Punitive Damage "Overkill" After TXO Production Corp. v. Alliance Resources: The Need for a Congressional Solution

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NOTES

PUNITIVE DAMAGE "OVERKILL" AFTER TXO PRODUCTION CORP. v. ALLIANCE RESOURCES: THE NEED FOR A CONGRESSIONAL SOLUTION

Punitive damages have long been available as a remedy in civil lawsuits.¹ In recent years, however, they have been seriously challenged on both legal and public policy grounds. During the past decade, litigants have attacked punitive damages as unconstitutional under the Excessive Fines Clause,² the Double Jeopardy Clause,³ and the Due Process Clause.⁴ Tort reformers criticize punitive damages on public policy grounds, arguing that awards have increased dramatically in size, scope, and frequency in recent decades.⁵ Punitive damages, according to this view, should be brought under control because they are both unfair and economically destructive.⁶ One advocate of tort reform has

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1. On the history of punitive damages, see 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES §§ 1.0-1.4 (2d ed. 1989 & Supp. 1993). One of the first American cases to apply the doctrine of punitive damages was Coryell v. Colbough, 1 N.J. (Coxe) 77 (1791), in which the defendant was assessed damages "for example's sake" as well as to compensate the plaintiff. Id. at 77. By 1851, the availability of "exemplary, punitive, or vindictive damages" was "well established" in American law and "[would not] admit of argument." Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851).


3. See United States v. Halper, 490 U.S. 435 (1989); see also infra note 52.


6. See infra notes 26-27 and accompanying text.
called punitive damages a "lightning rod" for public discontent with the legal system. Indeed, highly publicized and seemingly unjust punitive awards helped to make civil justice reform an issue in the most recent presidential election. Defenders of punitive damages, however, emphasize the useful role of such awards in deterring and punishing socially undesirable conduct. Viewed from this perspective, punitive damages are "a necessary remedy against the abuse of power by economic elites," or, even more vividly, "a 'sword' [to be] wielded by relatively powerless individuals and entities against giant firms." Some scholars also argue that the evidence cited by the tort reformers is anecdotal and that large punitive damage awards actually remain a relatively rare phenomenon.

An intriguing and unresolved aspect of the debate over punitive damages concerns the phenomenon of punitive damage "overkill." This phenomenon occurs when a single act or course of conduct gives rise to multiple punitive damage awards. This Note will begin with a brief description of the context in which overkill occurs and an assessment of why multiple punitive awards are problematic. Next, the Note will assess case law on

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7. Nancy E. Roman, A PR Blitz is Dramatizing the Public Cost of "Junk Lawsuits" and Multimillion-Dollar Judgments, WASH. TIMES, Feb. 14, 1993, at A1 (quoting Martin Connor, President, American Tort Reform Association). In a 1993 case that attracted national media attention, a jury in Fulton County, Georgia awarded $4 million in actual damages and $101 million in punitive damages after finding that a negligently-designed gas tank in a General Motors truck was responsible for the death of the plaintiffs' son. Id. More recently, Domino's Pizza announced that it would discontinue its guarantee of 30-minute delivery in part because of a $78 million punitive damage award levied against it. In that case, the plaintiff suffered head and spinal injuries when a Domino's driver ran a red light and struck her car. Michael Janofsky, Domino's Ends Fast-Pizza Pledge After Big Award to Crash Victim, N.Y. TIMES, Dec. 22, 1993, at A1.


10. Rustad & Koenig, supra note 9, at 1276.

11. Id. at 1309.

this subject, especially in light of the Supreme Court's recent pronouncements on punitive damages in TXO Production Corp. v. Alliance Resources Corp. Although the constitutionality of overkill may remain an open question, courts will not soon resolve the problem. Moreover, legislative efforts to limit overkill at the state level likely would prove ineffective. Accordingly, Congress should enact national legislation limiting multiple punitive damage awards in mass tort litigation. In crafting such legislation, Congress must evaluate proposals in terms of three important criteria: (1) simplicity, (2) constitutionality, and (3) fairness to all litigants. A number of proposals discussed in this Note would reduce defendants' exposure to punitive overkill, but only reform of class action procedures is likely to satisfy all three of these legislative criteria.

DEFINING OVERKILL: MASS TORTS, PUNITIVE DAMAGES, AND PUBLIC POLICY

The issue of multiple punitive damage awards arises in the context of mass tort litigation, a comparatively new area of the law. In modern life, a single act or "course of conduct" can affect thousands of individuals, as when a manufacturer markets a defective product or fails to provide adequate safety warnings. Methods of mass production, marketing, and distribution—nonexistent when the common law of torts developed—now allow products to reach vast numbers of consumers. Familiar instances of mass torts involving products include asbestos, the Dalkon Shield IUD, Agent Orange, the Ford Pinto, and pharmaceuticals such as DES. Airplane crashes

14. See infra notes 120-22 and accompanying text.
16. See infra notes 24-25 and accompanying text.
and other large-scale disasters, because they involve large numbers of plaintiffs, also raise the possibility of punitive damage overkill.\textsuperscript{21} Common law tort principles permit every individual harmed by a defendant's conduct to sue for both actual and punitive damages.\textsuperscript{22}

Multiple punitive damage awards based on a single act or course of conduct pose several problems. First, they unfairly punish defendants repeatedly for the same conduct. Multiple awards also subject corporate defendants to potentially bankrupting liability. Often the blameworthy conduct that is the basis for a punitive damage award occurred many years in the past when a corporate defendant consisted of a completely different set of officers, directors, employees, and shareholders. One must ask whether extracting repetitive awards under such circumstances serves the essential purposes of punitive damages—punishment and deterrence.\textsuperscript{23}

Additionally, successive punitive damage awards are unfair to "late" plaintiffs, potentially depriving them of even compensatory damages because large awards or settlements to earlier plaintiffs have bankrupted the defendant. Current asbestos litigation demonstrates how the zealous pursuit of punitive damage awards ultimately may deprive numerous plaintiffs of any possible remedy. Testifying before Congress, Judge William W. Schwarzer summarized the crisis in asbestos litigation:

There are now some 100,000 asbestos cases pending in feder-

\textsuperscript{912} (1980).

\textsuperscript{21} See, e.g., \textit{In re Paris Air Crash}, 622 F.2d 1315 (9th Cir.), cert. denied, 449 U.S. 976 (1980).

\textsuperscript{22} Some jurisdictions have abolished or restricted punitive damages. The states that disallowed punitive damages in all or most settings as of 1993 were: Connecticut, Michigan, New Hampshire, Louisiana, Massachusetts, Nebraska, and Washington. \textsc{1 Ghiardi \& Kircher, Punitive Damages: Law \& Practice} § 4.07 (1985 \& Supp. 1993). However, only two states have specifically legislated against multiple punitive awards. Until 1990, a Georgia statute allowed just one award of punitive damages for any act or omission in a products liability action, "regardless of the number of causes of action which may arise from such act or omission." \textsc{Ga. Code Ann.} § 51-12-5.1(e) (Michie 1994). Georgia's "first comer" statute has since been held unconstitutional. \textit{See infra} notes 133-34, 145 and accompanying text. Missouri credits the defendant with prior payments of punitive damages. \textsc{Mo. Ann. Stat.} § 510.263(4) (Vernon 1994).

\textsuperscript{23} \textsc{Restatement (Second) of Torts} § 908 cmt. a (1977).
al and state courts, and it is expected that over the next ten years an equal number will be filed. Considering that nearly every one of these cases includes a prayer for punitive damages, should such damages be awarded in many of these cases, the aggregate amount would be far in excess of what the defendants would be able to pay. Even without considering punitive damages, the compensation claims alone currently exceed the aggregate assets of the asbestos industry.  

Although most asbestos cases have settled or will settle out of court, Judge Schwarzer notes that the settlement process, affected heavily by the availability of punitive damages, also "jeopardizes the ability of future plaintiffs to recover compensation."  

Finally, successive punitive damage awards can have an undesirable "chilling effect" on the development of potentially valuable new products and harm the competitiveness of American firms.

OVERKILL AND THE COURTS: PRACTICALITY, POWERLESSNESS, AND DUE PROCESS

The courts generally have been unwilling to ratify a "first comer" or "one bite" doctrine that would limit recovery of punitive damages to those plaintiffs who arrive first at the court-

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25. Id. at 138. Adding to the unfairness is the reality that all asbestos claims are not equally meritorious. Depending partly on the type of asbestos fiber to which the plaintiff was exposed, symptoms may range from rare and deadly forms of lung cancer to comparatively benign "pleural plaques" that have many causes other than exposure to asbestos. See Suzanne L. Oliver & Leslie Spencer, Who Will the Monster Devour Next?, FORBES, Feb. 18, 1991, at 75.


house steps although they have recognized and sometimes have sympathized with the "overkill" problem outlined above.\textsuperscript{28} The decisions are based on constitutional grounds and the perceived impracticality of court-ordered solutions to the problem. The powerlessness of the courts is a recurring theme in these opinions. For example, in \textit{Roginsky v. Richardson-Merrell, Inc.},\textsuperscript{29} the court noted that the plaintiff's lawsuit was the first of several hundred factually similar lawsuits involving injuries caused by MER/29, the defendant's anti-cholesterol drug.\textsuperscript{30} The court also recognized that the defendant's potential punitive liability could reach into the tens of millions of dollars, far in excess of the maximum criminal penalties for the defendant's conduct.\textsuperscript{31} Nevertheless, the frustrated author of the court's opinion failed to see how the "multiplicity of actions throughout the nation [could] be so administered as to avoid overkill."\textsuperscript{32} The court therefore refused to announce a legal principle "whereby the first punitive award exhausts all claims for punitive damages and would thus preclude future judgments."\textsuperscript{33}

A number of federal courts have rejected the constitutional argument that multiple punitive awards violate due process. In \textit{Cathey v. Johns-Manville Sales Corp.},\textsuperscript{34} the defendant, a manufacturer of insulation containing asbestos, asked the court to hold that imposition of multiple punitive awards violated the "fundamental fairness" requirement of the Fourteenth Amendment.\textsuperscript{35} The court chose to focus narrowly on the requirement of procedural due process, concluding that "[a]s a matter of federal constitutional law we believe that the presence of a judicial tribunal before which to litigate the propriety of a punitive dam-

\begin{itemize}
\item \textsuperscript{28} \textit{See generally}, 1 DAN B. DOBBS, LAW OF REMEDIES § 3.11(8) (2d ed. 1993); Andrea G. Nadel, Annotation, Propriety of Awarding Punitive Damages to Separate Plaintiffs Bringing Successive Actions Arising Out of Common Incident or Circumstances Against Common Defendant or Defendants ("One Bite" or "First Comer" Doctrine), 11 A.L.R.4TH 1261 (1992).
\item \textsuperscript{29} 378 F.2d 832 (2d Cir. 1967).
\item \textsuperscript{30} Id. at 838.
\item \textsuperscript{31} Id. at 839.
\item \textsuperscript{32} Id.
\item \textsuperscript{33} Id.
\item \textsuperscript{34} 776 F.2d 1565 (6th Cir. 1985), cert. denied, 478 U.S. 1021 (1986).
\item \textsuperscript{35} Id. at 1571.
\end{itemize}
ages award provides Johns-Manville with all of the procedural safeguards to which it is due.\textsuperscript{36} Similarly, the Court of Appeals for the Second Circuit has held that multiple awards do not necessarily violate either the substantive or procedural components of the Due Process Clause.\textsuperscript{37} That court rejected the appellant’s “single punitive award” theory, arguing that it would be impossible for the first trier of fact to assess a punitive award with the understanding that it is “punish[ing] the tort-feasor for the full extent of its wrongful conduct.”\textsuperscript{38} A short-lived exception to the general trend in these cases came in 1989 when a federal district court in New Jersey held that multiple punitive awards against the same defendant \textit{did} violate the “fundamental fairness” requirement of the Fourteenth Amendment.\textsuperscript{39} The court found that “[t]he right to assess punitive damages in mass tort litigation permits a jury to punish but not to execute a company.”\textsuperscript{40} Upon reconsideration however, the court vacated this earlier order.\textsuperscript{41} Although concerned about the defendant’s due process rights, the court cited two practical reasons for retreating from a judicially-imposed “first comer” rule: (1) the court’s inability to prevent future punitive awards by courts in other jurisdictions,\textsuperscript{42} and (2) a nagging doubt that the first jury could assess a single award that would take into account the full scope of the defendant’s misconduct.\textsuperscript{43} The court summed up the exasperation of many courts over the inability of our judicial system to deal with this problem: “Until there is uniformity either through Supreme Court decision or national legislation, this

\textsuperscript{36} Id.
\textsuperscript{37} Simpson v. Pittsburgh Corning Corp., 901 F.2d 277, 281-82 (2d Cir.), cert. dismissed, 497 U.S. 1057 (1990). On the issue of substantive due process, the court held vaguely that the aggregate amount in punitive damages awarded thus far against the defendant had not reached “whatever limit due process might impose on the total punitive damages.” \textit{Id.} at 281. The court also rejected the appellant's claims of insufficient procedural safeguards such as inadequate jury instructions, a low standard of proof, the absence of bifurcation, and a lack of “meaningful judicial oversight.” \textit{Id.} at 282-84.
\textsuperscript{38} Id. at 280.
\textsuperscript{40} Id.
\textsuperscript{42} Id. at 1235.
\textsuperscript{43} Id.
court is powerless to fashion a remedy which will protect the due process rights of this defendant or other defendants similarly situated."\(^\text{44}\)

THE SUPREME COURT AND PUNITIVE DAMAGES

Although the Supreme Court of the United States has never squarely addressed punitive damage overkill, it has attempted in recent years to address the constitutionality of "excessive" single awards under various provisions of the Constitution. In 1988, a petitioner asked the Court to overturn a $1.6 million punitive award that allegedly violated both the Excessive Fines Clause and the Due Process Clause.\(^\text{45}\) However, the Court refused to address the petitioner's claims because they had not been properly raised and considered in state court.\(^\text{46}\) Justice Marshall, writing for the majority, believed that the Court's hands-off approach would permit "a number of less intrusive, and possibly more appropriate, resolutions" of the punitive damages issue by state legislatures or courts.\(^\text{47}\) Justice O'Connor agreed that the due process question "should not be decided today," but wrote separately to emphasize her view that the due process implications of "permitting juries to impose unlimited punitive damages on an ad hoc basis" were "worthy of the Court's attention."\(^\text{48}\)

A year later, in *Browning-Ferris Industries v. Kelco Disposal, Inc.*,\(^\text{49}\) the Court decisively rejected an Eighth Amendment "excessive fines" challenge to large punitive damage awards.\(^\text{50}\) Evaluating the history and purposes of the Eighth Amendment, the Court decided that the Framers never intended for it to apply to lawsuits involving private parties.\(^\text{51}\) Accordingly, the Court held that punitive damages in civil lawsuits could not be considered excessive fines as long as the government neither

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44. *Id.*
46. *Id.* at 76.
47. *Id.* at 79-80.
48. *Id.* at 87-88 (O'Connor, J., concurring).
50. *Id.* at 275-76.
51. *Id.* at 262-76.
prosecuted the action nor had any right to recover a share of the punitive damage award.\textsuperscript{52} Because the petitioner failed to offer a due process challenge in the district court or in the court of appeals, the Supreme Court again refused to consider whether the large punitive damage award in the case violated due process, saying coyly that this inquiry would have to "await another day."\textsuperscript{53}

In \textit{Pacific Mutual Life Insurance Co. v. Haslip},\textsuperscript{54} the Court at last confronted two questions: (1) whether, in the absence of definitive judicial guidelines, a procedure for determining punitive damage awards could violate procedural due process and (2) whether an award could be so excessive as to be inherently unfair and thus a violation of substantive due process.\textsuperscript{55} The Court's answer to both questions, as one commentator observed, was a "resounding 'maybe'."\textsuperscript{56}

In \textit{Haslip}, an insurance agent collected health insurance premiums from the plaintiffs but failed to remit those payments to the insurers, and the plaintiffs' insurance policies lapsed without their knowledge.\textsuperscript{57} After one plaintiff was hospitalized and had to pay medical expenses out-of-pocket, she claimed damages for fraud.\textsuperscript{58} The plaintiffs joined the insurance company under a theory of respondeat superior.\textsuperscript{59} The jury's verdict of over $1 million included a punitive award that was more than four times the amount of compensatory damages requested by the plaintiff.\textsuperscript{60} The Alabama Supreme Court upheld the award.\textsuperscript{61}

\textsuperscript{52} \textit{Id.} at 275-76. The Court had previously ruled that "nothing . . . precludes a private party from filing a civil suit seeking damages for conduct that previously was the subject of criminal prosecution and punishment. The protections of the Double Jeopardy Clause are not triggered by litigation between private parties." \textit{United States v. Halper}, 490 U.S. 435, 451 (1989).
\textsuperscript{53} \textit{Browning-Ferris}, 492 U.S. at 276-77.
\textsuperscript{54} \textit{Id.} 5 (1991).
\textsuperscript{55} \textit{See id.} at 18.
\textsuperscript{57} \textit{Haslip}, 499 U.S. at 5.
\textsuperscript{58} \textit{Id.} at 5-6.
\textsuperscript{59} \textit{Id.} at 6.
\textsuperscript{60} \textit{Id.} at 7 n.2.
The United States Supreme Court also upheld the award, finding that neither the method by which it was determined, nor its large size in relation to actual damages, violated due process. The Court concluded that the defendant in Haslip had enjoyed "the benefit of the full panoply of Alabama's procedural protections," which included jury instructions that placed reasonable constraints on the jury's discretion, a post-verdict hearing, and review by the state supreme court. On the murkier issue of whether the size of the award violated substantive due process, the Court concluded that while it was probably "close to the line," the award in Haslip did not "cross the line into the area of constitutional impropriety." Apart from this rough indication of where the boundary might lie, the Court refused to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case," saying only that "general concerns of reasonableness . . . properly enter into the constitutional calculus."

Significantly, however, a majority of the Court in Haslip acknowledged for the first time that "unlimited jury discretion . . . in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." Commentators seized on these words, arguing that they would become a powerful weapon to curb punitive damages, including multiple awards. One article, coauthored by a prominent tort reform expert, predicted that Haslip would serve as "a strong foundation for creating due process limits to avoid overpunishment in [multiple award] situations." The Court soon demonstrated that such

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63. Id. at 23.
64. Id. at 19-21.
65. Id. at 23-24.
66. Id. at 18.
67. Id. Only Justice Scalia flatly rejected the notion that substantive due process could place limits on the size of a punitive award. Id. at 24-40 (Scalia, J., concurring).
68. 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, 102 (1992). For another "optimistic" view of Haslip and its import for reforming multiple punitive damages, see Dennis N. Jones et al., Multiple Punitive Damages Awards for a Single Course of Wrongful Conduct: The Need for a
hopes were misplaced.

**TXO Production Corp. v. Alliance Resources Corp.**

The Court's recent plurality decision in *TXO Production Corp. v. Alliance Resources Corp.* has weakened substantially any "foundation" that *Haslip* may have laid for judicial reform of multiple punitive awards. The facts of this case were unusual and complex. TXO had negotiated a deal to acquire the mining rights to some property in West Virginia. Through various legal maneuvers, it then created a cloud of title on the property in order to renege on its agreement with Alliance. When TXO sought a declaratory judgement on the status of the property, Alliance counterclaimed for the unusual tort of "slander of title" and won compensatory damages of $19,000 (the cost of defending the TXO action) plus punitive damages of $10 million. The West Virginia Supreme Court upheld the verdict. The United States Supreme Court disagreed with TXO that "a $10 million punitive damages award—an award 526 times greater than the actual damages awarded by the jury—is so excessive that it must be deemed an arbitrary deprivation of property without due process of law." As in *Haslip*, the petitioner challenged the award in *TXO* on both procedural and substantive due process grounds. The Court was satisfied that adequate procedural safeguards were present, even though the jury instructions and post-trial review in *TXO* were considerably looser than in *Haslip*. The jury instructions, for example, encouraged jurors to consider TXO's wealth and informed them that one of the purposes of punitive

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69. 113 S. Ct. 2711 (1993) (plurality opinion).
70. *Id.* at 2715.
71. *Id.* at 2715-16.
72. *Id.* at 2716-17.
74. *TXO*, 113 S. Ct. at 2718.
75. *Id.* at 2718, 2723.
76. *Id.* at 2723.
damages was to provide "additional compensation" to the plain-
tiff. The Court did not find it significant that the trial judge
in TXO denied TXO's motions for remittitur and j.n.o.v. without
explanation; nor was it bothered, apparently, by the breezy non-
chalance of the West Virginia Supreme Court of Appeals when it
reviewed the TXO case.

In determining whether the award in TXO was "excessive," a
plurality of the Supreme Court again acknowledged a substan-
tive due process right to reasonable awards but declined to an-
nounce a generally applicable test for evaluating an award's
reasonableness (although both sides in the litigation proposed
standards of review for punitive damages). Justice Stevens,
writing for the plurality, noted the "understandable" desire to
formulate such a test, but stated:

In the end, then, in determining whether a particular award
is so "grossly excessive" as to violate the Due Process Clause
of the Fourteenth Amendment, we return to what we said
two Terms ago in Haslip: "We need not, and indeed we can-
ot, draw a mathematical bright line between the constitu-
tionally acceptable and the constitutionally unacceptable that
would fit every case. We can say, however, that a general con-
cern of reasonableness... properly enter[s] into the
constitutional calculus."

Instead of formulating a test, the Court turned to the specifics of
the case to determine whether, in its view, the award was rea-
sonable. Surprisingly, the Court focused not on the relationship
between actual damages and punitive damages, but on a num-
ber of other, case-specific factors that rendered the award "rea-

77. Id. at 2723 n.29.
78. Id. at 2724. The Supreme Court of Appeals of West Virginia refused to con-
sider remittitur because TXO "and its agents and servants failed to conduct them-
selves as gentlemen." TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870, 875 (W. Va. 1992). It went on to distinguish between "really stupid" and "really
mean" defendants, commenting that for the "really stupid" defendant, a ratio of pu-
nitive damages to actual damages of roughly five to one would be acceptable, while
the limit for "really mean" defendants, such as TXO, might be as high as 500 times
the amount of actual damages without offending the Constitution. Id. at 887-89.
79. TXO, 113 S. Ct. at 2719.
80. Id.
81. Id. at 2720 (alteration in original) (citation omitted).
These factors included: (1) the ability of punitive damages to deter and punish, in light of TXO's wealth, (2) the amount of money potentially at stake in the transaction that led to the lawsuit, and (3) TXO's overall pattern of "fraud, trickery and deceit."3

Justice Scalia, joined by Justice Thomas, concurred in the result in TXO,4 focusing on whether the West Virginia courts had provided adequate procedural safeguards in the case, such as an instruction to the jury on the purposes of punitive damages and appellate review of the award. According to Justice Scalia, the Constitution and “[t]raditional American practice governing the imposition of punitive damages” required no more.5 A constitutional literalist, Justice Scalia chastised the plurality for relying on “Lochner-era” precedents and for explicitly announcing a “substantive due process’ right that punitive damages be reasonable.”

Justice O’Connor’s strong dissent in TXO6 echoed the views she expressed as the lone dissenting Justice in Haslip.7 Citing the prejudicial remarks of the plaintiff’s counsel at trial, the judge’s questionable instructions in the case, the lack of post-trial review, and, above all, the “monstrous”8 size of the award, O’Connor painted an ugly picture of “the jury’s raw,
redistributionist impulses stemming from antipathy to a wealthy, out-of-state, corporate defendant.”

In *TXO*, as in *Haslip*, O'Connor agreed that due process could operate to limit punitive damages. In terms of numbers or multipliers, however, substantive due process concerns clearly arise at a much lower threshold for Justice O'Connor. O'Connor also condemned the plurality in *TXO* for not erecting “a single guidepost to help other courts find their way through this area.” She characterized the “no-mathematical-bright-line” standard in *Haslip* and *TXO* as a cop-out and compared it to Justice Stewart's infamous definition of obscenity: “I know it when I see it.” Justice O'Connor was also troubled that the plurality could uphold the award in *TXO* despite even less guidance for the jury and less meaningful post-trial review than existed in *Haslip*. Finally, O'Connor criticized the plurality for accepting the argument that the award in *TXO* was partially justified by the large amount that TXO stood to gain by the fraudulent acts that gave rise to the lawsuit. O'Connor pointed out that this factor was not even mentioned in the jury instructions and described it as essentially “an after-the-fact rationalization invented by counsel to defend this startling award on appeal.”

*TXO* reaffirms the idea that due process somehow limits punishment in the form of punitive damages. Nevertheless, as Justice Scalia correctly observed in his concurring opinion, the real message of the case is that the Court’s “constitutional sensibilities” are far more resistant to “jarring” than one would have supposed following *Haslip*. This “bottom-line” message of *TXO* should encourage state legislatures and Congress to resolve punitive damage issues, including “overkill,” legislatively.

90. *Id.* at 2725-26 (Kennedy, J., concurring) (characterizing Justice O'Connor's opinion).
91. *Id.* at 2731 (O'Connor, J., dissenting); *Haslip*, 499 U.S. at 63-64 (O'Connor, J., dissenting).
93. *Id.* at 2732 (quoting Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).
94. *Id.* at 2739-41.
95. *Id.* at 2734.
96. *Id.*
97. *Id.* at 2727 (Scalia, J., concurring).
THE JUDICIAL LANDSCAPE AFTER TXO

As respected appeals court Judge Alex Kozinski has noted, TXO does not necessarily "slam the door on constitutional challenges to punitive damages." The Supreme Court, despite its reluctance to strike down punitive damage awards, could rule that multiple awards trigger a "general concern of reasonableness" and violate substantive due process because they go beyond what is necessary to deter and punish bad conduct. Such a ruling would not be inconsistent with Haslip or TXO. However, the Court will likely hesitate to address this issue for a number of reasons. First, although a number of courts and commentators have alluded to the possibility that the Court might strike down multiple punitive awards on due process grounds, few have contemplated what such a decision would look like. A declaration by the Supreme Court that multiple awards are unconstitutional would not, in itself, fashion a fair solution to the overkill problem. In fact, it could result in a national "first comer" doctrine, which would create new inequities in mass tort litigation by disadvantaging plaintiffs who "lose the race to the courthouse." Perhaps sensing the pitfalls that await it, the Court

98. Synopsis, Constitutional Law Conference, 62 U.S.L.W. 2263, 2277 (Nov. 2, 1993) (quoting Judge Alex Kozinski). Since deciding TXO, the Court has demonstrated that it will entertain constitutional challenges to punitive damage awards, particularly if an award violates procedural due process. In 1994, the court reversed an Oregon decision that held that a punitive damage award need not be "subject to a form of post-verdict or appellate review that includes the possibility of remittitur." Oberg v. Honda Motor Co., 851 P.2d 1084, 1096 (Or. 1993), rev'd, 114 S. Ct. 2331 (1994). The Court stated:
The common law practice, the procedures applied by every other State, the strong presumption favoring judicial review that we have applied in other areas of the law, and elementary considerations of justice, all support the conclusion that such a decision should not be committed to the unreviewable discretion of a jury.

Honda Motor Co. v. Oberg, 114 S. Ct. 2331, 2342. Honda's challenge may have succeeded where others have failed because it focused narrowly on procedural due process and because Oregon was, until the decision, the only state that flatly denied the right to post-verdict review of damages for excessiveness. See Claudia MacLachlan, High Court Takes Another Look at Punitive Damages, NAT'L L.J., Jan. 31, 1994, at 17.

99. See supra note 68.

100. If the Court does grant certiorari in an "overkill" case, it would be wise to do so in one that presents class action certification issues. The Court then could give
has steadily refused to review cases on multiple punitive awards and probably will continue to do so until after it has reached a clearer consensus on the broader issue of whether and under what circumstances punitive damages violate due process. Additionally, a Supreme Court resolution of the overkill issue is unlikely because several of the sitting Justices have expressed the view that legislative bodies, rather than courts, can and should act to limit unjust punitive awards.

Before TXO, the judicial consensus was that courts could not fashion an effective response to the "overkill" problem and were not constitutionally obligated to do so. The Court's refusal to curb the very large award in TXO will solidify that consensus. In Justice Scalia's words, the TXO decision at best gives federal judges "some, almost-never-usable, power to impose a standard of 'reasonable punitive damages' through the clumsy medium of the Due Process Clause." Not surprisingly, judges have been reluctant to use that ill-defined power. Accordingly, judges have interpreted TXO to place no limitations on successive awards of

the idea of a mandatory class action some "teeth" without having to announce a first comer doctrine. See infra text accompanying notes 127-35, 148-63 (discussing the first comer doctrine and class action reform). However, it is uncertain whether the Court would be inclined to take this route. See infra notes 164-67 and accompanying text.


102. Justices Scalia and Thomas clearly believe that punitive damage reform should be undertaken by "the proper institutions of our society" (i.e., legislatures, not courts). TXO, 113 S. Ct. at 2728 (Scalia, J., concurring); see also Haslip, 499 U.S. at 39 (Scalia, J. concurring). Justice Kennedy also worries that the plurality decision in TXO will "discourage legislative intervention that might prevent unjust punitive awards." TXO, 113 S. Ct. at 2725 (Kennedy, J., concurring).

103. See supra notes 28-44 and accompanying text.

104. TXO, 113 S. Ct. at 2728 (Scalia, J., concurring).
punitive damages.

In the months since TXO was decided, two federal appeals courts and at least one state supreme court have upheld multiple punitive awards. The Third Circuit, in *Dunn v. Hovic*,\(^{105}\) rejected the substantive due process challenge of a defendant asbestos manufacturer that had been subjected to successive punitive awards. Noting that the Supreme Court failed to restrict or redirect punitive damage awards in *Haslip* and *TXO*, the court stated that it "would be intrepid indeed were we to use this case as a vehicle to iterate a blanket policy judgement against [multiple] punitive damages . . . in light of the Supreme Court’s studied silence on the policy issue."\(^{106}\) The court noted that Congress or the state legislature would be a more appropriate forum than the courts in which to debate and resolve the issue.\(^{107}\)

In *Cantrell v. GAF Corp.*,\(^ {108}\) also an asbestos case, the Court of Appeals for the Sixth Circuit recently rejected the punitive overkill argument for a third time,\(^ {109}\) saying that any relief from multiple punitive awards "should not be sought from a federal court . . . but . . . from the legislature."\(^ {110}\) In dicta, the court cited *TXO* for the proposition that a due process challenge to the multiple punitive awards in the case, if presented, would have failed.\(^ {111}\) A recent decision of the Iowa Supreme Court similarly relied on *Haslip* and *TXO* in ruling that repetitive

106. *Id.* at 1389. Nevertheless, the original jury award of $25 million, reduced by the district court to $2 million, was further reduced by the Third Circuit to just $1 million. *Id.* at 1391. Actual damages in the case were $500,000. *Id.* at 1363.
107. *Id.* at 1389. A strong dissent by Judge Weis argued for judicial resolution of the overkill problem in asbestos litigation, especially in light of Congress' failure to act: "Unquestionably, a national solution is needed . . . . It is time—perhaps past due—to stop the hemorrhaging so as to protect future claimants." *Id.* at 1399 (Weis, J., dissenting).
108. 999 F.2d 1007 (6th Cir. 1993).
110. *Cantrell*, 999 F.2d at 1017.
111. *Id.* at 1017 n.8. Admittedly, it is not clear from the opinion whether the court is talking about substantive or procedural due process. What is significant is that the court did not perceive *TXO* as placing any significant constitutional limitations on multiple awards of punitive damages.
awards of punitive damages are not per se unconstitutional.\textsuperscript{112}

**LEGISLATION**

The focus of most law review commentary has been on constitutional or judicial modes of attacking the multiple punitive damages problem. Commentators have been particularly enamored of due process arguments.\textsuperscript{113} Given the current jurisprudential landscape, however, legislation is the most promising avenue for addressing this problem. A number of innovative proposals have been offered in recent years.\textsuperscript{114} Four options merit serious consideration: (1) administrative solutions, (2) a federal “first comer” statute, (3) instructing the trier of fact, and (4) reforming class action procedures.

**Advantages of a Legislative Solution**

A legislative solution offers the surest way out of the current quagmire\textsuperscript{115} and should be pursued aggressively in lieu of waiting for a reluctant Supreme Court to take action. The courts, including the Supreme Court, have urged legislative solutions on numerous occasions.\textsuperscript{116} Furthermore, a legislature is by nature in a better position to bring about reform in this area.\textsuperscript{117}

\textsuperscript{112} Spaur v. Owens-Corning Fiberglass Corp., 510 N.W.2d 854, 865-66 (Iowa 1994).

\textsuperscript{113} See John C. Jeffries, Jr., A Comment on the Constitutionality of Punitive Damages, 72 VA. L. REV. 139 (1986); 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 (1990); sources cited supra note 68.

\textsuperscript{114} Some of these solutions are surveyed in AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT ON PUNITIVE DAMAGES OF THE COMMITTEE ON SPECIAL PROBLEMS IN THE ADMINISTRATION OF JUSTICE § IV (1989) [hereinafter ACTL REPORT]; see also AMERICAN LAW INSTITUTE, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: Vol. II, Approaches to Legal and Institutional Change 260-65 (1991) [hereinafter ENTERPRISE RESPONSIBILITY].

\textsuperscript{115} Such an approach has been endorsed by United States District Court Judge William W. Schwarzer, Director of the Federal Judicial Center. William W. Schwarzer, Punishment Ad Absurdum, 11 CAL. LAW. 116 (1991).

\textsuperscript{116} See, e.g., Cantrell v. GAF Corp., 999 F.2d 1007, 1017 (6th Cir. 1993); Dunn v. Hovic, 1 F.3d 1371, 1389 (3rd Cir. 1993); Glasscock v. Armstrong Cork Co., 946 F.2d 1085, 1096-97 (5th Cir. 1991), cert. denied, 112 S. Ct. 1778 (1992); see also supra note 102 and accompanying text.

\textsuperscript{117} Victor E. Schwartz & Mark A. Behrens, Punitive Damages Reform—State Leg-
latures can fashion comprehensive solutions; they are not confined to the issues presented in a specific case, nor are they swayed by sympathy for a particular plaintiff or defendant. Legislative committees have the power to solicit opinions from all parties who may have an interest in an issue, and they may act proactively, rather than retroactively, providing all concerned with advance notice and clear guidelines.

A national legislative solution is preferable to state efforts at reform for the simple reason that "one state court cannot bar [its counterpart] in another [state] from awarding repetitive damages." Not surprisingly, only a handful of states have passed legislation specifically targeted at multiple punitive damage awards. As explained in a 1991 Reporters' Study issued by the American Law Institute, "the state that acts alone may simply provide some relief to out-of-state manufacturers at the expense of its own citizen-victims, a situation that hardly provides much law reform incentive for state legislators." Clearly, a reform package aimed at limiting multiple damages awards must be enacted at the national level if it is to be at all effective.

Criteria for Evaluating Reform Proposals

In assessing the various proposals outlined below, this Note will measure the four legislative options mentioned above using the following three criteria:

1. Simplicity. Any solution to the overkill problem should be straightforward enough to be understood and accepted by legislators and simple enough to prove practical. Intricate reforms

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118. See id. at 1373.
119. Id. at 1373-74.
120. See Schwarzer, supra note 115, at 116.
121. Georgia's "first comer" statute limits recovery to one punitive award in products liability cases. GA. CODE ANN. § 51-12-5.1(e)(1) (Michie 1994). A federal district court has ruled that the Georgia statute is unconstitutional. See McBride v. General Motors Corp., 737 F. Supp. 1563 (M.D. Ga. 1990). Missouri's statute allows the defendant to file a motion requesting that jury awards be credited by prior payments of punitive damages. MO. ANN. STAT. § 510.263(4) (Vernon 1994).
122. ENTERPRISE RESPONSIBILITY, supra note 114, at 261.
123. See supra text following note 114.
involving little-understood aspects of civil procedure may not pass this test. Reforms that promote judicial efficiency, such as increased reliance on the class action mechanism, do simplify the litigation process even though they are complex.

2. Constitutionality. Solutions that invite litigation or infringe upon legitimate rights are unacceptable. Reforms that give certain plaintiffs an advantage over other plaintiffs, for example, may violate the Constitution's equal protection guarantee.

3. Fairness. Reforms should bring about greater fairness in mass tort litigation without depriving plaintiffs of their substantive rights and without depriving society of the benefits of deterrence and punishment that are the underlying rationale for punitive damages. Primarily, reforms should address the concerns of the two classes of litigants currently disfavored by the system: (1) defendants, who are subject to repetitive punishment, and (2) "late" plaintiffs, whose ability to recover compensatory damages is jeopardized by the early recovery of large punitive damage awards or settlements.

**Option One: Administrative Solutions**

Administrative solutions to the punitive damage overkill problem are somewhat promising, especially in the area of asbestos litigation.\(^\text{124}\) The basic idea of administrative reform is to establish a compensation fund and empower either an agency of the Executive Branch or the United States Claims Court to administer it. Sources of funding would include a tax on manufacturers, such as manufacturers of asbestos or other products that give rise to a large volume of litigation. Claimants who could sufficiently document their entitlement to compensation would be paid, without the necessity of a lengthy trial to establish liability. A major advantage of this mechanism for defendant-manufacturers is that it would eliminate punitive damages, and thus "overkill," altogether. Proponents of an administrative

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124. See Asbestos Hearings, supra note 24, at 218-35 (statement of Steven Flanders). The model for this proposal is the childhood vaccine program, which is administered by the United States Claims Court and funded by an excise tax on childhood vaccines. See, 42 U.S.C. § 300aa-10 to -34 (1993) (establishing National Vaccine Injury Compensation Program).
solution claim that it would lower overall transaction costs significantly.\textsuperscript{125}

An administrative approach has a number of drawbacks, however. In order for a fund to be solvent, this approach would either have to be mandatory, raising serious concerns about infringement on the right to a jury trial, or it would have to enjoy full cooperation from the affected industry. One advocate of this solution suggests that asbestos manufacturers would gladly trade the uncertainties of protracted litigation and bankrupting punitive liability for a costly, but more rational system based on strict liability.\textsuperscript{126} Lastly, while this approach may prove useful in products liability situations involving large numbers of claims and a discrete industry or product, it would be impractical for Congress to establish \textit{and fund} bureaucratic mechanisms to deal with smaller-scale mass torts.

\textbf{Option Two: A Federal "First Comer" Statute}

A federal "first com'er" or "one bite" rule, allowing just one award of punitive damages "up front," has the advantage of relative simplicity. Congress once considered and rejected this idea, in part because of the potential for a small initial punitive award orchestrated by the defendant.\textsuperscript{127} The American Tort Reform Association (ATRA) has therefore proposed a more refined first com'er proposal. The legislation proposed by ATRA would only allow subsequent punitive damage awards where the plaintiff could, in a pre-trial hearing, "offer new evidence of previously undiscovered, additional wrongful behavior."\textsuperscript{128} Alternatively, the court could allow a subsequent award if it determined that the prior punitive damages "were insufficient to either punish the defendant's wrongful conduct or to deter the defendant and others from similar behavior in the future."\textsuperscript{129} In neither case would the jury be informed of the court's finding. In-
stead, the court would reduce the amount of the punitive damages award by the sum of punitive damages previously awarded.\textsuperscript{130} Although this proposed scheme is significantly more fair to defendants than the status quo, like all first comer proposals it favors the winner of the "race to the courthouse."\textsuperscript{131} The first comer approach treats plaintiffs differently based on the fortuity of timing, which may be unconstitutional as well as unfair.\textsuperscript{132} In \textit{McBride v. General Motors Corp.},\textsuperscript{133} a federal district court ruled that Georgia's "first comer" statute denied plaintiffs equal protection by giving the one and only punitive award to the first plaintiff.\textsuperscript{134} Additionally, a federal statute permitting just one award of punitive damages would have to provide substantive rules governing that award, which would require preemption of state substantive law on punitive damages recovery.\textsuperscript{135}

\textit{Option Three: Instructing the Trier of Fact}

Another way of bringing greater fairness to the process of assessing punitive damages in a mass tort case would be to \textit{require} the trier of fact to consider the full scope of a defendant's punitive liability before awarding punitive damages.\textsuperscript{136} Under the Uniform Product Liability Act of 1979,\textsuperscript{137} for example, the trier of fact must take into account the financial condition of the defendant and the "total effect of . . . punishment imposed or likely to be imposed . . . as a result of the misconduct, including

\begin{enumerate}
\item[130.] \textit{Id}.
\item[131.] This result is particularly inequitable in the case of a latent physical condition such as asbestosis where some plaintiffs discover symptoms much later than others.
\item[132.] Such unequal treatment may also be unavoidable unless there is some mechanism for identifying and joining all plaintiffs so that the total amount of punitive damages awarded can be shared equally. \textit{See infra} notes 148-77 and accompanying text.
\item[134.] \textit{Id.} at 1569.
\item[135.] For discussion of preemption issues see \textit{infra} notes 172-74 and accompanying text.
\item[136.] The American Law Institute suggests that it is "appropriate" for the trier of fact to consider both prior awards and awards that may be granted in the future when determining an amount of punitive damages. \textit{See Restatement (Second) of Torts} \S\ 908 cmt. e (1977).
\item[137.] 44 Fed. Reg. 62,714 (1979) (model legislation drafted by the Commerce Department).
\end{enumerate}
punitive damage awards to persons similarly situated to the claimant. In effect, the trier of fact credits any “downpayments” already made by the defendant on its total punitive liability. Many states do not require such instructions and the Supreme Court, while generally approving of instructions that place “reasonable constraints” on juror discretion, has yet to hold that the Constitution requires them. Some states have adopted this requirement in tort reform statutes, and provisions similar to those of the Uniform Product Liability Act appear in legislation introduced in the 103d Congress. Because of the obvious prejudice to the defendant of having to introduce evidence of other punitive awards in a trial on liability, it makes sense to couple this proposal with a bifurcated trial procedure so that actual and punitive damages are assessed in separate proceedings.

This approach, which focuses on the trier of fact rather than on complex procedural reforms, has several advantages. First, it would result in greater fairness to defendants who are subject to multiple punitive damage liability. To the extent that it reduced overall punitive liability, it would also preserve assets needed to compensate future plaintiffs. Although the trier of fact would

138. Id. at 62,748.
140. See, e.g., MINN. STAT. ANN. § 549.20 (1) (West 1992) (setting forth factors relevant to amount of punitive damages).
141. S. 687, 103d Cong., 1st Sess. § 203(e) (1993); H.R. 1910, 103d Cong., 1st Sess. § 6(c) (1993). Although a senate filibuster blocked passage of this legislation in the 103d Congress, similar legislation is likely to be introduced in the 104th Congress. Prospects for federal tort reform legislation improved following the 1994 congressional elections, which removed powerful opponents of reform from office and installed reform-minded legislators in key committee posts. Milo Geyelin & Richard B. Schmidt, Liability Reform Buoyed by GOP Win, WALL ST. J., Nov. 11, 1994, at B5.
142. Federal legislation introduced in the 103d Congress provided for bifurcated trial procedures at the request of the defendant. See S. 687, supra note 141, § 203(d); H.R. 1910, supra note 141, § 6(b). Somewhat analogous are state sentencing statutes that allow the jury in the sentencing stage of a criminal trial to be informed about prior convictions of a defendant. See, e.g., KY. REV. STAT. ANN. § 532.055 (Baldwin Supp. 1992). The rationale behind these statutes is to allow jurors to consider prior convictions in assessing punishment, but not in determining guilt or innocence. The analogy with punitive overkill is imperfect, however, because by definition the civil defendant in an overkill situation is guilty of only a single act or omission.
remain free to impose a repetitive or cumulative award, it would at least consider the totality of the circumstances and not render punishment in a vacuum. As with many of the proposals considered in this Note, however, mandatory instructions for the trier of fact would require preemption of state law governing punitive damages. 143

Another question regarding the mandatory-instructions proposal is whether the government could extend this protection to defendants in products liability lawsuits, as proposed in recent Federal legislation, 144 and not to defendants in other types of actions. A federal district court recently held that Georgia's tort reform statute, which made such a distinction, violated the Equal Protection Clause. 145 For this reason, Congress should consider extending the proposal to defendants in all types of mass tort cases. Congress' inherent powers under the Commerce Clause would certainly allow this type of legislation because mass tort litigation itself inevitably affects interstate commerce—even when the accident or event giving rise to litigation has occurred entirely within one state. 146

Finally, although this suggested reform is procedurally different from the "first comer" approach, its effect would be similar: early plaintiffs would collect more punitive damages than later ones. In theory, this result makes the idea unfair and vulnerable on equal protection grounds, although no cases have yet addressed the race-to-the-courthouse issue in the jurisdictions that have adopted mandatory instruction requirements. However, absent a procedure for identifying and joining all plaintiffs, no solution exists to address this problem either in the first comer or mandatory instructions proposals. 147 Ideally, all plaintiffs

143. See infra notes 172-74 and accompanying text.
144. See supra note 141 and accompanying text.
147. Notwithstanding this problem, the greater simplicity of these options and the
who succeed on the issue of liability should share equally the total punitive damages awarded. The class action, discussed below, offers a mechanism for achieving this result.

Option Four: Class Action Reform

The most fair solution to the overkill problem in mass tort litigation would limit punishment to one punitive award and divide that award equally among all successful plaintiffs. This proposal would defer distribution of such an award until all or most compensatory claims have been settled. Like a "first comer" statute, it would limit punitive damages to one award, but that award would be determined in a separate mass trial and would be shared equally by all plaintiffs.

Reform of existing class action procedures and changes in other federal laws would be necessary to achieve such a system. In any class action suit, before certifying a class, the judge must determine that the prerequisites of "numerosity," "commonality," "typicality," and "adequacy of representation" are met. The fact that they would require less intrusion onto the "turf" of state courts may make them more likely to succeed in the legislative arena than complicated class action reforms.


149. See GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCED-
judge must then determine which type of class action is appropriate. In a "prejudice" situation, where the prosecution of separate lawsuits might adversely affect the interests of other class members, a mandatory class action is appropriate under Federal Rule 23(b)(1). This situation exists, for example, "when claims are made by numerous persons against a fund insufficient to satisfy all claims." Under this mandatory, "limited fund" type of class action, class members may not "opt out." Much of the punitive damage overkill litigation has focused on this rule and on determining the threshold at which a judge must decide that a defendant is entitled to a mandatory class. Generally, the courts have held that mass tort defendants requesting class certification must face almost certain insolvency before a court will grant relief in the form of a 23(b)(1) class action. In a few cases, federal district courts have certified a class only to have their orders vacated by an appellate court.

DURE § 63 [A] (1989). A class action is appropriate when:
(1) the class is so numerous that joinder of all members is impracticable,
(2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a).

150. FED. R. CIV. P. 23(b)(1). Another type of class action is contemplated by Rule 23(b)(3), which calls for certification when questions of law or fact "predominate" among class members and the class action would be a superior method for "the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23(b)(3). However, the opt out provisions that apply to this type of class action make it useless in addressing the overkill problem because they permit "mass exits." CONSTRUCTIVE EXAMINATION, supra note 148, at 75; see also C. Delos Putz & Peter M. Astiz, Punitive Damage Claims of Class Members Who Opt Out: Should They Survive?, 16 U.S.F. L. REV. 1 (1981) (concluding that they should not).


152. See In re Northern Dist. of Cal., "Dalkon Shield" IUD Prod. Liab. Litig., 693 F.2d 847, 851 (9th Cir. 1982) (holding that record must establish that separate punitive awards will clearly and "inescapably" affect later awards), cert. denied, 459 U.S. 1171 (1983); McElhaney v. Eli Lilly & Co., 93 F.R.D. 875, 879 (D.S.D. 1982) (holding that fund must be so limited that early recovery by some plaintiffs leaves other class members with "no prospect of recovery"), aff'd, 739 F.2d 340 (8th Cir. 1984).

In litigation involving the infamous Dalkon Shield, claims filed against the manufacturer had already reached $3 billion, while the manufacturer had a net worth of just $280 million. The district court judge, concerned about the exhaustion of available resources, found that a limited fund existed, the depletion of which could affect future claimants. He certified a nationwide 23(b)(1) class for assessment of punitive damages based on "an implied in law ceiling on the amount of punitive damages that may be assessed against the defendant company." His concern was not just with the proper interpretation of Rule 23(b)(1), or with the depletion of funds, but with the due process rights of the defendant:

A rule 23(b)(1)(B) nationwide class action for punitive damages obviates many of the abuses inherent in multiple punitive damage awards. A defendant has a due process right to be protected against unlimited multiple punishment for the same act.

A defendant in a civil action has a right to be protected against double recoveries... because overlapping damage awards violate that sense of "fundamental fairness" which lies at the heart of constitutional due process. Certainly the principle of res judicata, the notion that litigation must come to an end, that a party cannot sue or be sued repeatedly on the same cause of action, is part of the process that is due under our constitutional system.

The courts have also been reluctant to grant class action status in mass tort situations because of language in a 1966 Advisory Committee Note accompanying Rule 23. That note states that "[a] 'mass accident' resulting in injuries to numerous per-

154. Dalkon Shield, 526 F. Supp. at 897.
155. Id. at 898.
156. Id. at 899. The Court of Appeals treated this constitutional argument briefly, saying only that "no rule of law limits the amount of punitive damages a jury may award." Dalkon Shield, 693 F.2d. at 852. For further compelling (but unsuccessful) arguments in favor of class certification, see In re Federal Skywalk Cases, 680 F.2d 1175, 1184-93 (8th Cir. 1982) (Heaney, J., dissenting).
sons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. 157 While this observation may be true in determining liability, no reason exists why it should apply to the determination of punitive damages, which is not plaintiff-specific but rather based on the egregiousness of the defendant's conduct. 158

In light of the significant precedent against certification of mandatory classes, the ABA has recommended a strengthening of Rule 23(b)(1) so that the threshold for invocation of a mandatory class would be "a reasonable possibility that adequate compensatory damages will not be available if punitive damages are not brought under control." 159 Under the ABA proposal, state cases as well as federal cases would be consolidated, federal law would apply, and one mass trial would decide the punitive damages component of the claims. 160 Punitive damages would be distributed equally, with some withheld, if necessary, for future class members. The result of the trial on punitive damages would bind all victims/plaintiffs, including future or unascertained claimants. 161

Although a complex endeavor, reformation of class action procedures as outlined here would be simpler than some other proposed procedural changes. 162 The courts have already had experience and success with class action lawsuits, as in the case of Agent Orange litigation. 163 Furthermore, consolidating trials

158. This argument assumes no choice of law problems (i.e., federal standards for punitive liability have been established). See infra notes 172-73 and accompanying text.
159. Constructive Examination, supra note 148, at 79.
160. Id. at 78-81.
161. Id.
162. Such as those involving multidistrict litigation and interpleader. See ACTL REPORT, supra note 114, at 23-25.
on punitive liability would promote judicial efficiency. Moreover, these reforms are probably constitutional. In 1985, the Supreme Court suggested in *Phillips Petroleum Co. v. Shutts*\(^{164}\) that a plaintiff's ability to "opt out" of a class action amounted to a fundamental right,\(^{165}\) thus calling into question the constitutionality of all mandatory class actions.\(^{166}\) However, recent federal case law makes it clear that *Shutts* was a "limited holding" and that the ability to opt out is closer to being a constitutional nicety than a fundamental right.\(^{167}\) This limitation is especially true in the case of punitive damages,\(^{168}\) to which a plaintiff has no constitutional entitlement.\(^{169}\) Many state governments have restricted or abolished the punitive damages remedy without running afoul of the Constitution.\(^{170}\)

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165. Id. at 811-12.
169. In re Paris Air Crash, 622 F.2d 1315, 1319-20 (9th Cir.), cert. denied, 449 U.S. 976 (1980) ("So far is this opportunity from being a fundamental personal right that it is an interest not truly personal in nature at all. It is rather a public interest."). The court in this case upheld provisions in the California Code (since modified) barring recovery of punitive damages in wrongful death cases. Id. at 1319-20. The United States Supreme Court has characterized as a "windfall" punitive damages for plaintiffs who have already been "fully compensated" with an award of actual damages. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267 (1981).
170. See supra note 22 (listing states that disallow punitive damages in all or most circumstances). Some states allow punitive damages but limit the amount that can be recovered, either by setting a maximum dollar amount or by establishing a multiplier of actual damages as a ceiling. See, e.g., Fla. STAT. § 768.73 (1993) (punitive award may not exceed three times compensatory damages); Ga. CODE ANN. § 51-12-5.1(e) (Michie 1994) ($250,000 cap); Va. CODE ANN. § 8.01-38.1 (1993) ($500,000 cap on punitive damages). Courts have recently upheld statutory caps in Virginia and Georgia as constitutional. Wackenhut Applied Technologies Ctr., Inc. v. Sygneton Protection Sys., 979 F.2d 980, 985 (4th Cir. 1992) ("Virginia's statutory cap on punitive damages is an economic regulation . . . the Fourteenth Amendment requires only that an economic regulation bear a rational relation to a proper governmental purpose."); Bagley v. Shortt, 410 S.E.2d 738, 739 (Ga. 1991) (holding that Georgia's
It therefore seems beyond dispute that Congress could restrict punitive damages to one award, equally shared, for each wrongful act or course of conduct that results in mass injury. Plaintiffs may complain that such mandatory class actions deprive them of autonomy, or that they inconveniently postpone the collection of punitive damages. These concerns, while not trivial, do not rise to the level of constitutional objections. Because punitive damages are a windfall to the plaintiff, sharing them or waiting for them does not work any hardship.

Such class action reforms, however, raise serious federalism concerns because they would require significant intrusion into the autonomy of state courts and legislatures. Congress logically would have to create federal substantive law governing punitive damage liability in mass torts, which it could do by statute under the *Erie* doctrine. This body of punitive damages law would preempt state substantive laws, which vary substantially as to both the type of misconduct that will warrant punitive damages and the level of proof required to prove such misconduct. In addition to relying on its broad powers under Article III and under the Supremacy Clause, Congress could justify such displacement of state law, especially in the products liability context, as a measure necessary to regulate interstate commerce. Finally, in order to make the mandatory class action concept work, legislation must empower the federal courts to

$250,000 cap on punitive damages does not violate due process, equal protection, or the right of access to the courts.

171. See Martin v. Wilks, 490 U.S. 755, 762 n.2 (1988) ("[A] person, although not a party, [may have] . . . his interests adequately represented by someone with the same interests who is a party."); Hansberry v. Lee, 311 U.S. 32, 41-42 (1940) (holding that a litigant's right to an individual hearing is qualified by the power of legislatures to create, where appropriate, litigation schemes that aggregate claims, so long as adequate representation is provided); see also Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 813 (1989) ("A plaintiff is entitled to due process, but has no right to sole possession of center stage; we need to tell the prima donna of the legal world that she must work with some co-stars.").


173. See *supra* note 146 and accompanying text.
stay state court proceedings on punitive damages. The Anti-
Injunction Act contemplates this kind of infringement on the
power of state courts only in limited situations, such as bank-
ruptcy. 174

In addition to promoting judicial efficiency, a consolidated
trial on punitive liability would be more fair to defendants be-
cause they would be "deterred and punished" all at once and no
longer subjected to repetitive awards. At the same time, the one
punitive award would continue to serve the socially desirable
goals of punishment and deterrence. Such a system, if it gave
priority to claims for actual damages and delayed distribution of
punitive damages, could also eliminate the unfairness of losing
the race to the courthouse or discovering a cause of action "too
late" (as in the case of a latent medical condition).

For all its virtues, however, the ABA proposal does not ad-
dress the situation in which a solvent defendant is subjected to
multiple punishment. In a 1989 report, the American College of
Trial Lawyers correctly noted that "the unfairness of mulcting a
defendant more than once for the same conduct does not dimin-
ish with the prospect that there may be sufficient funds to pay
all awards." 175 Rule 23 should be concerned, not just with
avoiding prejudice to class members, but with promoting judicial
efficiency and treating all litigants as fairly as possible. The
Rule should therefore allow the certification of a mandatory
class whenever (a) the traditional requirements for class certifi-
cation are present 176 and (b) a defendant faces unfair and re-
petitive punishment for the same act or course of conduct. 177

174. The Anti-Injunction Act states that: "A court of the United States may not
grant an injunction to stay proceedings in a State court except as expressly author-
rized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect
or effectuate its judgments." 28 U.S.C. § 2283 (1993). One author has argued that
FED. R. CIV. P. 23(b)(1) should be considered as an "Act of Congress" exception to
the Anti-Injunction Act. Under this argument, federal courts already have the power
to stay state court proceedings in overkill situations. See Note, Class Actions, supra
note 148, at 1810-12. This argument was rejected by In re Federal Skywalk Cases,
680 F.2d 1175, 1182-83 (8th Cir.) cert. denied, 459 U.S. 988 (1982).
175. ACTL REPORT, supra note 114, at 22.
176. See supra note 149.
177. Another commentator has proposed a sound, if poorly worded, revision to Rule
23 that would require the court to consider "the extent to which independent puni-
tive damage awards to prior individual plaintiffs would cause a court in subsequent
Changing Rule 23 in this fashion would not eliminate punitive damages, or restrict in any way a plaintiff's entitlement to compensation for actual damages. It would, however, require consolidation of trials in federal court whenever necessary to avoid unfair punitive overkill, regardless of whether the defendant has deep or shallow pockets.

CONCLUSION

Practical and constitutional obstacles have prevented the courts from resolving the problem of punitive damages overkill. According to the Supreme Court in TXO, the Constitution places only ill-defined, and as yet unreached, due process limitations on the extent of punitive damage liability. Whether the Court should have ruled or reasoned differently in TXO depends largely on how expansive a view of due process one's judicial philosophy permits. However, TXO cannot be seen as an invitation to wait for "creative" judicial resolution of the overkill problem. Rather, for legislators concerned about punitive overkill, TXO should be considered a call to arms.

Congress should take advantage of its broad powers under Article III, the Commerce Clause, and the Supremacy Clause to enact national solutions to the overkill problem. These solutions should be simple, constitutional, and fair to all litigants. All of the proposals discussed in this Note would alleviate the overkill situation and make the world of mass torts more just. However, only comprehensive class action reform promises a significantly more fair and more rational approach to the adjudication of punitive damage claims in mass tort litigation. Congress should waste no time in reforming Rule 23 to make the certification of mandatory classes easier to obtain for defendants facing oppressive punitive damage overkill.

Jonathan Hadley Koenig

litigation to find the defendant had been sufficiently punished so that no further awards of punitive damages would be made." Note, supra note 157, at 491.