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 9 (5th ed. 1984) (explaining that punitive damages are awarded for purpose of punishing defendant, teaching defendant not to "do it again," and deterring others from similar behavior); PROSSER ET AL., *supra* note 17, at 528-29 (stating that purpose of punitive damages is to punish, admonish, and deter others); *see also* International Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 48 (1979) (stating that punitive damages are " 'private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence' ") (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974)).

19. *See* KEETON ET AL., *supra* note 18, at 9 (noting that punitive damages are those "over and above" full compensation for injuries); PROSSER ET AL., *supra* note 17, at 528 (explaining that punitive damages are awarded "over and above" compensation for harm); *see also* RICHARD L. BLATT ET AL., PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE 9 (1991) (stating that punitive damages, as compared with other types of damages, are not measured by party's position before and after wrong).

20. *See* Northwestern Nat'l Casualty Co. v. McNulty, 307 F.2d 432, 434 (5th Cir. 1962) (describing compensatory damages as those that are designed to place injured party in pecuniary position equivalent to what he or she would occupy had no tort been committed).

In personal injury actions, compensatory damages include payment for out-of-pocket expenses (e.g. lost wages and medical costs) and awards for "pain and suffering."[21] Most damages in our tort/liability system are compensatory.[22]

Punitive damages were developed in the English common law to serve as an auxiliary, or "helper," to the criminal law system, which in eighteenth-century England punished property rights infractions more severely than personal rights infractions.[23] Punitive damages existed to ferret out and impose a public sanction against antisocial conduct that was otherwise undeterred by the criminal law.[24] In their origins in England and in America, punitive damages were confined to a narrow category of claims called intentional torts, such as assault and battery, libel and slander, malicious prosecution, false imprisonment, and intentional interferences with property such as trespass and conversion.[25]

In recent years, however, the scope of punitive damages law has broadened considerably beyond its origins, and its purposes have become cloudy.[26] As a result, the frequency and size of punitive

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21. *See* 1 MARILYN MINZER ET AL., DAMAGES IN TORT ACTIONS § 1.03, at 1-16 (1992) (noting that included in definition of compensatory damages is compensation for physical and mental suffering).

22. *See id.* (stating that compensatory damages are most common form of damages in tort actions).

23. *See* Sales, *supra* note 16, at 355 (asserting that punitive damages were adopted in England as means by which infractions involving personal harm could be severely punished); *see also* Victor E. Schwartz & Liberty Magarian, *Challenging the Constitutionality of Punitive Damages: Putting Rules of Reason on an Unbounded Legal Remedy*, 28 AM. BUS. L.J. 485, 485 (1990) (stating that punitive damages originally served as "helpful auxiliary to state criminal law").

24. *See* Samuel Freifield, *The Rationale of Punitive Damages*, 1 OHIO ST. L.J. 5, 7 (1935) (suggesting that punitive damages were awarded when civil law branch sought to attain objectives of criminal system); David L. Walther & Thomas A. Plein, *Punitive Damages: A Critical Analysis:* Kink v. Combs, 49 MARQ. L. REV. 369, 371 (1965) (noting ways in which punitive damages were used to "castigate" defendant for "malicious or cruel motives").

25. *See* KEETON ET AL., *supra* note 18, at 10-11 (listing torts that courts have historically considered to warrant punitive damages); Ellis, *supra* note 16, at 14-15 (discussing historic application of punitive damages awards to victims of torts that "resulted in affronts to [their] honor").

26. *See* Michael C. Garrett, *Allowance of Punitive Damages in Products Liability Claims*, 6 GA. L. REV. 613, 613-20 (1972) (discussing extension of punitive damages awards into new areas of law and noting changing theoretical foundations of punitive damages). The size and frequency with which courts awarded punitive damages exploded beginning in the late 1970s and 1980s primarily because of three significant legal developments in the late 1960s and early 1970s. First, courts moved away from the basic and understandable application of punitive damages in the area of intentional torts and applied them in the developing field of products liability. *See, e.g.*, Roginsky v. Richardson-Merrell Inc., 378 F.2d 832, 838-42 (2d Cir. 1967) (considering appropriateness of punitive damages in products liability context); Toole v. Richardson-Merrell Inc., 60 Cal. Rptr. 398, 414-18 (Ct. App. 1967) (upholding punitive damages award against drug company regarding safety of potentially toxic drug); Moore v. Jewel Tea Co., 253 N.E.2d 636, 648-49 (Ill. App. Ct. 1969) (allowing award of punitive damages in product liability context where there was evidence of willful and wanton conduct). *See generally* Garrett, *supra*, at 613 (discussing courts' tendency to extend punitive damages awards to product liability suits). Second, with the advent of "mass tort" litigation, courts permitted

damages awards have "skyrocketed."[27] "Today," as one respected commentator in the field has noted, "hardly a month goes by without a multi-million dollar punitive damages verdict in a product liability case."[28]

II. THE POLITICAL BATTLE IN REFORM

When legislatures seek to reform punitive damages law, members of the organized plaintiffs' bar suggest that such reform is unnecessary.[29] They argue that there are not enough punitive damages claims to merit a legislator's attention.[30] The debates about the number of punitive damages awards are rampant, although, as a recent study funded by the plaintiffs' bar's Roscoe Pound Foundation showed, while estimates can be made, "the actual number of punitive damages awards in products liability litigation is unknown and possibly unknowable because no comprehensive reporting system exists."[31]

One matter is crystal clear, however; as a General Accounting Of-

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punitive damages to be awarded repeatedly for what was essentially a single act or course of conduct by the defendant. *See, e.g.*, *Toole*, 60 Cal. Rptr. at 418 (awarding $500,000 in punitive damages, later reduced by remittitur to $250,000, to individual adversely affected by prescription drug MER/29); Ostopowitz v. William S. Merrell Co., N.Y. L.J., Jan. 11, 1967, at 21 (N.Y. Sup. Ct. 1967) (awarding $100,000 in similar claim associated with MER/29); Paul D. Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CAL. L. REV. 116, 134-38 (1968) (examining MER/29 cases and their significance in product liability litigation); *see also* Jeffries, *supra* note 16, at 141-42 (discussing *Roginsky* and considering problem of repetitive punitive damages awards); Victor E. Schwartz & Liberty Magarian, *Multiple Punitive Damage Awards in Mass Disaster and Product Liability Litigation: An Assault on Due Process*, 8 ADELPHIA L.J. 101, 110-12 (1992) (considering due process implications of mass tort litigation and, specifically, multiple exposure to punitive damages awards for same conduct); Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37, 51-55 (1983) (discussing how single act may result in mass tort litigation and, hence, multiple punitive damages awards). Third, courts began, contrary to settled law, to permit recovery of punitive damages in contract actions such as breach of an implied duty of good faith and fair dealing. *See, e.g.*, Gruenberg v. Aetna Ins. Co., 510 P.2d 1032, 1042 (Cal. 1973) (allowing assessment of punitive damages in contract action where defendant breached implied duty of good faith and fair dealing, but not allowing plaintiff to recover because of failure to state sufficient facts).

27. Melvin M. Belli, Sr., *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 49 UMKC L. REV. 1, 1 (1980).

28. Wheeler, *supra* note 16, at 919, *cited in* Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1066 (1991).

29. *See, e.g.*, Roxanne B. Conlin, *Litigation Explosion Disputed*, NAT'L L.J., July 29, 1991, at 26, 26 (discussing recent studies refuting view that excessive tort litigation has become norm); *see also* David B. Rottman, *Tort Litigation in the State Courts: Evidence from the Trial Court Information Network*, STATE CT. J., Fall 1990, at 4, 11 (concluding that most tort cases are settled, withdrawn, dismissed, or arbitrated).

30. *See* Conlin, *supra* note 29, at 26 (relying on empirical study indicating that punitive damages are awarded infrequently). *See generally* Robert S. England, *Congress, Nader, and the Ambulance Chasers*, AM. SPECTATOR, Sept. 1990, at 18 (explicating plaintiffs' bar influence over Congress through political action committees and campaign contributions).

31. Michael Rustad, *Demystifying Punitive Damages in Product Liability Cases: A Survey of a Quarter Century of Verdicts*, 78 IOWA L. REV. (forthcoming Oct. 1993).

fice study showed, a huge number of punitive damages awards are reversed or reduced.[32] This is because there is an absence of guidelines on the topic.[33] Plaintiffs' bar opponents of punitive damages reform suggest that these reductions and reversals mean that "everything is all right."[34] This is not true.

Vague and uncertain punitive damages law has a substantial and detrimental impact on American industry.[35] It undermines confidence in the civil justice system,[36] serves as a significant obstacle to the settlement process,[37] and handicaps American businesses in competition with foreign enterprises.[38] Most troubling, uncertainty about how and when punitive damages awards will be imposed adversely affects the development of new technology.[39] For example,

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32. *See* U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON COMMERCE, CONSUMER PROTECTION, AND COMPETITIVENESS, COMM. ON ENERGY AND COMMERCE, HOUSE OF REPRESENTATIVES, PRODUCT LIABILITY: VERDICTS AND CASE RESOLUTION IN FIVE STATES 38 (1989) (noting that out of 12 punitive damages awards that appellate courts reviewed, three were vacated and remanded, seven were reversed, and two were affirmed).

33. *See* Paul M. Barrett, *Judicial Disorder: High Court Vagueness on Punitive Damages Leads to Legal Chaos*, WALL ST. J., Mar. 24, 1993, at A1 (observing that lower courts have used same Supreme Court precedent to affirm and limit punitive damages and that Court is revisiting issue this term).

34. *See* Robert L. Habush, *The Tort System Under Fire: Don't Fix What Ain't Broke*, 34 FED. B. NEWS & J. 119, 122-23 (1987) (discussing study analyzing verdicts and reduction of judgments).

35. *See, e.g., The General Aviation Accident Liability Standards Act: Hearings on S. 640 Before the Comm. on the Judiciary*, 101st Cong., 2d Sess. 43-44 (1990) (statement of Robert Martin, counsel, Beech Aircraft Corp.) (describing devastating impact that product liability has had on aviation manufacturers); SENATE COMM. ON COMMERCE, SCIENCE & TRANSP., THE GENERAL AVIATION ACCIDENT LIABILITY STANDARDS ACT OF 1989, S. REP. NO. 223, 101st Cong., 1st Sess. 1-3 (1989) (reporting that in part because of product liability exposure, general aviation production has declined precipitously since mid-to-late 1970s); *see also* Cannuli v. Cessna Aircraft Co., Nos. 80-3285, 81-2209, 89-1052 (D.N.J. Jan. 8, 1984) (awarding punitive damages of $25 million in consolidated wrongful death/product liability litigation case).

36. *See* PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 6, 22-23 (Aug. 1991) (commenting that current approach to punitive damages results in random, capricious, and disproportionate awards).

37. *See* Aaron D. Twerski, *A Moderate and Restrained Federal Product Liability Bill: Targeting the Crisis Areas for Resolution*, 18 U. MICH. J.L. REF. 575, 612 (1985) ("It is close to impossible to negotiate sensibly with a plaintiff who believes that he [or she] can shoot for the moon.").

38. *See* S. REP. No. 215, 102d Cong., 1st Sess. 9 (1991) ("American manufacturers and product sellers generally pay product liability insurance rates which are twenty to fifty times higher than those of foreign competitors. This disparity is attributable in large part to the uncertainties and costs of the American tort litigation system."); H.R. REP. No. 748, 100th Cong., 2d Sess., pt. 1, at 24 (1988) ("Without having to absorb the costs of product liability exposure for most of their sales, foreign corporations have an obvious price advantage. In Japan and Europe, product liability laws are more stable, litigation less frequent, and large damage awards uncommon."); *cf.* U.S.-JAPAN WORKING GROUP, FIRST ANNUAL REPORT, STRUCTURAL IMPEDIMENTS INITIATIVE 5 (1991) (noting group's expectation that U.S. Government will institute product liability reform as means to enhance U.S. international business competitiveness).

39. *See* PETER W. HUBER & ROBERT E. LITAN, THE LIABILITY MAZE: THE IMPACT OF LIABILITY ON SAFETY AND INNOVATION 7 (1991) (reporting on American Medical Association study finding that "[i]nnovative new products are not being developed or are being withheld from the market because of liability concerns or inability to obtain adequate insurance"); *see also* Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J.,

the Immune Response Corporation recently halted its work on an HIV vaccine because it feared unchecked liability such as punitive damages.[40]

The organized plaintiffs' bar tries to focus on the political fight over "how many cases occur,"[41] but this approach misses a fundamental point. As the Supreme Court's decision in *Haslip* stressed, the issue is fairness.[42] Whether there are 100 or 100,000 punitive damages awards annually, they must be imposed in a fair way in accord with both the letter and spirit of the Constitution.

III. COURTS VERSUS LEGISLATURES

The organized plaintiffs' bar and some consumer groups have argued that if changes are to occur in the law of punitive damages, they should be made by courts, not legislatures. These groups contend that legislatures are really not "qualified" to undertake such reforms and that the reforms should be made by judges in the common law process.

It is true that courts should reform this area: the Supreme Court, as well as sound social policy, demand such action. Indeed, at least four courts have found state punitive damages systems unconstitutional in light of *Haslip*.[43] As mentioned previously, the Supreme

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concurring in part and dissenting in part) (emphasizing that "the threat of . . . enormous awards has a detrimental effect on the research and development of new products"); WALTER K. OLSON, THE LITIGATION EXPLOSION 7 (1991) (insisting that growth in product liability litigation has driven manufacturers to remove products from market or not introduce them at all).

40. *See* Jon Cohen, *Is Liability Slowing AIDS Vaccines?*, SCIENCE, Apr. 10, 1992, at 168-69 (reporting that fear of liability prompted Immune Response Corporation (IRC) to halt HIV vaccine research and that halt is especially troubling because IRC's HIV vaccine has outperformed every other vaccine); *cf.* Brown v. Superior Ct., 751 P.2d 470, 479 (Cal. 1988) (discussing withdrawal of Bendectin from market after price increased by more than 300%, and also noting withdrawal from market of all but two manufacturers of diphtheria-tetanus-pertussis (DPT) vaccine and price increase from 11¢ per dose to $11.40 per dose to cover insurance). *See generally* Bruce N. Kuhlik & Richard F. Kingham, *The Adverse Effects of Standardless Punitive Damage Awards on Pharmaceutical Development and Availability*, 45 FOOD DRUG COSM. L.J. 693, 697-704 (1990) (addressing unfavorable effects of punitive damages on product availability and pharmaceutical innovation).

41. *See, e.g.*, Conlin, *supra* note 29, at 26 (discussing low percentage of cases resulting in punitive damages awards); Habush, *supra* note 34, at 120-21 (stating that number of tort cases filed reflects slow growth in tort litigation); Rottman, *supra* note 29, at 5-6 (providing information on volume and composition of tort cases).

42. *See* Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1038-39 (1991) (observing that due process prohibits punitive damages awards that lack " 'basic elements of fundamental fairness' ") (quoting Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 276 (1989)).

43. *See* Johnson v. Hugo's Skateaway, 974 F.2d 1408, 1418 (4th Cir. 1992) (holding that in light of *Haslip*, Virginia's scheme for awarding punitive damages as applied by federal district court below violated Due Process Clause of Fifth Amendment); Mattison v. Dallas Carrier Corp., 947 F.2d 95, 99-106 (4th Cir. 1991) (holding that South Carolina's punitive damages system violated Due Process Clause because strict review criteria must be applied in accord-

Court recently decided to revisit the punitive damages due process issue.[44] A number of courts have made reforms by the common law process without invoking the Constitution.[45] Nevertheless, several reasons exist why legislatures, as contrasted with courts, are in a much better position to effectuate sound and effective reform.

First, courts are confined to the narrow issues before them in a case. If they go beyond those issues, they violate the concept of dealing with true "cases and controversies."[46] These specific, legalistic issues, such as whether punitive damages can be awarded when compensatory damages are not, often miss the forest for the trees.

Second, courts do not have the benefit of learning about the full extent of the public policy issues that guide sound punitive damages reform. Unlike courts, whose "view" of a case is generally limited only to the arguments of two opposing attorneys, legislative committees have the power to hear from all parties and groups who may have legitimate interests in punitive damages issues. The ability of legislatures to call upon a wealth of knowledge and different perspectives gives them better insight than courts into the "total picture." Furthermore, courts' sympathy for particular plaintiffs or defendants may impede sound reform.

Third, courts, following the common law process, institute their rules on a retroactive basis. This results in expensive legal costs and unfairness because people who are potential plaintiffs or defendants

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ance with *Haslip*); Alexander & Alexander, Inc. v. B. Dixon Evander & Assocs., Inc., 596 A.2d 687, 705-12 (Md. Ct. Spec. App. 1991) (concluding that amount of punitive damages violated due process, reasoning that $12.5 million punitive damages award surely crossed line that $840,000 award in *Haslip* approached), *cert. denied*, 605 A.2d 137 (Md. 1992); Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897, 904-10 (W. Va. 1991) (announcing that West Virginia's system for awarding punitive damages violated due process because it did not consider strict review criteria as required in *Haslip*); *see also* Owens-Illinois v. Zenobia, 601 A.2d 633, 648-54 (Md. 1992) (considering *Haslip* and raising burden of proof for punitive damages to showing of "actual malice"); Gamble v. Stevenson, 406 S.E.2d 350, 353-55 (S.C. 1991) (adopting more detailed postverdict review process to comply with *Haslip*); Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 900-02 (Tenn. 1992) (reforming Tennessee system because of *Haslip*, through raised burden of proof, developed review criteria, and tightened standard for assessing punitive damages).

44. TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870 (W. Va.), *cert. granted*, 113 S. Ct. 489 (1992).

45. *See, e.g.*, Masaki v. General Motors Corp., 780 P.2d 566, 574-75 (Haw. 1989) (utilizing common law to raise burden of proof in claims seeking punitive damages from preponderance of evidence standard to clear and convincing evidence standard); Travelers Indem. Co. v. Armstrong, 442 N.E.2d 349, 362-63 (Ind. 1982) (proposing new clear and convincing evidence standard as opposed to preponderance of evidence standard when punitive damages are sought); Wangen v. Ford Motor Co., 294 N.W.2d 437, 458 (Wis. 1980) (deciding that burden of proof standard for punitive damages will thereafter be "clear, satisfactory and convincing" standard).

46. *See* U.S. CONST. art. III, § 2, cl.1; *see also* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-7, at 68 (2d ed. 1988) (describing requirement of Article III of Constitution that claim must contain "real and substantial controversy" to ensure that courts do not overstep their authority and offer "advisory opinions").

need to know the rules in advance. Legislatures can and do behave proactively, giving the public advance notice of what the rules are. This notice seems particularly important when the rules at issue relate to punishment.[47]

In sum, while courts can and should have a role in punitive damages reform, legislatures can best paint the "big picture." This may explain why in a footnote in *Haslip* the Supreme Court pointed to legislative action in the area of reform.[48]

IV. KEY REFORMS BASED ON THE LETTER OF *HASLIP*

A. Establish a Clear and Strong Trigger

Legislators should articulate a clear and strong standard for juries to apply in evaluating whether a defendant's conduct warrants punitive damages. In *Haslip*, the Supreme Court noted that "[t]he trial court specifically found the conduct in question 'evidenced intentional malicious, gross, or oppressive fraud.' "[49] In light of this language, states that allow punitive damages awards for less than intentional or conscious wrongdoing[50] are vulnerable to due process objections, including, for instance, states that permit punitive damages awards for "gross negligence."[51]

Legislators must remember, as described above, that in its origins and at the time the Founding Fathers ratified the Constitution, punitive damages were reserved for clearly intentional torts such as bat-

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47. A simple example, perhaps, makes the practical point. Controversy exists about what the maximum speed should be on rural highways. Some say 55 miles per hour, some say 65 miles per hour, or even more. Would anyone propose that the changes regarding maximum speed be made by courts on a common law basis? Would it be reasonable or prudent to wait until a case comes before a court, then decide what the maximum speed should be, and fine a driver for speeding based on that decision? That approach would most likely be considered outrageous and absurd. Likewise, it is irrational to use the same retrospective system of common law to devise rules that guide punitive damages.

48. *See* Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1046 n.11 (1991) (noting that there is much to be said in favor of state statutes imposing standards of proof for punitive damages).

49. *Id.* at 1046.

50. An example of purely "intentional wrongdoing" would be an individual purposely firing a handgun at a specific person, whereas an example of a "conscious wrongdoing" would be an individual purposely firing a handgun into a crowd.

51. *See, e.g.*, FLA. STAT. ch. 768.73 (1991) (allowing for punitive damages in various civil actions involving "willful, wanton, or gross misconduct"); TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (West Supp. 1992) (stating that exemplary damages may be awarded only if claimant proves that harm resulted from fraud, malice, or gross negligence); Wisker v. Hart, 766 P.2d 168, 173 (Kan. 1988) (announcing that punitive damages may be awarded whenever element of malice, fraud, gross negligence, or oppression is involved in controversy); Buzzard v. Farmers Ins. Co., 824 P.2d 1105, 1105-15 (Okla. 1991) (holding that plaintiff must demonstrate that defendant acted with malice, fraud, oppression, gross negligence, or wantonness to receive punitive damages).

tery, assault, trespass, and false imprisonment.[52] Sound public policy suggests that punitive damages be reserved for this type of egregious conduct.[53] The compensatory tort system with its ample awards, especially for pain and suffering, has developed mechanisms such as the collateral source rule[54] to deter wrongful conduct that falls short of intentional or conscious wrongdoing.[55]

B. Instruct Juries About the General Purposes of Punitive Damages

Second, legislators should not allow juries to be given unlimited discretion in determining whether to award punitive damages. In *Haslip*, the trial court stressed the discretionary nature of punitive damages and described their purpose, which is not to compensate the plaintiff, but rather to punish the defendant and deter future misconduct.[56] The jury also was told to focus on promoting the state policies of deterrence and retribution and to consider the character and degree of the wrong.[57] Approvingly, the Supreme Court noted: "The instructions thus enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory."[58]

C. Establish Detailed Standards for Judicial Review

Third, detailed post-trial standards for judicial review should be established. In upholding the award in *Haslip*, the U.S. Supreme Court stressed the fact that the Alabama Supreme Court had estab-

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52. *See supra* note 25 and accompanying text (discussing traditional category of claims for punitive damages).

53. *See supra* note 24 and accompanying text (noting public purpose of punitive damages).

54. *See generally* John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478, 1478 (1966) (discussing development of collateral source rule and defining it as rule that prohibits defendant from reducing damages based on benefits received by plaintiff from outside sources such as insurers).

55. *See* Note, *supra* note 16, at 523 (recognizing deterrent effect of ordinary negligence law). As the Note aptly states:

> If an act is particularly wrongful, society imposes criminal sanctions in order to deter the wrongdoer and others from repeating the offense. But *while some faults, such as ordinary negligence, should be discouraged, they do not warrant the stigma and severity of criminal punishment. Such deterrence is effected in tort law by shifting the loss: the defendant is forced to repair the harm done to the plaintiff.*

Id. (emphasis added).

56. *See* Pacific Mut. Ins. Co. v. Haslip, 111 S. Ct. 1032, 1037 n.1 (1991) (noting trial court's jury instructions regarding punitive damages awards). The trial court opinion was not published.

57. *Id.* The trial court instructed the jury that "[s]hould you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." *Id.*

58. *Id.* at 1044.

lished post-trial procedures for trial courts to scrutinize punitive damages awards and had required them to reflect in the record their reasons for sustaining a jury verdict or for setting it aside on the ground of excessiveness.[59] As an additional check, the Alabama court provided a meaningful standard for appellate review of punitive damages awards by first undertaking "a comparative analysis"[60] and then applying detailed substantive standards to ensure that the award did not " 'exceed the amount that will accomplish society's goals of punishment and deterrence.' "[61] As the U.S. Supreme Court noted: "The Alabama Supreme Court's post-verdict review insures that punitive damage awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages."[62]

In a key footnote, the Supreme Court contrasted Alabama's detailed appellate guidelines with those of Mississippi and Vermont, where awards are set aside or modified only if they are "manifestly and grossly excessive"[63] or evince "passion, bias and prejudice . . . so as to shock the conscience."[64] The *Haslip* decision strongly suggests that these and other states with open-ended appellate review schemes are vulnerable to constitutional attack on the ground that their review of punitive damages awards is vague and arbitrary, and therefore violates due process.[65]

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59. *Id.* The Court noted that the factors applied by the trial court included the "culpability of the defendant's conduct," the "desirability of discouraging others from similar conduct," the "impact upon the parties," and "other factors, such as impact on innocent third parties." *Id.*

60. *See id.* at 1045 (citing Aetna Life Ins. Co. v. Lavoie, 505 So. 2d 1050, 1053 (Ala. 1987), which required Alabama appellate courts to evaluate appropriateness of juries' punitive verdicts by comparing them with other awards allowed in similar cases).

61. *See id.* (discussing Alabama law and quoting Greer Oil Co. v. Hornsby, 539 So. 2d 218, 222 (Ala. 1989)). The U.S. Supreme Court set forth seven factors that the Alabama Supreme Court applies in reviewing punitive damages awards:

> (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Id. (citing Central Alabama Elec. Coop. v. Tepley, 546 So. 2d 371, 377-78 (Ala. 1989)); *Hornsby*, 539 So. 2d at 223-24).

62. *Id.*

63. *See id.* at 1045 n.10 (quoting Pezzano v. Bonneau, 329 A.2d 659, 661 (Vt. 1974)).

64. *See id.* (citing Bankers Life & Casualty Co. v. Crenshaw, 483 So. 2d 254, 278 (Miss. 1985), *aff'd*, 486 U.S. 71 (1988)).

65. *See id.* at 1046 (holding that Alabama review standards did not violate due process because they contained specific, objective criteria); *see also* Mattison v. Dallas Carrier Corp.,

D. Shift Focus Away from Defendant's Wealth

The *Haslip* opinion also suggests that the jury's focus in determining punitive damages should not be on the defendant's wealth.[66] In *Haslip*, the Supreme Court was particularly impressed that Alabama did not permit the jury to consider the defendant's wealth.[67] The Court stated: "[T]he factfinder must be guided by more than the defendant's net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket."[68] Although Alabama did allow the defendant's wealth to be considered for appellate review, this information was not before the jury.[69]

Unfortunately, many states make the defendant's wealth a principal consideration in a jury's determination of the magnitude of punitive damages to be awarded.[70] Legislatures can correct this prejudicial approach by allowing courts to consider wealth in determining whether an award is excessive or inadequate, but they should not allow the "wealth factor" to be paraded before juries.

E. Amount of the Award

As the introduction to this Article suggests, the Supreme Court in *Haslip* found a four-to-one ratio of compensatory to punitive damages to be "close to the line" of being unconstitutional.[71] The Court made clear that this is an area where states, legislatures in particular, can do the most good in providing a reasonable and rational rule for assessing punitive damages amounts.[72] Indeed, recognizing the need to place reasonable restraints on runaway

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947 F.2d 95, 104-05 (4th Cir. 1991) (announcing that South Carolina's punitive damages law as applied by federal district court violated Due Process Clause of Fifth Amendment because state's punitive damages review procedures were substantially similar to Mississippi and Vermont "excessiveness" standards suggested by Supreme Court in *Haslip* to be unconstitutional).

66. *See* Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1045 (1992) (commenting that, under Alabama law, jury must be guided by more than defendant's "net worth").

67. *See id.* at 1044 (approving of jury instructions and noting that "[a]ny evidence of Pacific Mutual's wealth was excluded from the trial in accord with Alabama law").

68. *Id.* at 1045.

69. *Id.*

70. *See, e.g.*, Rhue v. Dawson, 841 P.2d 215, 229 (Ariz. Ct. App. 1992) (stating that assessment of punitive damages should reflect consideration of defendant's wealth in order to achieve "appropriate level of punitive effect"); Adams v. Murakami, 813 P.2d 1348, 1350-53 (Cal. 1991) (en banc) (reasoning that goal of deterrence will only be achieved if defendant feels financial implication of wrong committed); Jardel Co. v. Hughes, 523 A.2d 518, 528 n.6 (Del. 1987) (noting that one factor to be considered in assessing punitive damages is defendant's financial well being).

71. Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1046 (1991).

72. *See id.* at 1046 n.11 (recognizing that "there is much to be said in favor" of legislatures creating rules regarding punitive damages).

punitive damages awards, at least one state legislature, North Dakota,[73] and two state courts since *Haslip* have met the Supreme Court's challenge and focused their actions on the important relationship between punitive and compensatory damages.

In *Garnes v. Fleming Landfill, Inc.*,[74] the West Virginia Supreme Court reversed and remanded for new trial a case containing a punitive damages award of $105,000 and no compensatory damage award.[75] The court held that West Virginia could not allow juries to award punitive damages without finding compensatory damages.[76] Writing for the court, Justice Richard Neely stated that "[p]unitive damages should bear a reasonable relationship to the potential of harm caused by the defendant's actions and that generally means that punitive damages must bear a reasonable relationship to actual damages because compensatory damages provide a reasonable measure of likely harm."[77]

Similarly, in *Alexander & Alexander, Inc. v. B. Dixon Evander Associates*,[78] the Maryland Court of Special Appeals applied the *Haslip* guidelines to a punitive damages award imposed against a New York insurance broker.[79] The court held that a $12.5 million punitive damages award violated due process because it was "out of all proportion to both the harm caused and the perniciousness of the conduct."[80] The court found that the punitive damages award "surely crosse[d] th[e] line" set forth in *Haslip*.[81]

Groups advocating punitive damages reform in recent years have likewise recommended that punitive damages awards be limited to some ratio of compensatory damages.[82] Perhaps the most fair and

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73. *See* N.D. CENT. CODE § 32-03.2-11(1)-(5) (signed by governor Mar. 31, 1993) (discussing procedure, criteria, and limitations regarding awarding of punitive damages).

74. 413 S.E.2d 897 (W. Va. 1991).

75. Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897, 900 (W. Va. 1991). The plaintiffs in the case alleged that the defendant's solid waste disposal facility constituted a nuisance. *Id.*

76. *Id.* at 908.

77. *Id.* Justice Neely also applauded the U.S. Supreme Court's opinion in *Haslip* as "a major step in the unification of America's decisional law in matters where the separate states are unable to craft a set of rational rules." *Id.*

78. 596 A.2d 687 (Md. Ct. Spec. App. 1991), *cert. denied*, 605 A.2d 137 (Md. 1992).

79. *See* Alexander & Alexander, Inc. v. B. Dixon Evander Assocs., 596 A.2d 687, 710 (Md. Ct. Spec. App. 1991) (comparing punitive damages award with actual harm in light of *Haslip*), *cert. denied*, 605 A.2d 137 (Md. 1992).

80. *Id.* at 710. The court in *Alexander* stated that "[n]ot only is the $12.5 million allowed by the court extraordinary in terms of Maryland history, it is far in excess of the actual harm caused to Evander, representing nearly fifty times the essentially liquidated compensatory damage." *Id.* at 711.

81. *Id.* at 711 ("If the $840,000 awarded in *Haslip* came 'close to the line' in terms of the actual loss suffered, this surely crosses that line").

82. *See, e.g.*, AMERICAN BAR ASSOC., SPECIAL COMM. ON PUNITIVE DAMAGES OF THE AMERICAN BAR ASSOC. SECTION ON LITIGATION, PUNITIVE DAMAGES: A CONSTRUCTIVE EXAMINATION 64-66 (1986) [hereinafter ABA REPORT] (recommending that punitive damages awards in ex-

flexible approach is one developed by the American College of Trial Lawyers, a group of trial attorneys experienced in representing both plaintiffs and defendants. This group would limit punitive damages to twice the amount of compensatory damages or $250,000, whichever is greater.[83] A similar approach was recommended in a 1991 report by scholars of the esteemed American Law Institute.[84]

Unlike other approaches that use only a ratio tied to compensatory damages to limit punitive damages awards,[85] these proposals provide the trier of fact with great flexibility to do justice in the rare situation where a defendant has engaged in heinous conduct with a huge potential for harm, but which resulted in little actual harm.[86] In such a situation, the court could assess punitive damages up to the fixed monetary ceiling (e.g. $25,000 or $250,000) without being handcuffed to a strict ratio corresponding to compensatory damages.[87]

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cess of three-to-one ratio to compensatory damages awarded be considered presumptively "excessive"); AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT ON PUNITIVE DAMAGES OF THE COMMITTEE ON SPECIAL PROBLEMS IN THE ADMINISTRATION OF JUSTICE 13-15 (1989) [hereinafter ACTL REPORT] (proposing that quantum of punitive damages be limited by relationship to compensatory damages); AMERICAN LAW INST., ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY—REPORTERS' STUDY 265-69 (Vol. II 1991) [hereinafter ALI REPORTERS' STUDY] (arguing for establishment of numerical ratio between amount of compensatory damages and punitive damages).

83. ACTL REPORT, *supra* note 82, at 15. Some states have already adopted limitations similar to this. *See, e.g.*, NEV. REV. STAT. § 42.005 (1991) (confining punitive damages awards to $300,000 in cases in which compensatory damages are less than $100,000 and to three times amount of compensatory damages in cases of $100,000 or more); N.D. CENT. CODE § 32-03.2-11(4) (signed by governor Mar. 31, 1993) (limiting punitive damages to twice compensatory damages or $250,000, whichever is greater); TEX. CIV. PRAC. & REM. CODE ANN. § 41.007 (West Supp. 1992) (limiting punitive damages to four times actual damages or $200,000, whichever is greater).

84. *See* ALI REPORTERS' STUDY, *supra* note 82, at 258-59 (endorsing concept of ratio coupled with alternative monetary ceiling, "perhaps $25,000," for cases "in which the plaintiff's harms were minimal even though the defendant's behavior was egregious"). The Reporters did not recommend a specific ratio of punitive to compensatory damages that states should adopt. *See id.* ("Our concern in this Report is to endorse the substantive principle of the ratio of punitive to compensatory damages, not to commit ourselves to specific judgments about each of the issues in the operative formula."). *See generally* Victor E. Schwartz & Mark A. Behrens, *The American Law Institute Reporters' Study on Enterprise Responsibility for Personal Injury: A Timely Call for Punitive Damages Reform*, 30 SAN DIEGO L. REV. (forthcoming Summer 1993).

85. *See, e.g.*, COLO. REV. STAT. § 13-21-102(1)(a) (1987) (prohibiting punitive damages from exceeding amount of compensatory damages awarded); CONN. GEN. STAT. ANN. § 52-240b (West 1991) (limiting punitive awards to twice compensatory damages); COUNCIL ON COMPETITIVENESS, MODEL STATE PUNITIVE DAMAGES ACT (1991) (limiting punitive damages to amount of compensatory damages awarded); ABA REPORT, *supra* note 82, at 64-66 (proposing three-to-one ratio of punitive to compensatory damages).

86. An example of such conduct is a case where the defendant throws harmful acid at a person's face but misses, causing only minimal clothing damage. *See* ALI REPORTERS' STUDY, *supra* note 82, at 259 (noting that advantage of ratio principle with flexible formula is ability to adjust to "special features of individual cases").

87. *See* Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897, 902 (W. Va. 1991) (discussing situation where actual damage is minimal, yet court awards substantial punitive damages as deterrence measure); Morris, *supra* note 16, at 1181 (noting that actual result of harm may

It is important to note that, for due process reasons, any ratio construct may be challenged in two situations on the ground of excessiveness: first, in cases where the defendant is being subjected to repeated punishment for what was essentially a single act or course of conduct,[88] and second, where the case involves a very large compensatory damage award.[89] In these situations, strict adherence to a fixed ratio may overemphasize the deterrent effect of the punitive damages award and thus be excessive. Also, when legislatures act on these recommendations, it is important they provide both that juries not be informed of the limit and that juries' awards for punitive damages exceeding the limit be reduced by courts.[90] If a jury is informed of the dollar or ratio limit, the jurors may perceive it as a guideline for assessing punitive damages, rather than as a ceiling.

V. REFORMS THAT MEET THE SPIRIT OF *HASLIP*

Legislatures can do more than follow the letter of *Haslip*; they can adhere to its spirit. In *Haslip*, the Supreme Court vested in state legislators a great challenge to exercise their good judgment and place reasonable restraints on punitive damages.[91] Three reforms, at the very least, fit within this category.

A. Burden of Proof

The *Haslip* opinion suggested that states can improve punitive damages awards procedure by fostering changes in the common law.[92] For instance, states may change the burden of proof that a plaintiff must show to establish that a defendant's conduct warrants punitive damages. In a footnote, the Court noted that "[t]here is much to be said in favor of a State's requiring, as many do, . . . a standard of 'clear and convincing evidence.' "[93]

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have little to do with necessary admonition). Opponents of these proposals may argue that $250,000 is an insufficient punishment in such a case. This argument approaches frivolity when one considers criminal fine punishments for similar wrongful conduct. *See* Appendix (listing examples of state criminal penalties).

88. *See* Schwartz & Magarian, *supra* note 26, at 102 (suggesting that imposition of multiple, or repetitive, punitive damages awards for single act or course of conduct by defendant may offend due process).

89. *See* TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870, 889 n.12 (W. Va.) (discussing situation where five-to-one ratio would be "excessive" in terms of due process), *cert. granted*, 113 S. Ct. 594 (1992).

90. *See* ACTL REPORT, *supra* note 82, at 15 (reasoning that jury may attempt to circumvent limit by increasing amount of compensatory damages).

91. *See* Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1046 n.11 (1991) (calling state legislatures to action regarding imposition of burden of proof for punitive damages that is higher than preponderance of evidence standard).

92. *Id.*

93. *Id.*

The "clear and convincing evidence" burden of proof standard is the accepted trend in punitive damages law.[94] Each of the principal groups to analyze the law of punitive damages since 1979 has recommended this standard, including the American Bar Association in 1987[95] and the American College of Trial Lawyers in 1989.[96] More recently, a report issued by the American Law Institute in 1991 recommended the clear and convincing evidence standard because it would "signal clearly to juries that there is something special about a punitive award."[97] Approximately half of the states have chosen to adopt the clear and convincing standard either by legislative action[98] or judicial decision.[99]

The public policy reason for adopting this heightened burden of

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94. *See infra* notes 98-99 and accompanying text (listing states that have adopted clear and convincing evidence standard).

95. *See* ABA REPORT, *supra* note 82, at 19 (suggesting adoption of clear and convincing standard because standard will "strengthen the hands of judges" to ensure against abuse).

96. *See* ACTL REPORT, *supra* note 82, at 15-16 (asserting that clear and convincing evidence standard is more "in harmony" with current punishment system than preponderance of evidence standard); *see also* Uniform Product Liability Act, 44 Fed. Reg. 62,714, 62,748-49 (1979) (analyzing clear and convincing standard adopted by Uniform Act).

97. ALI REPORTERS' STUDY, *supra* note 82, at 248-49.

98. *See, e.g.*, ALA. CODE § 6-11-20 (Supp. 1992); ALASKA STAT. § 09.17.020 (Supp. 1992); CAL. CIV. CODE § 3294(a) (West Supp. 1993); GA. CODE ANN. § 51-12-5.1(b) (Michie Supp. 1992); IND. CODE ANN. § 34-4-34-2 (Burns 1986); IOWA CODE ANN. § 668A.1 (West 1987); KAN. STAT. ANN. § 60-3701(c) (Supp. 1991); KY. REV. STAT. ANN. § 411.184(2) (Baldwin Supp. 1991); MINN. STAT. § 549.20 (1992); MONT. CODE ANN. § 27-1-221(5) (1991); NEV. REV. STAT. § 42.005 (Supp. 1991); N.D. CENT. CODE § 32-03.2-11(5) (signed by governor Mar. 31, 1993); OHIO REV. CODE ANN. § 2307.80(A) (Anderson 1991); OKLA. STAT. tit. 23, § 9 (1991); OR. REV. STAT. § 30.925 (1991); S.C. CODE ANN. § 15-33-135 (Law. Co-op. Supp. 1992); S.D. CODIFIED LAWS ANN. § 21-1-4.1 (1987); UTAH CODE ANN. § 78-18-1 (1992); Miss. H.B. 1270 § 2(1)(a) (signed by governor Feb. 18, 1993). One state, Colorado, requires proof of punitive damages liability "beyond a reasonable doubt." COLO. REV. STAT. § 13-25-127(2) (1987).

99. *See, e.g.*, Linthicum v. Nationwide Life Ins. Co., 723 P.2d 675, 680-81 (Ariz. 1986) (holding that punitive damages are appropriate only upon showing of clear and convincing evidence of defendant's "evil mind"); Travelers Indem. Co. v. Armstrong, 442 N.E.2d 349, 362-63 (Ind. 1982) (employing clear and convincing standard when punitive damages are sought because standard best furthers public interest of avoiding abuses associated with punishment); Tuttel v. Raymond, 494 A.2d 1353, 1362-63 (Me. 1985) (allowing recovery of punitive damages only if plaintiff can prove malice by clear and convincing evidence); Owen-Illinois v. Zenobia, 601 A.2d 633, 655-57 (Md. 1992) (noting that clear and convincing standard is most appropriate because it ensures that damages are properly awarded); Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 (Tenn. 1992) (reasoning that clear and convincing standard of proof is best for punitive damages awards considering dual purposes of punishment and deterrence); Wangen v. Ford Motor Co., 294 N.W.2d 437, 457-58 & n.23 (Wis. 1980) (adopting "middle burden of proof," which court defines as clear and convincing standard, as requisite burden for obtaining punitive damages). In *Masaki v. General Motors, Inc.*, the Hawaii Supreme Court stated:

> [P]unitive damages are a form of punishment and can stigmatize the defendant in much the same way as a criminal conviction. It is because of the penal character of punitive damages that a standard of proof more akin to that required in criminal trials is appropriate, rather than the preponderance of the evidence standard generally employed in trials of civil actions. . . . A more stringent standard of proof will assure that punitive damages are properly awarded.

Masaki v. General Motors, Inc., 780 P.2d 566, 575 (Haw. 1989).

proof is to alert jurors that they should be more certain of their decision when they invoke punishment, as contrasted with awarding compensatory damages.[100] It also alerts trial courts to the fact that some cases may not appropriately be heard by a jury.[101] Finally, the clear and convincing evidence standard gives appellate courts power to review decisions carefully[102] and to ensure that punitive damages are properly awarded.[103]

B. Bifurcating the Trial

Another means by which legislatures can meet the Supreme Court's challenge in *Haslip* to restrain extraordinary punitive damages awards is through the procedure of bifurcating trials. The bifurcation procedure requires a jury, usually at the defendant's request, to determine punitive damages liability in a separate proceeding subsequent to its verdict on compensatory damages liability. Bifurcated trials are equitable because they prevent evidence that may be relevant only to the issue of punitive damages, such as evidence of a defendant's net worth or profits, from being heard by the jury when it is determining basic liability.[104]

This reform meets the spirit of the *Haslip* case and is supported by the American Law Institute's *Reporters' Study*,[105] the American Bar Association,[106] and the American College of Trial Lawyers.[107] Recently, in the first common law decision on this point by a state

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100. *See* Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1064 (1991) (O'Connor, J., dissenting) (arguing that clear and convincing evidence standard should be required of states because such standard would "signal to the jury that it should have a high level of confidence in its factual findings before imposing punitive damages"); *Masaki*, 780 P.2d at 574 (asserting that clear and convincing standard will ensure that jury is firmly resolved regarding assessment of punitive damages).

101. *See Haslip*, 111 S. Ct. at 1064 (O'Connor, J., dissenting) (maintaining that clear and convincing evidence standard would constrain jury discretion).

102. *See id.* (alleging that clear and convincing evidence standard would allow for closer scrutiny of evidence by judges and reviewing courts).

103. *See Owens-Illinois*, 601 A.2d at 657 (asserting that clear and convincing standard will further help ensure that punitive damages are correctly awarded).

104. *See* ALI REPORTERS' STUDY, *supra* note 82, at 255 n.41 (positing that potential prejudicial effect of evidence of defendant's wealth is most prominent rationale underlying proposals to bifurcate punitive damages trials). Evidence of profits is highly prejudicial. A jury that is informed that a firm made substantial profits from the product at issue could be improperly influenced to issue a favorable plaintiff's verdict when the case for liability is weak.

105. *See* ALI REPORTERS' STUDY, *supra* note 82, at 255 n.41 (discussing advantages of proposals to bifurcate trials in punitive damages cases and citing prejudicial evidence of defendants' wealth as predominant reason driving such proposals).

106. *See* ABA REPORT, *supra* note 82, at 19 ("Evidence of net worth and other evidence relevant only to the question of punitive damages ordinarily should be introduced only after the defendant's liability for compensatory damages and the amount of those damages have been determined.").

107. *See* ACTL REPORT, *supra* note 82, at 18-19 (recommending flexible approach to bifurcation in cases where punitive damages are sought).

supreme court, the Tennessee Supreme Court in *Hodges v. S.C. Toof & Co.*[108] held that defendants may move for a bifurcated trial in punitive damages cases.[109] The court followed several other states that had previously made similar changes through court rules or legislation.[110]

C. *Compliance with Regulatory Standards Defense*

State legislation should also create a shield against punitive damages awards in cases where the harm-causing aspect of a product's design, formulation, inspection, testing, packaging, labeling, or warning either complied with the requirements of a federal statute or administrative regulation existing at the time the product was produced, or received premarket approval or certification by a federal agency. The American Law Institute scholars who wrote the *Reporters' Study* endorsed this concept in no uncertain terms:

> We believe that the risk of overdeterrence of socially valuable activities through the imposition of tort liability on regulated products and activities merits more widespread recognition of a regulatory compliance defense. . . .
>
> . . . The strongest case for a regulatory compliance defense arises when punitive damages are sought. If a defendant has fully complied with a regulatory requirement and fully disclosed all material information relating to risk and its control, it is hard to justify the jury's freedom to award punitive damages.[111]

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108. 833 S.W.2d 896 (Tenn. 1992).

109. Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 (Tenn. 1992).

110. *Id.*; *see, e.g.*, CAL. CIV. CODE § 3295(d) (West Supp. 1993) ("The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud."); MINN. STAT. ANN. § 549.20 (West Supp. 1993) (announcing that evidence of defendants' financial situation is not admissible in initial proceedings to determine compensatory damages); Miss. H.B. 1270 § 2(1)(b) (signed by governor Feb. 18, 1993) (stating that trier of fact must first determine liability for compensatory damages before deciding any issues related to punitive damages); MO. ANN. STAT. § 510.263 (Vernon Supp. 1992) (stating that all actions involving punitive damages shall be heard in bifurcated trials and that evidence of defendants' financial condition is not admissible in first trials); MONT. CODE ANN. § 27-1-221(7) (1991) (providing mandatory bifurcation of proceedings in which liability and amount of punitive damages are determined); NEV. REV. STAT. § 42.005(3) (1991) (stating that separate proceeding will determine amount of punitive damages subsequent to trier of fact finding liability for punitive damages); N.J. STAT. ANN. § 2A:58C-5(b) (West 1987) (setting out mandatory bifurcation of proceedings for determining compensatory and punitive damages in product liability actions); N.D. CENT. CODE § 32-03.2-11(2)-(3) (signed by governor Mar. 31, 1993) (allowing bifurcation at either party's election and prohibiting evidence of defendant's financial condition or net worth in proceeding to determine punitive damages); UTAH CODE ANN. § 78-18-1(2) (1992) (precluding evidence of defendant's financial condition prior to determination of defendant's liability for punitive damages). *See generally* Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 320-23 (1983) (promoting concept of bifurcated proceedings in punitive damages cases).

111. ALI REPORTERS' STUDY, *supra* note 82, at 95, 101.

The public policy reason for this type of rule is that society wants to encourage companies to invest in and develop new and useful products, especially in the area of medicine.[112] If implemented, the recommendation would provide a strong incentive for the innovation of pharmaceuticals and medical devices that may otherwise be withheld because of liability risk. At the same time, a carefully drafted compliance with standards defense could punish manufacturers who intentionally withhold material information from a federal agency, such as the Federal Food and Drug Administration (FDA), by subjecting the irresponsible manufacturers to punitive damages.[113] Such a defense, easily crafted, would be a jewel for responsible innovators and a "big stick" against those who fail to comply with regulatory rules.[114] At least five states have already enacted this type of defense against punitive damages liability for drugs and medical devices approved by the FDA.[115]

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112. *See* HUBER & LITAN, *supra* note 39, at 21 (pointing out that recent study by prestigious Brookings Institution suggests strong need for adoption of compliance with regulatory standards defense for product designs that meet all applicable regulatory standards); *see also* PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 213-15 (1988) (arguing that compliance with licensing and federal standards should provide protection against punitive damages).

113. It is relevant to note that in all of the controversial product liability medical device and drug litigation, such as the heart valve and silicon breast implant cases, plaintiffs allege that the companies failed to provide material information to the FDA. *See, e.g.*, Bravman v. Baxter Healthcare Corp., 984 F.2d 71, 73 (2d Cir. 1993) (considering claim of failure to warn of problems associated with artificial heart valve); Lee v. Baxter Healthcare Corp., 721 F. Supp. 89, 94-95 (D. Md. 1989) (discussing plaintiff's claim of failure to warn of risks associated with silicon breast implants); Rosburg v. Minnesota Mining & Mfg. Co., 226 Cal. Rptr. 299, 305 (Ct. App. 1986) (litigating claim of insufficient warning regarding breast implants).

114. It should be remembered that the use of this type of defense will not shield companies from compensatory actions because that responsibility will still be determined by the jury.

115. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-701 (1992) (stating that drug manufacturer or seller is not liable for punitive or exemplary damages if drug at issue was manufactured and labeled in accordance with FDA regulations); N.J. STAT. ANN. § 2A:58C-5(c) (West 1987) (disallowing punitive damages awards in cases where drug, device, or food that caused harm was approved or licensed by FDA or is "generally recognized as safe and effective" pursuant to FDA regulations); OHIO REV. CODE ANN. § 2307.80(c) (Anderson 1991) (prohibiting liability for punitive damages if drug manufacturer produced product within terms of approval or license by FDA); OR. REV. STAT. § 30.927(1) (1991) (preventing punitive damages awards in cases where drug manufacturer produced and labeled drug in accordance with FDA regulations, or where drug "generally is recognized as safe and effective" pursuant to FDA conditions); UTAH CODE ANN. § 78-18-2 (1992) (barring punitive damages where drug was approved or licensed by FDA or is "generally recognized as safe and effective" under FDA regulations). Very recently, two federal courts of appeals have recognized the strong public policy behind a compliance with FDA standards defense, finding a medical device manufacturer immune from *all* liability for damages, compensatory and punitive, where the medical device received FDA premarket approval. *See* Stamps v. Collagen Corp., 984 F.2d 1416, 1421-22 (5th Cir. 1993) (finding plaintiff's state tort claims preempted by FDA Class III regulations because state law constitutes requirement different from, or in addition to, FDA requirement and relates either to safety or effectiveness of device or any other matter in FDA requirement applicable to device); King v. Collagen Corp., 983 F.2d 1130, 1132-37 (1st Cir. 1993) (analyzing plaintiff's claims and concluding that all claims are preempted by FDA regulations).

CONCLUSION

The Supreme Court's decision in *Haslip* issued a challenge to state legislatures to provide reasonable guidelines in the area of punitive damages in hopes of stopping the irresponsible and devastating trend toward punitive damages "run wild."[116] The Court may further clarify its position in *TXO Production Corp. v. Alliance Resources Corp.*[117] Even if the Court provides more detailed rules, they will be constitutional guidelines at best. Only state legislatures have the power, resources, and skills to develop guidelines that meet both the letter and spirit of *Haslip*. State legislators can and should meet that responsibility.

116. *See supra* notes 91-93 and accompanying text (detailing Supreme Court's challenge).
117. *See supra* notes 13-14 and accompanying text (discussing *TXO Production*).

APPENDIX

EXAMPLES OF STATE CRIMINAL PENALTIES

DISTRICT OF COLUMBIA

Title and Section in the *District of Columbia Code*	Description	Fine
§ 22-504	Assault or threatened assault in a menacing manner	not more than $500
§ 22-712	Bribery	not more than $25,000 or 3 times the monetary equivalent of the thing of value, whichever is greater
§ 22-2511	Perjury	not more than $5,000
§ 22-3102	Unlawful entry on property	not more than $100
§ 22-3812	Penalties for theft	not more than $5,000 for 1st degree; not more than $1,000 for 2nd degree
§ 22-3822	Penalties for fraud	For first degree fraud— not more than $5,000 or 3 times the value of the property, whichever is greater, if the value of the property is $250 or more; not more than $1,000 if the value of the property is less than $250. For second degree fraud— not more than $3,000 or 3 times the value of the property, whichever is greater, if the value of the property is $250 or more; not more than $1,000 if the value of the property is less than $250.

ILLINOIS

Title and Section in the *Smith-Hurd Illinois Annotated Statutes*	Description	Fine
38 ¶ 12-1	Assault	not to exceed $500
38 ¶ 12-3	Battery	not to exceed $1,000
38 ¶ 16-1	Theft	not to exceed $1,000 on property valued at $150 or less; not to exceed $10,000 or the amount specified in the offense, whichever is greater, on property valued at more than $150 or theft of a firearm
38 ¶ 17-8	Health care benefits fraud	not to exceed $1,000

38 ¶ 21-3	Criminal trespass to land	not to exceed $500
38 ¶ 32-2	Perjury	not to exceed $10,000 or the amount specified in the offense, whichever is greater
38 ¶ 33-1	Bribery	not to exceed $10,000 or the amount specified in the offense, whichever is greater

MARYLAND

Title and Section in the *Annotated Code of Maryland* (1957)	Description	Fine
Art. 27, § 12	Assault with intent to rob	incarceration only
Art. 27, § 23	Offering bribe to or receiving bribe by public officer; witness in prosecution	not less than $100, not more than $5,000
Art. 27, § 35B	Abuse or neglect of vulnerable persons	not more than $5,000
Art. 27, § 36	Carrying or wearing concealed weapon; carrying openly with intent to injure	not more than $1,000
Art. 27, § 173	Fraud—Conversion of partnership money	not more than $5,000
Art. 27, § 209	Fraud—Receiving premiums after insolvency	not more than $500
Art. 27, § 342	Theft	a value of $300 or greater shall restore property to owner or pay the value of the property or services and be fined not more than $1,000; a value of less than $300 shall restore property to owner or pay him the value of the property or services and be fined not more than $500
Art. 27, § 439	Perjury	incarceration only
Art. 27, § 576	Trespass on posted property	not exceeding $500

MICHIGAN

Title and Section in *Michigan Statutes Annotated*	Description	Fine
Penal Code § 28.276(1)	Assault without weapon and infliction of serious injury without certain intent	not more than $500
Penal Code § 28.313	Bribe	not more than $5,000
Penal Code § 28.371	Embezzlement	not more than $100† if valued at $100 or under; not more than $5,000 if valued at more than $100
Penal Code § 28.588	Larceny	not more than $2,500 if value of property stolen exceeded $100; not more than $100† if property stolen valued at $100 or less
Penal Code § 28.594	Larceny by conversion or embezzlement	not more than $2,500 if value of property exceeded $100; not more than $100† if property stolen valued at $100 or less
Penal Code § 28.664	Perjury committed in courts	incarceration only
Penal Code § 28.815	Willful trespass	not more than $100†
Penal Code § 28.824	Wage discrimination	not more than $100†

† Penal Code § 28.772 provides that the monetary punishment for a misdemeanor, when not fixed by statute, is not more than $100.

NEW YORK

Title and Section in *New York Consolidated Laws*	Description	Fine
Penal Law § 120.00	Assault in the third degree	not exceeding $1,000
Penal Law § 120.05	Assault in the second degree	not exceeding the higher of $5,000, or double the amount of D's gain from commission of the crime
Penal Law § 120.10	Assault in the first degree	not exceeding the higher of $5,000, or double the amount of D's gain from commission of the crime
Penal Law § 140.10	Criminal trespass in the third degree	not exceeding $500
Penal Law § 140.15	Criminal trespass in the second degree	not exceeding $1,000
Penal Law § 140.17	Criminal trespass in the first degree	not exceeding the higher of $5,000, or double the amount of D's gain from commission of the crime

Penal Law § 155.25	Petit Larceny	not exceeding $1,000
Penal Law § 155.40	Grand Larceny in the second degree	not exceeding the higher of $5,000, or double the amount of D's gain from commission of the crime
Penal Law § 155.42	Grand Larceny in the first degree	not exceeding the higher of $5,000, or double the amount of D's gain from commission of the crime
Penal Law § 170.15	Forgery in the first degree	not exceeding the higher of $5,000, or double the amount of D's gain from commission of the crime
Penal Law § 185.05	Fraud involving a security interest	not exceeding $1,000
Penal Law § 190.05	Issuing a bad check	not exceeding $500
Penal Law § 200.00	Bribery in the third degree	not exceeding the higher of $5,000, or double the amount of D's gain from commission of the crime
Penal Law § 200.03	Bribery in the second degree	not exceeding the higher of $5,000, or double the amount of D's gain from commission of the crime
Penal Law § 200.04	Bribery in the first degree	not exceeding the higher of $5,000, or double the amount of D's gain from commission of the crime
Penal Law § 210.05	Perjury in the third degree	not exceeding $1,000
Penal Law § 210.10	Perjury in the second degree	not exceeding the higher of $5,000, or double the amount of D's gain from commission of the crime
Penal Law § 210.15	Perjury in the first degree	not exceeding the higher of $5,000, or double the amount of D's gain from commission of the crime

TEXAS

Title and Section in *Vernon's Texas Codes Annotated*	Description	Fine
Penal Code § 22.01	Assault	not to exceed $10,000
Penal Code § 30.05	Criminal Trespass	not to exceed $3,000
Penal Code § 31.03	Theft (includes embezzlement)	not to exceed $500 if value of property stolen is less than $20; not to exceed $1,500 if value of property stolen is $20 or more but less than $200; not to exceed $3,000 if value of property stolen is $200 or more but less than $750; not to exceed $10,000 if value of property stolen is at least $750 but less than $20,000
Penal Code § 32.21	Forgery	not to exceed $10,000
Penal Code § 32.34	Fraud in Insolvency	not to exceed $3,000
Penal Code § 32.41	Issuance of Bad Check	not to exceed $500

Penal Code § 32.45	Misapplication of Fiduciary Property	not to exceed $3,000 if value of property is less than $200; not to exceed $10,000 if value of property is $200 or more
Penal Code § 36.02	Bribery	not to exceed $10,000
Penal Code § 37.02	Perjury	not to exceed $3,000

VIRGINIA

Title and Section in the *Code of Virginia*	Description	Fine
§ 18.2-57	Assault and battery	not more than $2,500
§ 18.2-95	Grand larceny (includes embezzlement)	not more than $2,500
§ 18.2-96	Petit larceny	not more than $2,500
§ 18.2-119	Trespass	not more than $2,500
§ 18.2-181	Issuing bad checks	not more than $2,500
§ 18.2-204	False statement for the purpose of defrauding industrial sick benefit company	not more than $500
§ 18.2-434	Perjury	not more than $2,500
§ 18.2-449	Bribery	not more than $100,000

WEST VIRGINIA

Title and Section in the *West Virginia Code*	Description	Fine
§ 61-2-9	Malicious or unlawful assault; battery	not exceeding $500
§ 61-3-12	Entry of building other than dwelling	not exceeding $100
§ 61-3-13	Grand and petit larceny	not exceeding $500
§ 61-3-24	Obtaining money, property and services by false pretenses	not more than $1,000
§ 61-3-24a	Obtaining or attempting to obtain goods, property or service by false or fraudulent use of credit cards or other false or fraudulent means	not more than $500
§ 61-3-38	Publication of false advertisements	not more than $100
§ 61-3-39a	Making, issuing worthless check	not more than $100
§ 61-3B-2	Trespass in structure or conveyance	not more than $500

§ 61-3C-4	Computer fraud	not more than $10,000
§ 61-5-3	Perjury	not more than $1,000
§ 61-5-7	Bribery	not more than $5,000
§ 61-3-37	Publication of false statement as to financial condition of person, firm or corporation	not more than $1,000