

***A NEW KIND OF “OUTRAGEOUS MISCONDUCT”:
EFFORTS TO UNDERMINE LAW’S ABILITY TO DETER AND PUNISH
INTENTIONAL AND OUTRAGEOUS CORPORATE BEHAVIOR***

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ABSTRACT

The current tort “reform” movement, if successful, will completely undermine our most effective tool for deterring outrageous corporate misconduct: the threat of punitive damages. Such “reform” would have a particularly egregious impact on the environment and public health because, due to a lack of enforcement and the undetectable nature of many pollutants, environmental offenses are often more difficult to deter than other types of offenses. The essay argues that, although rarely imposed for environmental offenses, punitive damages are especially vital in that arena because, when imposed, they are richly deserved. It concludes that, rather than tort reform, what we need in order to protect the health and safety of our communities is bankruptcy reform.

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You can’t strike [at a corporation’s] heart. It has none. The only way you can get the attention of a corporation and talk to it is through its pocketbook... You can talk to the president of Johns-Manville. He is not too busy to talk to you, and you can send him a message. But when you do, it is going to have to be loud enough for him to hear it. And you can say to him that, at least in southern Mississippi, ‘We are not going to condone this kind of action.’

- Scott Baldwin, plaintiff’s attorney in *Jackson v. Johns-Manville*, from his summation, justifying their request of a \$3 million punitive damages award.¹

I. Introduction

Asbestosis and mesothelioma are irreversible, progressive respiratory diseases which slowly and painfully suffocate their victims.² Both diseases are caused exclusively by the inhalation of asbestos dust and only become manifest some ten to forty years after the victim’s initial exposure.³ Upon being diagnosed with mesothelioma, a unique form of cancer, 75% of patients die within one year.⁴

In the early 1980s, it came to light that Johns-Manville, one of the largest asbestos manufacturers, had been fully aware of the connection between exposure to asbestos dust and the development of serious respiratory disease for at least fifty years. During that fifty-year period, Johns-Manville not only failed to warn potential victims of the risks associated with its product, but it also actively concealed that information in order to safeguard company profits. As one

¹ PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT* 242-43 (Pantheon Books 1985).

² WHO Regional Offices for Europe, Copenhagen, Denmark, *Air Quality Guidelines - Second Edition*, Chapter 6.2 Asbestos, 5-6 (2000) *available at* http://www.euro.who.int/document/aiq/6_2_asbestos.pdf.

³ *Id.*

⁴ Health Central, *General Health Encyclopedia available at* <http://www.healthcentral.com/mhc/top/000115.cfm>.

particularly egregious facet of a large-scale cover-up, the company routinely withheld x-ray results from periodic employee physical exams – refusing to inform their employees that a serious respiratory disease had been diagnosed.⁵ In a 1949 company memorandum, Dr. Kenneth W. Smith, the medical director of Canadian Johns-Manville, stated that the employees “have not been told of the diagnosis, for it is felt that as long as the man feels well, is happy at home and at work and his physical condition remains good nothing should be said.”⁶ For the unwitting employee, this unconscionable practice subjected him to additional exposure to the deadly dust, substantially contributing to the seriousness of his illness. For Johns-Manville, however, this practice was win-win. Not only did the company benefit from the additional years of labor by experienced employees, but they also increased the likelihood that they would escape all liability for their intentional misconduct. Often, employees would not discover their illness until after retirement, when the statute of limitations had elapsed on their workers compensation and tort claims.⁷ In a further attempt to conceal the dangerous nature of their product, Johns-Manville and other manufacturers persuaded scientists to delay publication of findings that would be detrimental to the asbestos industry, or to soften the impact of such reports by obscuring their results.⁸

The asbestos manufacturers also manipulated the legal system in order to conceal the risks of asbestos. When asbestos victims finally realized that their respiratory diseases were caused by exposure to asbestos and sued the manufacturers, the companies always settled out of court -- eliminating the potential of publicly-accessible trial records.⁹ Further, as a condition of

⁵ BRODEUR, *supra* note 1 at 174-75.

⁶ *Id.*

⁷ David Rosenberg, *The Dusting of America: A Story of Asbestos – Carnage, Cover-up, and Litigation*, 99 HARV. L. REV. 1693, 1698 (1986) (reviewing PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT* (1985)).

⁸ *Id.* at 1700.

⁹ For instance, out of thirty-five hundred lawsuits that Johns-Manville had disposed of, thirty-four hundred were settled out-of-court. BRODEUR, *supra* note 1 at 4.

these out-of-court settlements, manufacturers demanded strict confidentiality and assurance from plaintiffs' lawyers that they would forgo all future asbestos suits and withhold from other plaintiffs' lawyers any evidence that had been obtained.¹⁰ The cases that actually reached trial encountered an additional hurdle in the form of a highly effective "state of the art" defense, which asserted that asbestos manufacturers could not be held liable for claims arising from asbestos exposure that occurred before the release of a certain epidemiological study in 1965,¹¹ because manufacturers had no prior knowledge of the risks of asbestos.¹² This defense was later crippled by plaintiffs' lawyers who, working together, were able to pool evidence which conclusively revealed that Johns-Manville had known about the dangers of asbestos since the early 1930s.¹³

After this revelation, asbestos manufacturers quickly scrambled back to settling most disputes out-of-court, in order to avoid exposure to large compensatory and punitive damages awards – which were being awarded with greater frequency.¹⁴ In the late spring of 1982, however, Johns-Manville puzzled plaintiffs' attorneys by allowing a number of cases that would have formerly settled out-of-court, to go to trial.¹⁵ It soon became apparent that this was yet another calculated maneuver designed to minimize Johns-Manville's financial losses when the company filed for Chapter 11 bankruptcy, automatically staying all pending litigation.¹⁶

The tort system with its prospect of punitive damages is an indispensable tool for uncovering and combating outrageous corporate misconduct, like that engaged in by Johns-Manville and other asbestos manufacturers. In the absence of punitive damages, asbestos

¹⁰ BRODEUR, *supra* note 1 at 90.

¹¹ Selikoff, Churg, & Hammond, *The Occurrence of Asbestosis Among Insulation Workers in the United States*, 132 ANNALS N.Y. ACAD. SCI. 139 (1965).

¹² BRODEUR, *supra* note 1 at 136-37.

¹³ *Id.* at 216-19.

¹⁴ *Id.* at 216.

¹⁵ *Id.* at 278-79.

¹⁶ *Id.*

manufacturers could not have been punished for their callous actions and the public would remain at the mercy of companies who could coldly calculate that they could profit from failing promptly to disclose known risks in the future. By deterring such “outrageous misconduct,” punitive damages awards help ensure that, in the future, the public is warned of potential dangers and that guilty parties are punished. However, our tort system, which is the best vehicle for addressing such intentional misconduct, is currently under attack by the so-called “tort reform” movement. Representatives of business interests are promoting federal and state legislation to limit tort liability and to restrict damages awards, including awards of punitive damages, by focusing the public’s attention on anecdotes of alleged abuses. These so-called abuses are unrelated to the field of environmental torts, but they are cleverly designed to dupe citizens into relinquishing their best protection against outrageous and intentional misconduct by the industries the tort reformers represent.

Part II of this essay examines the genesis of punitive damages awards and the evolution of their use in the courts, discussing their usefulness in deterring future intentional misconduct that undermines public health and safety. Additionally, it responds to the claims of tort reform proponents who seek to restrict punitive damages awards and whose true aim is to protect industry from legitimate legal claims.

Part III argues that efforts to restrict punitive damages awards threaten to curtail our most effective weapon against outrageous corporate misconduct. This section explores how such limits would be especially detrimental in the field of environmental and public health law where punitive damages, although rarely sought, have been extremely important to vindicate society’s interests.

The concluding section paints a picture of the world we can expect to inhabit if punitive remedies are reduced or eliminated and it summarizes why this vital tool should not be restricted.

II. Punitive Damages in Our Society and the Threat of “Tort Reform”

Punitive damages are an indispensable tool in the hands of the community, enabling it to hold powerful entities accountable for their dangerous misconduct. From the very beginning in the 18th Century, the role of punitive damages in the U.S. legal system has not changed significantly – they are still employed to punish and deter outrageous misconduct by defendants.¹⁷ However, today, as the scale of harm companies are capable of inflicting on society has vastly expanded, punitive damages are even more important than ever before to protect public health and the environment. The current tort reform movement that seeks to restrict or eliminate the availability of punitive damages is a transparent attempt to diminish that power.¹⁸

A. The Early History of Punitive Damages

Punitive, or exemplary, damages are awarded in addition to compensatory or nominal damages and are designed not to compensate a victim for an injury, but to punish and deter the outrageous misconduct of defendants.¹⁹ “Outrageous conduct” is characterized by either an evil motive or a reckless indifference to the rights of others.²⁰ Punitive damages are never awarded for mistakes, accidents or mere negligence.²¹ The amount of a punitive damages award is determined by the fact finder, either a judge or jury, who is deciding a case.²² Unlike civil or

¹⁷ See *infra* notes 24-39 and accompanying text.

¹⁸ See *infra* note 84-87 and accompanying text.

¹⁹ RESTATEMENT (SECOND) OF TORTS § 908 (1979).

²⁰ See *id.*

²¹ See *id.* cmt. b.

²² See *id.* cmt. d.

criminal penalties, punitive damage awards paid by defendants traditionally have been received by the plaintiff, not the state or federal treasury.²³

In *Genay v. Norris*, one of the earliest punitive damage awards recorded in the United States, a plaintiff was awarded £400 in 1784 by the South Carolina Supreme Court in order to punish a defendant for having adulterated the plaintiff's wine.²⁴ The *Genay* court may have decided to award punitive damages, in part, because the plaintiff suffered excruciating pain and, in part, because the defendant was a physician who should have known better.²⁵ Before adoption in America, punitive damages had been awarded by English courts for approximately twenty years.²⁶ Many of the earliest cases involved seductions of a plaintiff's daughter,²⁷ however, by the 1800s, punitive damages were being awarded for a wide variety of actions in which a defendant's conduct constituted gross negligence, or involved malicious intent.²⁸ Some examples which characterize the awards of that time include: a train passenger who was awarded exemplary damages after the gross negligence of a train company allowed a collision between two trains;²⁹ a farmer who was awarded double damages in his action against a railroad company for its failure to compensate him for three hogs that were struck and killed by a company train;³⁰

²³ Minnesota Pollution Control Agency, *Citizen Environmental Lawsuits*, Fact Sheet 37 (July 1997) available at <http://www.pca.state.mn.us/water/pubs/feedlot37.pdf> at p.3.

²⁴ 1 SCL 3, 1 Bay 6 (S.C. 1784).

²⁵ *Id.*

²⁶ See *Wagoner v. Bennett*, 814 P.2d 476, 488 n.33 (Okla. 1991) (stating that the earliest English case awarding exemplary damages appeared to be *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763)). It has also been suggested that punitive damages have their origin in 13th century England in the form of amercements which were fines levied against the king's subjects for minor criminal offenses against the Crown. See *Browning-Ferris Industries v. Kelco Disposal*, 492 U.S. 257, 268-69 (1989) (rejecting an argument that punitive damages are the modern-day analog to the English amercements, which were the inspiration for the Excessive Fines Clause, and, therefore, should be prohibited by the Excessive Fines Clause of the Eighth Amendment).

²⁷ Anthony J. Sebok, *What did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT. L. REV. 163, 191 (2003).

²⁸ See, e.g., *supra* notes 29-31 and accompanying text.

²⁹ *Milwaukee & St. Paul R. Co. v. Arms*, 91 U.S. 489 (1876).

³⁰ *Minneapolis & St. Louis R. Co. v. Beckwith*, 129 U.S. 26 (1889).

and a voter who was awarded punitive damages in his action against a voting official who, motivated by partisan malice, refused the voter access to the polls.³¹

Punitive damages were rarely awarded and relatively modest in size until the late 1970s, when a number of companies were forced to pay large sums in widely reported products liability lawsuits.³² Perhaps due to the indelible memory of those highly publicized cases, many Americans continue to believe that products liability torts constitute the bulk of the punitive damages which are awarded. This, however, is not the case. Most punitive damages are awarded in automobile personal injury and landowner liability actions, followed by medical malpractice, business, and then product liability actions.³³

Although punitive damages and compensatory damages are awarded for different reasons, in practice, the distinction between the two is somewhat nebulous. For the most part, a compensatory award is intended to make a victim whole by monetarily indemnifying her for any actual losses.³⁴ Punitive damages are awarded, when the defendant has acted with recklessness, malice, or deceit, in order to deter similar future misconduct and to express the censure of the community.³⁵ Between the two types of awards, there may also be a degree of cross-over because, like punitive damages, some types of compensatory damages cannot be valued in precise dollar amounts. For instance, there is no precise mechanism that a jury may employ to calculate intangible claims such as pain and suffering as opposed to other types of compensatory damages, such as lost wages. To compound matters, compensatory awards for such intangible

³¹ Friend v. Hamill, 34 Md. 298, 314 (1871).

³² Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into "Punishment,"* 54 S.C. L. REV. 47, 51-52 (2002).

³³ Erik Moller, *Trends in Civil Jury Verdicts: New Data from Fifteen Jurisdictions*, Research Brief, Rand Institute for Civil Justice available at <http://www.rand.org/publications/RB/RB9025/RB9025.html> (describing the work published as *Trends in Civil Jury Verdicts Since 1985*, by, RAND MR-694-ICJ, 1996, 105 pp). The study was based on all civil jury verdicts reached from 1985 to 1994 in 15 state courts of general jurisdiction across the nation. *Id.*

³⁴ Black's Law Dictionary 394 (7th ed. 1999).

³⁵ Black's Law Dictionary 396 (7th ed. 1999).

harms are relatively new and may have been compensated historically through punitive damage awards prior to the nineteenth century.³⁶ Despite this potential commingling of roles, it is nevertheless clear that courts have always viewed punitive damages as tools of deterrence and retribution.³⁷ In *Day v. Woodworth*,³⁸ which was decided in 1852, the Supreme Court stated that “exemplary or vindictive” damages had been awarded for tort actions for more than a century.³⁹

Considering the potential for overlap between compensatory and punitive damages, it would not be surprising if jurors occasionally conflated the roles of each by awarding punitive damages in order to compensate the victim and by awarding compensatory damages in order to punish the tortfeasor. This might conceivably occur in states where punitive damages have been statutorily capped. In response to such caps, juries may shift the would-be excess punitive damages award into the compensatory damages category, attributing the extra damages to intangible harms, rather than lessening the total award for the victim. However, even if such isolated practices exist, they would not signify a nationwide misapprehension by juries of their proper roles. When a jury is given full reign to award compensation and punishment as it deems proper, there is no reason to suspect that it would characterize a compensatory award as a punitive damage or vice versa. It is only when a jury’s ability to allocate the awards as it sees fit is thwarted by external means (such as tort reform) that monetary damages may be “misallocated.”

³⁶ See, e.g., *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 61 (U.S., 1991) (O’Connor, J., dissenting) (suggesting that the role of punitive damages prior to the 19th century encompassed a compensatory function since compensatory awards for injuries such as pain and humiliation did not yet exist) (citing *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 520 (1957)).

³⁷ In one of the early seduction cases, *Tullidge v. Wade*, 95 Eng. Rep. 909 (K.B. 1769), the court emphasized that the purpose of punitive damages was to express the public “insult” caused by the defendant’s actions – a decidedly retributive function. Sebok, *supra* note 27 at 191.

³⁸ 13 How. 363 (1852).

³⁹ *Id.* at 371.

B. Punitive Damages Safeguard Public Health and the Environment

Although one aim of punitive damages is retribution, their ability to deter future misconduct may be their most beneficial function. For this reason, punitive damages are also called “exemplary damages,” because the punished party will serve as an “example” to deter others. The availability of punitive damages equips citizens with the means to deter the outrageous misconduct of otherwise untouchable entities. Historically, the imposition of punitive damages has precipitated the recall of dangerous items, the enhancement of safety procedures, and the inclusion of warning labels on dangerous products.⁴⁰ Consequently, punitive damages do not merely punish the offender – they also act as sentinels of public health and safety.

The deterrent function of punitive damages is especially potent in situations where an actor’s conduct is harmful but not deterred through regulatory means. For example, an actor may be undeterred by the threat of fines where the magnitude of such fines is not great enough to outweigh the benefits of the misconduct. Additionally, there is no regulatory deterrence at all where an actor’s harmful conduct is in full compliance with applicable regulations. In both cases, punitive damages may be the *only* way to deter the undesirable conduct. Despite adequate regulatory deterrence, in the hands of concerned citizens, the threat of punitive damages will successfully leverage community interests against those of the actor – thus ensuring public health and safety.

One of the best-known examples of the ability of punitive damages to protect the safety of the public involved the 1972 Ford Pinto hatchback. In that case, punitive damages were particularly effective because Ford’s decision to conceal knowledge about the safety hazards of its vehicle was not deterred by ordinary threats of civil or criminal penalties. In *Grimshaw v.*

⁴⁰ See *infra* notes 41-62 and accompanying text.

Ford Motor Co.,⁴¹ the Court of Appeal of California awarded punitive damages in the amount of \$125 million to the plaintiffs,⁴² who were severely burned when the passenger compartment of their 1972 Ford Pinto hatchback became engulfed in flames after being rear-ended by a car traveling at 28-37 miles per hour.⁴³ The driver died of congestive heart failure resulting from burns and the passenger, a 13 year old boy, survived, but suffered permanently disfiguring burns on his face and body.⁴⁴ Based on crash tests conducted by Ford, the company was aware that the 1972 Pinto hatchback failed to meet federal standards which required that a car manufactured that year could withstand a fixed object, rear-impact collision without significant fuel spillage.⁴⁵ For as little as \$15.30 per vehicle, Ford could have made the fuel tank safe in a 34 to 38-mile-per-hour rear-end collision, thus complying with federal requirements and preventing the horrible tragedy that befell the *Grimshaw* plaintiffs.⁴⁶ In *Grimshaw*, the court held that punitive damages are recoverable “where the defendant’s conduct constitutes a conscious disregard of the probability of injury to others.”⁴⁷ The court elaborated that a “conscious disregard” is satisfied when “the plaintiff establishe[s] that the defendant was aware of the probable dangerous consequences of his conduct, and that he willfully and deliberately failed to avoid those consequences.”⁴⁸ In *Grimshaw*, existing regulations were insufficient to deter Ford’s decision to release the Pinto hatchback into the marketplace. Compensatory damages alone, likewise, would have had little deterrent effect on a company as wealthy as Ford. In such circumstances, deterrence must come from punitive damages.

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

⁴² The plaintiffs later remitted all but \$3.5 million of punitive damages award as a condition of denying Ford’s motion for a new trial. *Id.* at 358.

⁴³ *Id.* at 359.

⁴⁴ *Id.* at 358.

⁴⁵ *Id.* at 360.

⁴⁶ *Id.* at 361.

⁴⁷ *Id.* at 383.

⁴⁸ *Id.* at 381.

In *Fischer v. Johns-Manville Corp.*, a case which is representative of a multitude of similar asbestos lawsuits, the Supreme Court of New Jersey upheld an award of punitive damages in the amount of \$300,000 against an asbestos manufacturer for the company's failure to warn consumers about the danger of its product.⁴⁹ In *Fischer*, as in many other asbestos cases, Johns-Manville was forced to admit what it had concealed for years – that it had been aware of the link between asbestos exposure and pulmonary disease since the 1930s.⁵⁰ The *Fischer* court stated that “[b]ecause product safety is the paramount concern of products liability law, it is indifference to or disregard of the dangers posed by the product in its defective state that should be the key factor in justifying an award of punitive damages...”⁵¹ Like Ford, the asbestos manufacturer in *Fischer* knew about the dangers posed by its product and indifferently chose to conceal that knowledge from the public.⁵²

Unlike the immediate danger posed by Ford's faulty fuel tanks, the harm created by asbestos remains largely undetected during a long latency period – manifesting only some *ten to forty years* post-exposure.⁵³ Logically, this suggests that manufacturers of products which enjoy a long latency period before their injuries appear will require a stronger deterrent than the Fords of the world for at least two reasons. First, a long latency frustrates a plaintiff's ability to detect the disease and prove causation, thereby decreasing the likelihood that the manufacturer will be held responsible for its misconduct. Second, a long latency creates the potential that the manufacturer may no longer be in business (and no longer liable for damages) by the time the disease manifests itself. Consequently, a longer latency period increases the likelihood that a manufacturer will choose to conceal the dangers of its product from the public. Judge Richard

⁴⁹ 512 A.2d 466, 480 (N.J. 1986).

⁵⁰ *Id.* at 468-69.

⁵¹ *Id.* at 481.

⁵² *Id.* at 469.

⁵³ *Id.* at 475.

Posner and Professor William Landes have asserted that where, as here, the risk of discovery is very low and the risk of harm is very high, punitive damages are an efficient remedy.⁵⁴

An examination of *Silkwood v. Kerr-Mcgee Corp.*⁵⁵ demonstrates how punitive damages have been particularly useful in redressing an actor's conduct where, though harmful, the conduct was not subject to any civil or criminal penalties. In *Silkwood*, the United States Supreme Court held that the punitive damages awarded in a common law tort suit were not preempted by the fact that the nuclear plant had adhered to all of the regulations of the Atomic Energy Act.⁵⁶ *Silkwood's* plaintiff, the father of a deceased woman who suffered radiation injury while working for a nuclear power plant which had negligently allowed the escape of plutonium, was awarded ten million dollars in punitive damages.⁵⁷ Although the Nuclear Regulatory Commission had investigated the *Silkwood* incident and found no material violation of federal regulations⁵⁸ and the state had no authority to regulate the safety practices of nuclear plants,⁵⁹ the Court held that the punitive damages were not preempted.⁶⁰ The Court reasoned that it "[wa]s abundantly clear... that the punitive damages award in [*Silkwood*] deters a nuclear facility from operating in the same manner as Kerr-McGee"⁶¹ and that "the prospect of paying a large fine – in this case a potential \$ 10 million – for failure to operate a nuclear facility in a particular manner has an obvious effect on the safety precautions that nuclear licensees will follow."⁶²

⁵⁴ William M. Landes & Richard R. Posner, *New Light on Punitive Damages*, Reg. Sept.-Oct. 1986 at 33.

⁵⁵ 464 U.S. 238 (1984).

⁵⁶ *Id.* at 262.

⁵⁷ *Id.* at 243-46.

⁵⁸ *Id.* at 262.

⁵⁹ "It would clearly be impermissible for California to attempt to [regulate the construction or operation of a nuclear power plant], for such regulation, even if enacted out of nonsafety concerns, would nevertheless directly conflict with the [Commission's] exclusive authority over plant construction and operation." *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 212 (1983) (citing *Silkwood*, 464 U.S. at 262, n.1).

⁶⁰ *Silkwood*, 464 U.S. at 258 (Blackmun, Marshall, J.J., dissenting).

⁶¹ *Id.* at 261.

⁶² *Id.* at 260.

In addition to their ability to deter, punitive damages are also an effective expression of community outrage where the physically injured “victim” is not a person, but the environment. In *In re Exxon Valdez*⁶³ an Alaskan jury awarded \$5 billion in punitive damages against Exxon for its negligent shipping practices, which encompassed lax policies that enabled fatigued and intoxicated crewmembers to navigate its vessels.⁶⁴ The case arose from a 1989 oil spill, which occurred when one of Exxon’s oil tankers ran aground, resulting in the disgorgement of 10.8 million gallons of crude oil into Alaska’s formerly pristine Prince William Sound.⁶⁵ The resulting devastation, which sheathed 1,200 miles of coastline in oil and suffocated *hundreds of thousands* of sea birds, otters, whales, and seals, was widely televised.⁶⁶ In addition to the environmental damage, the spill also caused incalculable financial loss by halting all fishing, which was the economic foundation of the Sound.⁶⁷ Considering the aggregate outrage of the nation, it was not surprising that *In re Exxon Valdez*, a consolidated case on behalf of thousands of commercial fishermen, resulted in the largest punitive damages award of its time.⁶⁸ In fact, the spill had such a profound impact on the nation that it also precipitated the enactment of the Oil Pollution Act of 1990, which mandated, *inter alia*, that tanker crews be tested for alcohol and drugs, that tankers be replaced by double-hulls by 2015, and that Coast Guard units be appropriately stationed and equipped to respond to oil spills.⁶⁹ Since that infamous spill, both the number of oil spills and the volume of oil released into U.S. waters have decreased

⁶³ Baker v. Exxon Corp. (In re The Exxon Valdez), 239 F.3d 985, 2001 U.S. App. LEXIS 1803 (9th Cir. Cal. 2001).

⁶⁴ Yereth Rosen, *Exxon Will Appeal \$5B Penalty for 1989 Spill*, CHRISTIAN SCI. MONITOR, Sept. 20, 1994, at 9.

⁶⁵ Alaska Oil Spill Commission, *Spill: The Wreck of the Exxon Valdez*, Final Report, published Feb. 1990 by the State of Alaska, at 5-14.

⁶⁶ Ellen Hale, *Spanish Coast Seethes at Incessant Tide of Oil*, USA TODAY, Jan. 13, 2003, at 7A.

⁶⁷ Jay Mathews and Cass Peterson, *Spill's Economic Waves; Some Riding High as Others Struggle*, WASH. POST, Apr. 9, 1989, at A1.

⁶⁸ Keith Schneider, *Exxon is Ordered to Pay \$5 Billion for Alaska Spill*, N.Y. TIMES, Sept. 17, 1994, at 1.

⁶⁹ Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (codified at 33 U.S.C. 2701 et seq. (2005)). The legislation also created a \$1 billion Oil Spill Liability Trust Fund to be applied toward clean-ups and to compensate those who have lost money as a result of the spill. *Id.* The fund is not applicable where a tanker owner is deemed grossly negligent in causing the spill. *Id.*

considerably.⁷⁰ Incredibly, however, some fifteen years after the spill, *In re Exxon Valdez* is still unresolved as the newly merged Exxon Mobil, a company which earned \$242.4 billion in revenue during the last fiscal year,⁷¹ continues to appeal the size of the punitive damages award (currently at \$7 billion including interest).⁷²

In each of these cases, as well as many others, the availability of punitive damages enabled citizens to hold otherwise undeterrable defendants accountable for their grossly negligent or outrageous misconduct. These types of law suits not only vindicate the plaintiff, but they also leave society a safer place. For instance, the punitive damages awarded in the above cases prompted Ford to recall the 1972 Ford Pinto⁷³ and forced Kerr-McGee to close its nuclear plant while simultaneously placing other entities on notice that they could suffer the same fate if they choose to sacrifice safety for profit.⁷⁴ In each of these cases, the companies had knowledge of the danger that their products or practices posed to the public but chose to take a gamble that the monetary benefits of concealing that knowledge would outweigh the potential costs. Additionally, either due to their great wealth or compliance with federal regulations, each of the companies was virtually immune from any type of deterrent, save punitive damages. In the absence of punitive damages, these companies would have been substantially less inclined to cease their dangerous practices. Moreover, in the absence of their public example, a greater

⁷⁰ Wayne K. Talley, *Post OPA-90 Vessel Oil Spill Differentials: Transfers Versus Vessel Accidents*, a study supported by the Marine Policy Center of the Woods Hole Oceanographic Institution) available at <http://www.oduport.org/Oilspillpaper.htm>. The volume of oil spills declined from 27,651,000 gallons for the 1981-90 period to 1,390,138 gallons for the 1991-2000 period. *Id.*

⁷¹ David Drickhamer, *IW 1000's Top-Line Tango*, INDUS. WEEK, June 1, 2004 available at <http://www.industryweek.com/ReadArticle.aspx?ArticleID=1446&SectionID=40>.

⁷² Adam Liptak, *\$4.5 Billion Award Set For Spill of Exxon Valdez*, N.Y. TIMES, Jan. 29, 2004, at A18. Exxon Mobil is also appealing a \$3.6 billion judgment (reduced from \$11.9 billion) which was awarded by an Alabama court in a dispute over royalties from Alabama gas wells. Terry Maxon, *Exxon Mobil Judgment Cut 70% to \$3.6 Billion Oil Giant Still Plans to Appeal Award in Alabama Fraud Case*, DALLAS MORNING NEWS, Mar. 30, 2004, at 1D.

⁷³ Larry Kramer, *Jury Indicts Ford in Ind. Pinto Crash; Ford Indicted in Crash that Killed Three*, WASH. POST, Sept. 14, 1978, at C1.

⁷⁴ James Lardner, *Explosive 'Plutonium'*, WASH. POST, Mar. 11, 1980 at B3.

number of future offenders would have undoubtedly engaged in the same types of deceptive practices.

C. Punitive Damages under Attack

The ability of citizens to hold entities responsible for their outrageous misconduct by seeking unfettered punitive damages is currently under attack by the very industries which stand to lose the most by the continued availability of this remedy. The current, so-called “tort reform movement” which purportedly questions the effectiveness of punitive damages is not a new phenomenon – it has historical roots. In the 1850s, two authors of punitive damages treatises, Simon Greenleaf and Theodore Sedgwick, engaged in a public debate about the utility of punitive damages.⁷⁵ Greenleaf considered punitive damages to be an improper intrusion of the public into private disputes,⁷⁶ while Sedgwick viewed them as an appropriate blending of society’s interests and those of the plaintiff.⁷⁷ In today’s version of the debate, the “reformers” complain chiefly about “windfalls to plaintiffs” and “wild and unpredictable outcomes” which should qualify as unconstitutional takings of a defendant’s property.⁷⁸ In order to sell their proposal to the American public, these “tort reformers” package their product as the antidote to an ailing healthcare system – insisting that punitive damages awards against pharmaceutical companies and doctors will result in restricted access to adequate health care.⁷⁹ To remedy the system, these “reformers” propose, *inter alia*, that the standard of proof be raised in punitive

⁷⁵ DeMendoza v. Huffman, 51 P.3d 1232, 1239 (Sup. Ct. Or. 2002).

⁷⁶ *Id.* (citing Simon Greenleaf, 2 *A Treatise on the Law of Evidence* § 253, 244 (3d ed 1850)).

⁷⁷ *Id.* at 1240 (citing Greenleaf, 2 *Law of Evidence* § 253 at 244 n 2).

⁷⁸ American Tort Reform Association, *Punitive Damages Reform*, ATRA ISSUES (2002) available at <http://www.atra.org/show/7343>.

⁷⁹ American Tort Reform Association, *Medical Liability Reform*, ATRA ISSUES (2002) available at <http://www.atra.org/show/7338>.

damages cases from preponderance of the evidence to clear and convincing evidence and that direct proportionality between punitive and compensatory damages be required.⁸⁰

Their efforts have been largely successful. In response to these calls for reform, many states have voluntarily enacted measures such as placing “caps” on punitive damages.⁸¹ At the federal level, legislation was recently enacted which will require future class action lawsuits, which often seek punitive damages, to proceed in federal courts (rather than more sympathetic state venues), unless more than two-thirds of the plaintiffs are citizens of the state in which the action is filed and the defendant is headquartered there.⁸² Unfortunately for the American public, these legislative reform measures are attempting to remedy straw man concerns. Already, punitive damages awards are subject to numerous restrictions and opportunities for review. Therefore, there is absolutely no danger that an unconstitutional taking will occur.⁸³ The true aim of these “reformers” is not the reform of an ailing system as they claim, but the complete elimination of public accountability for the conscienceless “business decisions” of industry. Tort reform will not enhance our quality of life. To the contrary, it will destroy our most effective means to preserve and improve our quality of life.

The proponents of tort reform, such as the American Tort Reform Association (“ATRA”) are essentially front groups which are financed by insurance companies and industry representatives. These “reformers” advance their agenda by focusing the public’s attention on caricatures such as the greedy lawyer or the parasitic plaintiff – never once mentioning corporate

⁸⁰ *Punitive Damages Reform*, *supra* note 78.

⁸¹ As of 2001, fifteen states had established some form of punitive damages cap, including: Alabama, Alaska, Colorado, Connecticut, Florida, Georgia, Indiana, Kansas, Nevada, New Jersey, North Carolina, North Dakota, Oklahoma, Texas, and Virginia. *Punitive Damages Reform*, *supra* note 78.

⁸² The Class Action Fairness Act of 2005 *available at* <http://news.findlaw.com/hdocs/docs/clssactns/cafa05.pdf>. House Minority Leader Nancy Pelosi (D-Calif.) characterized the bill as “payback for big business at the expense of consumers.” John F. Harris, *Victory for Bush on Suits: New Law to Limit Class Action Cases*, WASH. POST, Feb. 18, 2005, at A1.

⁸³ *See infra* notes 90-103 and accompanying text.

interests.⁸⁴ One of their most effective weapons is the political commercial, in which they employ actors to portray “ordinary citizens” who are upset about the current system.⁸⁵ One such commercial, funded by the innocuously named “Citizens for a Sound Economy,” featured two average people discussing how “the system is out of whack,” because “[f]ewer people nowadays are willing to accept responsibility for their own doin’s.”⁸⁶ It is worth noting that, while the ATRA has been loudly decrying the abuse of the court system, they, themselves, have been doing most of the abusing. From 1991-1994, ATRA members filed 37,998 lawsuits in five states.⁸⁷

The tort reformers’ argument that the plaintiff is receiving a windfall ignores the state’s interest in encouraging such lawsuits for the benefit of the public good. The availability of punitive damages encourages plaintiffs, who would otherwise be discouraged by the time, money, and effort required, to file suits which may benefit the entire community by holding actors responsible for their outrageous misconduct. In addition to the ordinary stresses experienced by those who file lawsuits, plaintiffs seeking punitive damages may need additional encouragement to endure more aggravation on top of having often already suffered significant injury at the hands of the defendant. Similarly, the availability of these awards also encourages attorneys to take such cases. Because of the inherent difficulty in establishing the triggering conditions for punitive damages, many public health and safety actions require intense effort and a substantial initial outlay of funds.⁸⁸ The availability of punitive damages ensures that attorneys who have the means to win, will accept such cases. The result of redirecting such damages to state

⁸⁴ Ted Lyon, *Insurance Companies Foster Myth of Litigation Crisis*, DALLAS MORNING NEWS, Oct. 30, 1994, at 6J.

⁸⁵ Elizabeth Kolbert, *Special Interests’ Special Weapon*, N.Y. TIMES, Mar. 26, 1995, at Sec. 1, p. 20.

⁸⁶ *Id.*

⁸⁷ Colman McCarthy, *Corporate Litigators Seek to Order Court 9500004214*, WASH. POST, May 2, 1995, at D20. The five states in which the lawsuits were filed were California, Florida, Illinois, New York and Pennsylvania. *Id.*

⁸⁸ *See, e.g. infra* notes 118-120 and accompanying text.

repositories,⁸⁹ as tort reformers propose, will be the filing of fewer cases and an increased likelihood that corporate offenders will escape punishment and deterrence. It is clear why the “reformers” would support such a self-serving proposal.

The unconstitutional takings argument is similarly unpersuasive because the United States Supreme Court has already circumscribed the scope of the punitive damages awards in order to protect against that possibility. In a series of opinions assessing the constitutionality of punitive damages, the Court has restricted their size and scope. In the most recent decision, *State Farm Mutual Automobile Insurance Company v. Campbell*,⁹⁰ the Court clarified the three excessiveness guideposts, originally announced in *BMW v. Gore*,⁹¹ which define the boundaries of punitive damages awards.⁹² The three *Gore* guideposts directed reviewing courts to consider (1) “the degree of reprehensibility of the defendant’s conduct,”⁹³ (2) the ratio between punitive and compensatory damages,⁹⁴ and (3) a comparison of the amount of punitive damages to any “civil or criminal penalties that could be imposed for comparable misconduct.”⁹⁵

With respect to the reprehensibility guidepost, the *State Farm* Court announced that five factors should be considered, including whether a defendant’s conduct reflects: (1) “indifference to or a reckless disregard of the health or safety of others;” (2) “intentional malice, trickery, or deceit” vs. “mere accident;” (3) “repeated actions” vs. “an isolated incident;” (4) whether the harm inflicted was physical or economic; or (5) whether “the target of the conduct had financial vulnerability.”⁹⁶

⁸⁹ The following states have at least a portion of their punitive damage awards directed to a state fund: Alaska; Alabama; Illinois; Iowa; Missouri; Oregon; and Utah. *Punitive Damages Reform*, *supra* note 78.

⁹⁰ 517 U.S. 408 (2003).

⁹¹ *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

⁹² *State Farm*, 538 U.S. at 418.

⁹³ *BMW*, 517 U.S. at 575.

⁹⁴ *Id.* at 581.

⁹⁵ *Id.* at 583.

⁹⁶ *State Farm*, 538 U.S. at 419.

With respect to *Gore*'s second guidepost, the ratio of punitive to compensatory damages, the *State Farm* Court stated that a ratio of no more than 4:1 would be appropriate in most instances.⁹⁷ This suggestion does not appear to preclude the possibility of a higher award where "a particularly egregious act has resulted in only a small amount of economic damages;" where "the injury is hard to detect;" or where "the monetary value of noneconomic harm might have been difficult to determine."⁹⁸ Additionally, the Court suggested that where compensatory damages were "substantial," that a 1:1 ratio would be appropriate.⁹⁹

With respect to the third guidepost, which directs courts to compare punitive damages awards to any civil or criminal penalties that could be imposed for comparable misconduct, the Court stated that "[p]unitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award."¹⁰⁰ In addition to limiting the scope of punitive damages, the Court has also held that the Due Process Clause requires that awards of punitive damages be subject to meaningful judicial review in *Honda Motor Co. v. Oberg*.¹⁰¹ In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,¹⁰² the Court mandated that this judicial review must be conducted *de novo*, reasoning that a jury award of punitive damages is not a factual determination which should be reviewed deferentially.¹⁰³

Considering all of the restrictions on the award of punitive damages, there is little danger that such an award will be unjust. However, despite these protections and the knowledge of the

⁹⁷ *Id.* at 425.

⁹⁸ Laura J. Hines, *Due Process Limitations on Punitive Damages: Why State Farm Won't Be the Last Word*, 37 AKRON L. REV. 779, 794 (2004) (citing *State Farm*, 538 U.S. at 425 (quoting *BMW*, 517 U.S. at 582)).

⁹⁹ *State Farm*, 538 U.S. at 425.

¹⁰⁰ *Id.* at 428.

¹⁰¹ *Honda Motor Co. v. Oberg*, 512 U.S. 415, 426-27 (1994).

¹⁰² 532 U.S. 424 (2001).

¹⁰³ *Id.* at 437-41.

tort reformers' obvious vested interests, the American public is still being swayed by glossy sales pitches and increasingly favors tort reform.

D. Why Recent Tort “Reforms” are Dangerous

The tort “reform” remedies, proposed by industry groups and adopted by various states, have reduced the ability of citizens to hold entities accountable for and to deter future outrageous misconduct. Among the different types of reforms, several states have enacted caps on punitive damages that reduce the amount of the awards and increase their predictability. Additionally, some states have raised the burden of proof in punitive damages cases, making an already onerous task even more so for the plaintiff, thereby decreasing the ability of citizens to deter harmful conduct. The end result of these reforms will likely be an increase in harmful activity that jeopardizes public health and the environment.

1. Caps on Punitive Damages Result in Under-Deterrence of Harmful Conduct

The state adoption of measures that cap punitive damages awards will prove detrimental to public health and the environment because would-be violators will no longer be effectively deterred. In order for penalties to deter wrong-doing, they must be large enough, relative to the wealth of the defendant. The United States District Court for the District of New Jersey expressed this idea when it stated that “the amount of the ... penalty must be high enough to insure that polluters cannot simply absorb the penalty as a cost of doing business. Otherwise, a rational profit maximizing company will choose to pay the penalty rather than incur compliance costs.”¹⁰⁴ In states where punitive damages have been capped by the legislature, the ability of such damages to deter is reduced.

It follows logically that a reduction in punitive damages will result in a decrease in deterrence of harmful activity. This idea is echoed by the Second Restatement of Torts which

¹⁰⁴ PIRG v. Powell Duffryn Terminals, Inc., 720 F. Supp. 1158, 1166 (D.N.J., 1989)

states that “the degree of punishment or deterrence resulting from a judgment is ... in proportion to the *means* of the guilty person.”¹⁰⁵ For this reason, courts often consider the wealth of the defendant when awarding punitive damages.¹⁰⁶ Despite the United States Supreme Court’s recent assertion in *State Farm* that “[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award,”¹⁰⁷ the Court has repeatedly recognized the appropriateness of considering a defendant’s wealth when determining the reasonableness of a punitive damage award.¹⁰⁸ State courts, likewise, have long-understood the importance of considering the wealth of the defendant in effectively deterring misconduct.¹⁰⁹ In fact, in today’s climate of massive corporate mergers, in which the aggregate wealth of individual entities increases dramatically, the argument for a punishment which takes the offender’s wealth into account is fortified.

Another factor which counsels against the adoption of state caps on punitive damages is the fact that these caps will make the penalties too predictable. The more predictable the penalty, the easier it is for an entity to perform a cost-benefit analysis, weighing the benefit of the harmful practice against the potential detriment. Because punitive damages are relatively unpredictable, they frustrate a would-be defendant’s ability to make “business decisions” that will adversely affect the public or the environment.

2. Raising the Burden of Proof: Raising the Incidence of Harm

¹⁰⁵ RESTATEMENT (SECOND) OF TORTS § 908 (1979) (emphasis added).

¹⁰⁶ See *infra* note 108.

¹⁰⁷ *State Farm*, 538 U.S. at 427.

¹⁰⁸ See *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 n.28 (1993) (stating that “[u]nder well-settled law, however, factors such as [including the net worth of the defendant] are typically considered in assessing punitive damages.”). See also *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 819 (Cal. Ct. App., 1981) (favorably discussing an approach to the evaluation of punitive damages which balances society’s interest against defendant’s interest by focusing on several factors, *inter alia*, the wealth of the defendant) (citing Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 667-669 (1980)).

¹⁰⁹ See *e.g.*, *Neal v. Farmers Ins. Exchange*, 582 P.d 980, 990 (Cal., 1978) (asserting that wealth of defendant is one of the factors to consider when evaluating punitive damages award and that “obviously, the function of deterrence, will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort.”).

By the year 2001, twenty-one states had adopted the clear and convincing evidence standard of proof in punitive damages cases either through legislative or judicial means.¹¹⁰ In fact, Colorado has gone one step further and mandated that punitive damages must be proven beyond a reasonable doubt, a criminal standard of proof.¹¹¹ The adoption of these higher standards of proof can only decrease deterrence of misconduct because it will allow more defendants to escape punishment by increasing the burden on plaintiffs. This extra burden will be nearly insurmountable in health or environmental claims which involve long latency periods.¹¹² An increased standard of proof will also present tremendous obstacles for the plaintiff who must prove the existence of an evil motive on the part of the defendant, because it already requires evidence which is inaccessible to the plaintiff in the absence of a “smoking gun.”

Moreover, considering that defendants cannot be forced to pay punitive damages if their conduct is accidental, or merely negligent, the consequence of raising the burden of proof will mean that the worst offenders, those with malicious intent, will be much harder to prevail against. Raising the burden effectively stacks the deck even higher against plaintiffs who are unable to compete with powerful defendants.

When all of these factors are combined, supposed “tort reforms” increase the chances that corporate entities will make business decisions that incidentally diminish the health and safety of the community. Without the ability to deter these entities, members of society will have no choice but to trust that these corporations will conduct business practices in good conscience. In other words, the community must trust them not produce dangerous products, not to conceal

¹¹⁰ The following states have a clear and convincing evidence requirement in punitive damages cases: Alabama; Alaska; Arizona; California; District of Columbia; Florida; Georgia; Hawaii; Indiana; Iowa; Kansas; Kentucky; Maine; Maryland; Minnesota; Mississippi; Missouri; Montana; Nevada; New Jersey; North Carolina; North Dakota; Ohio; Oklahoma; Oregon; South Carolina; South Dakota; Tennessee; Texas; Utah; and Wisconsin. *Punitive Damages Reform*, *supra* note 78.

¹¹¹ *Punitive Damages Reform*, *supra* note 78.

¹¹² *See infra* notes 183-185 and accompanying text.

knowledge of those dangers, and to self-report when they have harmed the environment.

Although some corporations are worthy of this trust, history has shown us that many others are not, especially when faced with a financial bottom line that strongly argues against “doing the right thing.” Since punitive damages are only awarded in cases in which there has been outrageous misconduct, and no law-abiding corporation has any intention of engaging in such conduct – it begs the question: why are these corporations working so hard to restrict or eliminate our access to punitive damages?

III. Tort Reform Threatens to Eliminate Our Most Effective Weapon Against Outrageous Misconduct

When proponents of tort “reform” argue that the current tort system is broken, they rely heavily on unrepresentative anecdotal evidence – neglecting to mention how the proposed reforms will undermine the ability of citizens to protect themselves from intentional outrageous misconduct. This is especially troubling since the tort vehicle is the most effective, perhaps the *only* effective, means of deterring outrageous misconduct by corporations. Such deterrence is particularly needed in the field of environmental law where, due to numerous factors, environmental crimes are more difficult to deter than in other areas of law. Moreover, punitive damages are rarely awarded for environmental injuries, and when they are, the conduct tends to be highly outrageous. If tort reformers are truly concerned about protecting public health, they should instead focus their efforts at reforming the Bankruptcy Code which currently allows corporate offenders to escape liability for their outrageous misconduct. Bankruptcy reform, unlike tort reform, would protect public health by reinforcing the deterrent power of punitive damages thereby decreasing the likelihood that corporations will behave recklessly in order to increase profit margins.

A. Bait and Switch: Proffering Misleading Anecdotal Evidence to Justify Tort Reform

Tort reformers often argue that opportunistic plaintiffs and their avaricious lawyers are receiving windfalls in punitive damages awards against blameless defendants. Not only are their characterizations disingenuous, but they also grossly misrepresent the true state of the tort system. Additionally, tort reform proponents neglect to mention that their proposed reforms will either reduce or eliminate a plaintiff's ability to seek punitive damages against the worst offenders: defendants who have intentionally engaged in outrageous misconduct which has caused serious injury to large numbers of people or the environment.

One of the most famous examples employed by the tort reform movement to illustrate the unjustness of the tort system is the case of the woman who was awarded \$2.7 million dollars in punitive damages after spilling hot McDonald's coffee on her lap.¹¹³ Many people swallowed this anecdote hook, line, and sinker and quickly saw it as representative of the rampant abuse of the legal system. What most people did not realize, was that Mrs. Stella Liebeck, an 81 year-old woman who had never filed a lawsuit in her life, only sued McDonald's because they refused to compensate her for the pain and medical bills associated with her severe burns.¹¹⁴ Most people also were unaware that it was McDonald's policy to keep their coffee at 180-190 degrees Fahrenheit and that they had received over 700 reports of coffee burns and had settled claims arising from such burns for over \$500,000 in the past.¹¹⁵ However, even despite these omissions, this example fails to accurately reflect the context in which punitive damages are usually awarded, and it neglects to mention that the tort reform remedy will eliminate the ability of citizens to sue for outrageous misconduct.

¹¹³ Liebeck v. McDonald's Restaurants, No. CV-93-02419 (N.M. Dist. Aug. 18, 1994).

¹¹⁴ Andrea Gerlin, *A Matter of Degree*, WALL ST. J., Sept. 1, 1994, at A1.

¹¹⁵ *Id.*

Outrageous misconduct is deliberate and calculated and usually results in a great deal of damage. While allowing the temperature on a pot of coffee to get too high may not be nearly as outrageous as a manufacturer's concealment of the deadliness of its widely distributed asbestos product, the tort reform movement does not differentiate between the two types of misconduct. Instead, it seeks to eliminate or restrict *all* punitive damages – characterizing the whole system as flawed. It is no coincidence that the tort reformers themselves stand to gain the most from such reforms. If they succeed in restricting a citizen's right to sue for punitive damages, outrageous corporate misconduct will undoubtedly increase in frequency.

B. Tort Reform: Eliminating Our Best Defense Against Outrageous Misconduct

Eliminating or reducing the availability of punitive damages will undermine our most effective deterrent against outrageous corporate misconduct. In his book, *Outrageous Misconduct*, Paul Brodeur emphasizes the importance of tort remedies, especially punitive damages, in the context of asbestos litigation.¹¹⁶ In reviewing “Outrageous Misconduct” Harvard law professor David Rosenberg stated that Brodeur

...proves one point beyond dispute: the tort system was and remains the only institution capable of bringing justice to diseased workers. Were it not for the tort system, the evidence of the manufacturers' policy of silence probably would never have been disclosed, the victims of that policy would never have received anything approaching just compensation, the industry would never have been held accountable for its actions, and there would never have been any serious warning to other industries that might be tempted to ignore the human costs of their enterprise.¹¹⁷

¹¹⁶ BRODEUR, *supra* note 1 at 354.

¹¹⁷ Rosenberg, *supra* note 7 at 1704.

Without the strong financial incentives that only the tort system provides, evidence of the massive cover-up engaged in by the asbestos industry might never have been revealed. The tort system, which carries the prospect of punitive damages, not only created an incentive for lawyers to uncover damaging information, but it also provided asbestos plaintiffs with the financial means to do so. From the beginning, the playing field was grossly uneven – asbestos manufacturers had far more capital to spend on litigation expenses than their worker victims and held all of the self incriminating evidence safely in their own hands. There was a dearth of incriminating evidence because the asbestos manufacturers had for years been settling claims out-of-court, insisting on confidentiality, and precluding the release of any evidence related to those claims.¹¹⁸ As a result, there were no public records to prove that the industry knew about the dangers of asbestos prior to each current case, and no former plaintiff or plaintiff’s attorney who were permitted to share evidence. In essence, each plaintiff’s attorney was forced to recreate the wheel. Furthermore, the plaintiffs that dared to take the manufacturers to court found themselves engaged in a “war of attrition” in which the asbestos industry exploited its superior financial position in an attempt to outspend the often impoverished plaintiffs.¹¹⁹ These tactics created nearly insurmountable obstacles for plaintiffs’ attorneys, many of whom had to go into personal debt in order to finance the lawsuits.¹²⁰ Only the tort system offered the prospect of reimbursement for their time and expenses and a potential return on their investment. In the absence of that prospect, evidence of the cover-up would likely have never been discovered.

The tort system was also the only vehicle which could provide just compensation for the asbestos victims, in part, because it involved individual evaluations of their claims. Alternative dispute resolution, which usually involves a cookie-cutter benefits scheme, will always over-

¹¹⁸ BRODEUR, *supra* note 1 at 90.

¹¹⁹ Rosenberg, *supra* note 7 at 1701.

¹²⁰ BRODEUR, *supra* note 1 at 245.

compensate some victims and under-compensate others because it lacks the ability to account for variations in circumstances. The Fairness in Asbestos Injury Resolution Act of 2004 (“FAIRA”),¹²¹ a recent proposal which would establish a national administrative trust fund to compensate asbestos victims, is a good example of how proposed alternatives fail to compensate asbestos victims as well as the tort system. The proposed trust would be funded by insurers and defendant asbestos companies in the amount of \$123 billion in exchange for the elimination of all future liability.¹²² Unlike the tort system which involves a highly-individualized appraisal of plaintiffs’ claims, the trust fund would disburse compensation in a fixed range on a no-fault basis according to particular categories of illness.¹²³ Critics of the plan argue that these fixed compensation ranges fail to adequately compensate victims as well as the tort system would.¹²⁴ For example, the plan may pay as little as \$20,000 to compensate some victims of lung cancer¹²⁵ – an amount which is far less than the \$35,000-\$50,000 that a similarly situated plaintiff would receive in the tort system.¹²⁶ Moreover, even the highest award that a victim may receive (\$1 million for mesothelioma), may be insufficient to cover medical costs, considering that the annual treatment expenses for mesothelioma often exceed \$200,000.¹²⁷ FAIRA would also fail to adequately compensate the asbestos victims for additional expenses associated with loss of employment and pain and suffering. Senator Kennedy of Massachusetts criticized FAIRA’s

¹²¹ S. 2290, 108th Cong. (2004) available at <http://thomas.loc.gov/cgi-bin/query/z?c108:S.2290>.

¹²² *Id.* § 403.

¹²³ *Id.* § 131.

¹²⁴ S. REP. NO. 108-118, at § XI (2003). Expressing their minority viewpoint, various senators asserted that the appropriate benchmark for compensating asbestos victims should be ensuring that they receive more compensation than they would receive in the tort system. They claimed that the average tort system awards to victims for each of the different disease categories is substantially higher than the compensation provided by the fund.

¹²⁵ S. 2290 § 131, 108th Cong. (2004).

¹²⁶ S. REP. NO. 108-118, at § XI (2003).

¹²⁷ Susan Warren, *As Asbestos Mess Spreads, Sickest See Payouts Shrink*, WALL ST. J., Apr. 25, 2002, at A1. As an illustration, one mesothelioma victim was forced to take out a \$70,000 mortgage on the home that he owned outright in order to pay for necessary surgery which his insurance carrier would not cover. *Id.*

inability to adequately compensate victims and its inappropriate focus on the litigation pressures felt by the asbestos industry by stating that

[t]he litigation did not create these costs. Exposure to asbestos created them. They are the costs of medical care, the lost wages of incapacitated workers, the cost of providing for the families of workers who died years before their time. Those costs are real. No legislative proposal can make them disappear.¹²⁸

For these reasons, proposals such as FAIRA which cap awards and employ cookie-cutter criteria are inferior to the tort system at adequately compensating victims of asbestos exposure.

Moreover, such an Act would send the message to other industries that the more people they harm, the more likely they will escape full liability for their actions by virtue of a government bail out.

The tort system is also uniquely able to force the asbestos manufacturers to bear the full societal burden of the costs of their unconscionable business decisions. Punitive damages are the community's way of showing corporations that they may not harm them with impunity. They not only have the power to force a corporation to pay a fine that will actually hurt, by taking the wealth of the offender into account, but they also provide an outlet for the community to express its anger. Only the tort system is able to subject corporate entities to the simultaneous financial sting and condemnation of the community.

Finally, the exemplary damages awarded against the asbestos industry effectively warned other industries against engaging in the same outrageous misconduct. Because the threat of punishment was so severe and public, the asbestos litigation and ensuing bankruptcies could not fail to send a strong message to other industries: engage in outrageous misconduct at your peril.

¹²⁸ 150 CONG. REC. S4249 (daily ed. Apr. 22, 2004) (statement of Sen. Kennedy).

Although published in 1985, *Outrageous Misconduct*'s exploration of the development of asbestos litigation and the threat that tort reform poses to public safety still has a lot of currency two decades later. The tort reform movement that threatened to weaken the power of punitive damages in the mid-80s still looms large today. In fact, tort reform has gained a lot of momentum today, given the strong political ties between the White House, Congress and industry. Brodeur's analysis of the role of punitive damages in deterring the outrageous misconduct of the asbestos industry is equally applicable to corporate misconduct in other areas.

C. Greater Need to Deter Outrageous Misconduct in the Environmental Arena

The inherent characteristics of most environmental pollutants are obstacles to the effective deterrence of outrageous misconduct in the field of environmental law. Punitive damages, therefore, are crucial in the environmental arena in order to counteract those built-in obstacles. Moreover, outrageous misconduct in the field of environmental law often involves large-scale threats to public health and the environment. If the tort reform movement succeeds in diminishing or eliminating punitive damages, Americans will have relinquished their greatest weapon against outrageous misconduct and public health and the environment will surely suffer as a result.

In environmental law, attempts to deter would-be violators are accomplished largely through the penalty provisions in federal environmental statutes. While most environmental regulations include such deterrents as citizen suit provisions, as well as civil and criminal penalties, they may be less effective at deterring corporate misconduct than tort actions which carry the prospect of much larger, incalculable punitive damages. Furthermore, unlike punitive damages, statutory penalties lack the ability to articulate the moral condemnation of the community, whose environment has been injured by the outrageous misconduct of a corporate

entity. As a result, rather than being deterred by the prospect of incalculable punitive damages, corporations are able to insert a known variable, an express civil or criminal penalty, into a matrix which weighs the benefit of polluting against its potential cost. In this zero-sum game, the environment is often the loser.

1. Punitive Deterrents for Environmental Harm

In environmental law, most deterrence is currently achieved by the civil and criminal penalties provided by federal regulatory statutes and the availability of provisions which allow citizens to sue those who violate the regulations. To a lesser extent, deterrence is also achieved by the prospect of private common law tort or state statutory actions which allow a plaintiff to seek punitive damages. However, some state tort actions are precluded by a showing that the injurer has complied with an applicable federal statute, when that statute expressly preempts such state law claims. Tort actions also act as gap-fillers where no regulation has been promulgated to address the particular harm alleged.

i. Punitive Statutory Remedies

In order to deter violations of federal environmental regulations, many statutes contain penalty provisions which allow citizens to sue and also provide for civil and criminal fines to be levied as punishment for violations. Citizen suits assist the Environmental Protection Agency (“EPA”) in deterring violations by decreasing the possibility that a violator will escape punishment, while the civil and criminal penalties deter violations by reducing the potential monetary benefit of the polluting activity.

Environmental statutes are better able to deter illegal pollution by allowing citizens to sue violators and seek civil penalties. In order to encourage these citizen suits, the statutes provide

for the reimbursement of the costs of litigation, including reasonable attorneys' fees.¹²⁹ This is especially necessary since these citizen suits do not allow the plaintiff to recover damages, only injunctive action or civil penalties which are received by the U.S. Treasury.¹³⁰

Many statutory civil penalties can be considerable, having the ability to reach \$25,000 per day, per violation.¹³¹ For instance, the Comprehensive Environmental Resource Compensation and Liability Act ("CERCLA")¹³² contains a citizen suit provision which allows "any person [to] commence a civil suit on his own behalf" against "any person ...who is alleged to be in violation of any standard, regulation, condition, requirement or order that has become effective pursuant to this chapter..."¹³³ As a remedy, the district court may impose a civil penalty¹³⁴ of up to \$25,000 per day for violations of various CERCLA provisions.¹³⁵ Other statutes allow citizens to seek injunctive action, rather than civil penalties for violations.¹³⁶

The ability of the citizen to sue the polluter is becoming increasingly vital, especially in light of past budget cuts to the EPA and a recent proposal by the industry-friendly Bush administration to reduce the 2006 fiscal budget for the EPA by an additional six percent.¹³⁷

These budget reductions will significantly restrict the EPA's ability to enforce environmental

¹²⁹ See e.g., Kerry D. Florio, *Attorneys' Fees in Environmental Citizen Suits: Should Prevailing Defendants Recover?*, 27 B.C. ENVTL. AFF. L. REV. 707, 707 (2000).

¹³⁰ See *supra* note 23.

¹³¹ See e.g., Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6928(a) and (g) (2005)(enabling citizen suit to seek damages up to \$25,000 per day for violations involving the handling of hazardous waste); Clean Air Act ("CAA"), 42 U.S.C. § 7413(d) (2005) (enabling citizens to sue, *inter alia*, violators of emissions standards or limitations on air pollution for civil penalties up to \$25,000 per day to be deposited into a "penalty fund" used to finance compliance and enforcement activities); and Clean Water Act ("CWA"), 33 USCS § 1319(d) (2005) (enabling citizens to sue, *inter alia*, those who violate effluent standards or limitations for civil penalties up to \$25,000 per day).

¹³² 42 U.S.C. §§ 9601 et seq. (2005).

¹³³ 42 U.S.C. § 9659(a)(1) (2005).

¹³⁴ 42 U.S.C. § 9659(c) (2005).

¹³⁵ 42 U.S.C. § 9609 (2005).

¹³⁶ The following statutes do not allow recovery of civil penalties as part of their citizen suit provisions: Toxic Substances Control Act, 15 U.S.C. § 2619 (2005); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270 (2005); Marine Protection, Research and Sanctuaries Act, 33 U.S.C. § 1415(g); and Safe Drinking Water Act, 42 U.S.C. § 300j-8 (2005).

¹³⁷ Michael Kilian, *EPA, Interior Cutbacks Blasted; Groups Call Budget 'Anti-Environment'*, CHI. TRIBUNE, Feb. 10, 2005, at C22.

regulations, thereby reducing the potential that a polluter will be caught. The citizen suit provisions allow environmental organizations to supplement the depleted enforcement capacity of the EPA by serving as “private attorneys general”¹³⁸ to ensure that polluters are discovered and punished. One indication that citizen suits will increase in deterrent ability was a decision by the United States Supreme Court that strengthened citizen standing in citizen suits which seek civil penalties.¹³⁹ As a result of the decision in *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, a corporation may no longer moot an action by complying with the environmental regulations only *after* being caught.¹⁴⁰

In addition to civil penalties, many of the environmental statutes also provide for criminal penalties and, in the case of CERCLA, for punitive damages. For instance, RCRA provides criminal penalties which range from a maximum \$50,000 per day of violation and/or imprisonment not to exceed two years for knowingly violating the regulations to up to \$250,000 and/or imprisonment for not more than fifteen years for knowingly endangering others.¹⁴¹ Similarly, the CAA provides for a number of criminal penalties, with fines levied pursuant to Title 18 of the United States Code and potential maximum prison sentences ranging from one year for violations such as knowingly failing to pay a fee or the negligent release of a hazardous air pollutant which places others in imminent danger to fifteen years imprisonment for the knowing release of a hazardous air pollutant which places others in imminent danger of serious injury or death.¹⁴² Criminal penalties under the CWA range from maximums of \$25,000 per day

¹³⁸ Goodwin Procter, *The Next Generation of Citizen Enforcement Suits, Coming Soon to a Courthouse Near You?* Environmental Law Advisory, Goodwin Procter publication, May, 2001 available at http://www.goodwinprocter.com/publications/ELA_enforcementsuits_5_01.pdf.

¹³⁹ See *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167, 196-197 (2000) (holding that civil penalties should be treated as punitive damages for the purpose of mootness analysis, i.e., that post-complaint conduct will not moot a claim for civil penalties).

¹⁴⁰ *Id.*

¹⁴¹ 42 U.S.C. § 6928(e) (2005).

¹⁴² 42 U.S.C. § 7413(c) (2005).

and not more than one year of imprisonment for negligent violations to \$250,000 and imprisonment up to fifteen years for knowing endangerment.¹⁴³ Each of these statutes also provide for the doubling of both the monetary penalty and the imprisonment for a second conviction for the same violation.¹⁴⁴ Additionally, each statute increases the maximum criminal penalty to \$1 million if the entity which knowingly endangers others is an organization.¹⁴⁵ In addition to civil and criminal penalties, CERCLA is unique in that it also enables the U.S. government to collect punitive damages for up to three times the costs incurred as a result of an entity's failure to provide removal or remediation of the release or threat of release of a hazardous substance.¹⁴⁶ Unlike other penalties, these punitive damages are deposited into the CERCLA Fund rather than the U.S. Treasury.¹⁴⁷

The statutory civil and criminal penalties together with the citizen suit provisions are designed to deter violations of environmental laws by reducing the potential benefit for the would-be polluter to violate the laws. In other words, if it costs a company \$10,000 to dispose of waste in a safe manner, but carries a potential penalty of \$25,000 for each day that the violation continues, it is rationale that the permit holder may choose to spend the \$10,000 to dispose of the waste properly. However, if the risk of discovery is small, whether due to diminished enforcement capacity at the EPA or the undetectable nature of the pollution, the potential threat of a fine is reduced and may eventually be eclipsed by the definite prospect of the \$10,000 savings to be gained by improper disposal. In such instances, in order to deter the would-be polluter, either the potential punishment or the threat of discovery must increase substantially.

¹⁴³ 33 U.S.C. § 1319(c) (2005).

¹⁴⁴ 42 U.S.C. § 7413(c) (2005), 42 U.S.C. § 6928(e), 33 U.S.C. § 1319(c) (2005).

¹⁴⁵ 42 U.S.C. § 7413(c) (2005), 42 U.S.C. § 6928(e), 33 U.S.C. § 1319(c) (2005).

¹⁴⁶ 42 U.S.C. § 9607(c)(3) (2005).

¹⁴⁷ 42 U.S.C. § 9607(c)(3) (2005).

Citizen suits and stiffer criminal penalties help to achieve this deterrent purpose, however, they are inferior to the ability of punitive damages to truly deter.

ii. Availability of Punitive Damages in Environmental Law: Tort and Statutory Vehicles

Unlike the citizen suit provisions under the federal environmental statutes, an individual who sues a polluter for damages pursuant to state law may be awarded compensatory and punitive damages. In some instances, the courts have held that such state law inspired actions are preempted by federal statutes designed to regulate the behavior complained of when the behavior is in compliance with the regulations.¹⁴⁸ However, the courts are hesitant to find preemption unless the relevant statute expressly calls for it, and even then, they read that preemption narrowly.¹⁴⁹ Tort and state statutory actions are able to proceed without significant challenge where there exists no applicable federal statute to regulate the act which caused the injury. Such actions are useful deterrents because they carry the threat of unpredictable and potentially quite large punitive damages. Additionally, they have the added ability to express the condemnation of the community.

a. Preemption of State Actions by Federal Law

Although relatively rare, sometimes federal environmental statutes may expressly preempt claims based on state law (which are often stricter than the federal regulations). When this happens, an individual may be unable to seek compensation or punitive damages after having sustained an injury due to defendant's actions as long as that defendant has complied with the applicable federal regulations. Although the federal statutes may expressly preempt state actions, this ability was circumscribed by *Cipollone v. Liggett Group, Inc.*, in which the United States Supreme Court stated that express preemption clauses must be read narrowly and

¹⁴⁸ See *infra* 150-156 and accompanying text.

¹⁴⁹ See *infra* note 150 and accompanying text.

“construed in light of a presumption against pre-emption of state powers.”¹⁵⁰ Despite this direction to read preemption clauses narrowly, courts continue to hold state tort claims (and hence, private punitive damages) to be preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”). For example, in *Papas v. Upjohn Co.*,¹⁵¹ the United States Supreme Court held that state law actions for damages which relied upon a showing that a manufacturer failed to meet a labeling or packaging standard were expressly preempted by Section 136v of FIFRA¹⁵² which states that “[s]uch State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this Act.”¹⁵³ In *Papas*, the plaintiff, a consumer who was injured by defendant’s pesticide products, was unable to recover damages in actions of negligence, strict liability, and breach of an implied warrant of merchantability, because each of the claims was predicated on an allegation of inadequate labeling.¹⁵⁴ This lawsuit was preempted because, although the defendant’s label failed to adequately warn the plaintiff of potential harm, it was nonetheless in compliance with FIFRA’s labeling requirements, thus immunizing the defendant from suits arising from any such labeling failure pursuant to state law. Similarly, in *Int’l Paper Co. v. Ouellette*,¹⁵⁵ the United States Supreme Court held that state common law nuisance actions based on the law of the victim’s state and alleging transboundary pollution were preempted by a point-source’s compliance with the CWA regulations. The Court suggested, however, that if the Vermont property owners

¹⁵⁰ *Cipollone v. Liggett Group*, 505 U.S. 504, 518 (1992).

¹⁵¹ 985 F.2d 516 (11th Cir. 1993).

¹⁵² 7 U.S.C.A. § 136v (2005).

¹⁵³ *Papas*, 985 F.2d at 518. *See also* *King v. E. I. Du Pont de Nemours & Co.*, 806 F. Supp. 1030, 1036 (D. Me., 1992) (holding that “the prohibition of ‘requirements’ under FIFRA preempts common law damage actions for failure to warn in the herbicide labeling context”). *But see*, *Burke v. Dow Chemical Co.*, 797 F. Supp. 1128, 1133 (D.N.Y., 1992) (denying defendant’s motion for summary judgment on the ground that mother’s claim for failure to warn was not necessarily preempted by FIFRA’s express labeling provision because the chemical manufacturer may have neglected its duty to warn its industrial customer (who later used the chemical in a product marketed to consumers) of the danger that the chemical posed to unborn fetuses and children).

¹⁵⁴ *Papas*, 985 F.2d at 517.

¹⁵⁵ 479 U.S. 481 (1987).

wished to sue the paper mill in nuisance, they could do so pursuant to the common law of the source state, New York.¹⁵⁶

There are other areas, however, in which state law actions have not been preempted by federal environmental law. For instance, in *Silkwood v. Kerr-McGee*, the United States Supreme Court held that a state common law tort action seeking compensatory and punitive damages was not preempted by the defendant nuclear plant's compliance with the regulations of the Atomic Energy Act.¹⁵⁷ Similarly, although they characterized their decision as a close call, in *In Re Exxon Valdez*,¹⁵⁸ the United States Court of Appeals for the Ninth Circuit held that the punitive damages sought by private parties were not preempted by the Clean Water Act.¹⁵⁹ In *Exxon Valdez*, the court held that the savings clause, Section 1365 of the Clean Water Act, which states that "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief. . . ." preserves the common law right to sue for damages.¹⁶⁰ The court's decision legitimized a private damages action which, at the time, produced the largest (as yet unpaid) punitive damages award in American history.¹⁶¹ Unfortunately, the decision has not forced a resolution of the punitive damages tug-of-war that has been raging in that case for over a decade.¹⁶²

As just mentioned, in order to prevent preemption of state remedies, many statutes include savings clauses that expressly preserve the individual's right to sue. For example, the

¹⁵⁶ *Id.* at 500.

¹⁵⁷ See *supra* discussion in text accompanying notes 55-62.

¹⁵⁸ 270 F.3d 1215 (9th Cir. 2001).

¹⁵⁹ *Id.* at 1231.

¹⁶⁰ *Id.* (emphasis added).

¹⁶¹ *In re Exxon Valdez*, 270 F.3d 1215, 1238 (9th Cir., 2001). The punitive damages are currently valued at \$4.5 billion. *In re Exxon Valdez*, 296 F. Supp. 2d 1071, 1110 (D. Alaska, 2004)

¹⁶² Adam Liptak, *\$4.5 Billion Award Set for Spill of Exxon Valdez*, N.Y. TIMES, Jan. 29, 2004, at A18.

Surface Mining Control and Reclamation Act¹⁶³ provides that “[a]ny person who is injured in his person or property through the violation by any operator of any rule, regulation, order, or permit issued pursuant to this Act may bring an action for damages (including reasonable attorney and expert witness fees)”¹⁶⁴ Similarly, the Toxic Substances and Control Act (“TSCA”)¹⁶⁵ expressly protects the right to sue by providing that “[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of this Act or any rule or order under this Act or to seek any other relief.”¹⁶⁶ These types of savings clauses, present in most environmental statutes, clearly demonstrate Congress’ intent to preserve an individual’s right to sue for personal damages.

b. State Actions as Gap Fillers

Some tort and statutory claims based on state law are able to proceed where the applicable federal statute fails to either specifically regulate or expressly preempt the activity which resulted in harm to the plaintiff. The former instance is far less common today than the latter, because most practices which may impact the environment have already been regulated, at least to some extent. However, this was not always the case. For instance, at the turn of the twentieth century, farmers were able to successfully force copper smelters to reduce their dangerous emissions through private nuisance suits.¹⁶⁷ At that time, copper smelting, a process which extracted valuable copper from large amounts of ore, was a booming industry.¹⁶⁸ In Tennessee, farmers had begun to sue the Tennessee Copper Company because their crops were being destroyed by the large quantities of sulfur dioxide and arsenic which were deposited on

¹⁶³ 30 USCS §§ 1201 et seq. (2005).

¹⁶⁴ 30 USCS § 1270(f) (2005).

¹⁶⁵ 15 USCS §§ 2601 et seq. (2005).

¹⁶⁶ 15 USCS § 2619 (2005).

¹⁶⁷ Timothy LeCain, *The Limits of “Eco-Efficiency”: Arsenic Pollution and the Cottrell Electrical Precipitator in the U.S. Copper Smelting Industry*, ENVTL. HISTORY, July 2000, available at http://www.findarticles.com/p/articles/mi_qa3854/is_200007/ai_n8910950.

¹⁶⁸ *Id.*

their property as a byproduct of the smelting process.¹⁶⁹ The farmers' lawsuits acted as gap-fillers because there were no federal air pollution regulations at that point.¹⁷⁰ As a result of the pressure from those private nuisance suits, Tennessee Copper Company developed new technology which reduced the output of harmful emissions by harnessing the released sulfur dioxide and converting it into sulfuric acid.¹⁷¹ As luck would have it, sulfuric acid became a valuable commodity in and of itself, because it could be sold to fertilizer manufacturers.¹⁷² Later, plaintiffs across the country were able to highlight this beneficial aspect of the improved technology while arguing for the adoption of stricter emissions standards in order to protect their property.¹⁷³

The second, more common instance in which state law acts as a gap-filler to federal regulations occurs when a statute does not expressly preempt state law regarding an activity which resulted in harm to a plaintiff. This idea was expressed in *Cipollone v. Liggett Group*, in which the U.S. Supreme Court stated that "Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not pre-empted."¹⁷⁴ For example, in *Coastline Terminals of Conn., Inc. v. USX Corp.*,¹⁷⁵ the United States District Court for the District of Connecticut held that a plaintiff's state law claims which were related to petroleum releases were not preempted because the applicable statute, CERCLA, specifically excluded petroleum contamination from coverage damages.¹⁷⁶ The state law claim supplements CERCLA by providing a remedy for the plaintiff where there is no remedy under CERCLA.

¹⁶⁹ *Id.*

¹⁷⁰ The first legislation dealing with air pollution was passed with the Air Pollution Act of 1955.

¹⁷¹ LeCain, *supra* note 167.

¹⁷² *Id.* Eventually the sulfuric acid was became more valuable for the companies to produce than the copper. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 84 (4th ed. 2003).

¹⁷³ *Id.*

¹⁷⁴ 505 U.S. 504, 518 (1992).

¹⁷⁵ 156 F. Supp. 2d 203 (D. Conn. 2001).

¹⁷⁶ *Id.*

These types of state law actions provide supplemental protection for the environment in areas where Congress or federal agencies have yet to set standards and may be particularly useful deterrents because they create the potential that a polluter will be subject to punitive damages for his actions.

2. More Punishment is Required to Deter Environmental Harm

If the benefits of a polluting activity outweigh the potential punishment, the activity will not be sufficiently deterred. Because environmental injuries are often difficult to detect and successfully prove, many offenders will escape punishment. When combined with the fact that, even when the offender is caught, he is often only forced to pay a predictable, relatively modest fine, it is not surprising that environmental crimes are more difficult to deter than other types of offenses. Because of this greater need for deterrence in environmental law, it is crucial that punitive damages, perhaps the most effective deterrent of all, remain unfettered in this arena.

i. Deterrence is Hampered by an Inability to Detect and Successfully Sue Environmental Offenders

The inherent characteristics of most pollutants and the injuries they produce, which make them difficult to detect and indisputably trace to a source, frustrate attempts to deter polluting activities.¹⁷⁷ First, pollutants have the ability to commingle indistinguishably with surrounding pollution. Second, harms arising from pollutants or chemicals may take years to develop. Third, when the harm finally appears, there may be several potential underlying causes. Finally, due to a lack of obvious plaintiffs and adequate funding for the EPA, violations are often un-enforced.

¹⁷⁷ This does not refer to tort claims in jurisdictions which allow a plaintiff to dovetail her claim with a statutory violation in a negligence per se action. In such cases, the violation itself satisfies the requirement that the defendant had knowledge that his conduct would cause a particular harm as long as the harm caused was of a type intended by the statute to prevent and that the plaintiff was a member of a class that the statute intended to protect. Abraham, *infra* note 184, at 384. Causation also is not an impediment for plaintiffs in strict liability actions where the actor has engaged in “abnormally dangerous activities” and the activity poses a significant, foreseeable risk that cannot be eliminated even with reasonable care and the activity is not a matter of common usage. Abraham, *infra* note 184, at 385 (citing RESTATEMENT (SECOND) OF TORTS § 520 (1977)). Additionally, the availability of public records also lessens the impediments to filing actions against violators.

All combined, these factors reduce the likelihood that an offender (a) will be discovered, and (b) if discovered, that a successful tort action will result in an award of punitive damages. In other words, because there is a decreased risk that a polluter will be caught and successfully sued, there is a greater need for deterrence in order to protect the environment.

a. Commingling Ability

The fact that a pollutant can commingle indistinguishably with surrounding pollutants may frustrate a plaintiff's attempt to prove causation in a common law tort suit in two respects. First, the relative blame cannot be apportioned by a preponderance of the evidence – the traditional civil standard of proof. For instance, if several factories are releasing pollutants into a river, it would be impossible for a plaintiff to prove each defendant's relative responsibility. However, depending on the jurisdiction, some common law has evolved to allow plaintiffs to more easily prove causation through alternative liability schemes.¹⁷⁸ For instance, in the hypothetical posed, a court may employ the *Michie v. Great Lakes Steel Div.*¹⁷⁹ approach and shift the burden of proof to the defendant factories requiring them to *disprove* their relative responsibility for the river pollution.¹⁸⁰ Second, the ability of pollutants to commingle with ease complicates the plaintiff's ability to prove which of many pollutants is actually responsible for the harm produced. This was part of the problem in *Missouri v. Illinois*,¹⁸¹ in which the United States Supreme Court rejected Missouri's attempt to enjoin Illinois from releasing sewage into the Illinois river, in part, because Missouri was unable to prove that the increase in typhoid fever

¹⁷⁸ See e.g., *Summers v. Tice*, 199 P.2d 1, 4 (Cal. 1948) (holding that two hunters were equally liable for an injury which may have been caused by either man's negligent firing of a gun and reasoning that "where the matter of apportionment is incapable of proof, the innocent wronged party should not be deprived of his right to redress. The wrongdoers should be left to work out between themselves any apportionment"); *Sindell v. Abbott Labs.*, 607 P.2d 924, 937 (Cal. 1980) (holding manufacturers liable according to a "market share approach" in which a company's degree of liability is dependant on its share of the market at the time when the dangerous product was available to the plaintiff (only if the defendant is unable to prove that it was not responsible for the particular plaintiff's harm)).

¹⁷⁹ 495 F.2d 213, 218 (6th Cir. 1974).

¹⁸⁰ *Id.* at 218.

¹⁸¹ 200 U.S. 496 (1906).

in St. Louis was caused by Illinois' sewage and not Missouri's own.¹⁸² The ability of pollutants to commingle readily with other substances complicates the ability of a plaintiff to successfully prove causation.

b. Long Latency Period

Another quality associated with environmental injuries which makes them difficult to detect or prove is a potentially long latency period. Although some types of environmental damage are immediately apparent, such as a massive oil spill, other types may go unnoticed for years. For instance, asbestosis has a latency period of up to forty years between initial exposure to asbestos and development of respiratory disease.¹⁸³ Similarly, a contaminant that has been dumped at a remote site may not be discovered until long after it has seeped into the ground and contaminated the groundwater. Because of this long latency period, it will often be far more difficult for plaintiffs to reconstruct the chain of events leading up to the harm which occurred over a span of decades as opposed to a recent event.¹⁸⁴ Additionally, a long latency period casts doubt on whether the substance accused of causing the harm is in fact responsible. The longer time that passes between exposure and discovery of illness, the more opportunities a person has had to come in contact with other, potentially harmful substances – especially when the disease in question could have many possible causes.¹⁸⁵ Another factor which comes into play with a long latency period is the potential that the responsible party may have long departed the scene – never to be discovered and held responsible. Overall, the longer latency periods, which are

¹⁸² *Id.* at 522.

¹⁸³ *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 475 (N.J. 1986).

¹⁸⁴ Kenneth S. Abraham, *The Relation Between Civil Liability and Environmental Regulation: An Analytical Overview*, 41 WASHBURN L.J. 379, 380 (2002).

¹⁸⁵ *Id.* at 382 (citing Mark Geistfeld, *Scientific Uncertainty and Causation in Tort Law*, 54 VAND. L. REV. 1011, 1034 (2001)).

characteristic of environmental injuries, effectively increase the burden on the plaintiff to prove causation and the likelihood that the offender will escape punishment.

c. Numerous Potential Causes of Disease

In addition to the commingling problem and the long latency problem, the fact that many diseases could be caused by a number of different factors also deters a plaintiff's ability to prove direct causation between a substance and an illness. As an example of this difficulty, the Court in *Missouri v. Illinois* rejected arguments by the plaintiff State that an increase in the occurrence of typhoid fever in St. Louis was correlated with an increased release of sewage by Chicago into the Illinois river.¹⁸⁶ The Court was unconvinced by pure statistical increases in typhoid because there could have been many other causes for those increases, including pollution from *within* the state.¹⁸⁷ In *Reserve Mining Co. v. Environmental Protection Agency*,¹⁸⁸ the plaintiffs were similarly unable to prove a connection between the defendant's release of taconite tailings¹⁸⁹ into Lake Superior and gastrointestinal cancer in asbestos workers.¹⁹⁰ The United States Court of Appeals for the Eighth Circuit determined that the tailings did not pose an imminent health threat despite having viewed a variety of evidence which purported to demonstrate the opposite, including tissue studies of cadavers, animal experiments, and epidemiological studies.¹⁹¹ Diseases such as cancer are particularly resistant to a clean causation analysis because they can be caused by multitudinous factors.¹⁹² The fact that some diseases may have numerous causes, increases the difficulty for a plaintiff to prove causation by a particular agent.

¹⁸⁶ 200 U.S. 496, 526 (1906).

¹⁸⁷ *Id.* at 523-24.

¹⁸⁸ 514 F.2d 492 (8th Cir. 1975).

¹⁸⁹ Taconite tailings are similar in structure to asbestos fibers. *Id.* at 501.

¹⁹⁰ *Id.* at 536.

¹⁹¹ *Id.*

¹⁹² *See supra* note 185 and accompanying text.

d. Under-enforcement

The under-enforcement of environmental laws is another reason why would-be polluters are under-deterred. This occurs both because of a lack of obvious plaintiffs and an inability for the EPA to keep up with the large number of violations, especially in the wake of successive budget cuts. Unlike most other areas of law, offenses against the environment do not always implicate an obvious plaintiff. For instance, consider the company that dumps waste at a remote site and allows it to seep into the ground where it may never be discovered. Next, compare that conduct to a case where a motorist is rear-ended in her vehicle by another driver. In the second case, there is clearly a plaintiff – the injured motorist. In the first case, who is the injured party? While it is true that the “earth” has been injured, the earth is not a viable plaintiff. The owner of the remote site is the legal victim. Unfortunately, that entity is likely to be the offender, itself. This type of situation creates the potential that injuries will fail to be remedied.

In order to alleviate this sort of problem, most environmental statutes contain citizen suit provisions which provide for reasonable attorneys’ fees and court costs.¹⁹³ Although the provision of attorneys’ fees mitigates the impact of one of the chief obstacles to filing an action, it will likely only encourage environmental organizations to sue, rather than the average citizen. However, this can only attempt to increase the number of law suits, it cannot hasten the discovery of injuries. Another factor which hampers enforcement of federal regulations is the lack of staff at the EPA. Under-enforcement of environmental injuries increases the likelihood that offenders will pollute because there is less of a chance that they will be caught.

e. Over-reliance on Fines Rather than Punitive Damages Awards

Another reason why environmental law is currently unable to deter many violations is its over-reliance on civil and criminal penalties rather than tort-derived punitive damages. Punitive

¹⁹³ See *supra* note 129.

damages are superior to penalties in a number of ways. First, punitive damages are not only unpredictable, but they can be much larger than statutory penalties. Second, punitive damages are able to communicate the disapproval of the community. Third, the threat of punitive damages can be wielded as leverage by environmental groups in an attempt to force companies to institute safety improvements.

From a would-be polluter's perspective, one of the biggest advantages of facing a statutory penalty scheme, as opposed to punitive damages, is the relative predictability of the potential fine. Although statutory penalties are somewhat flexible, they will always fall within a discrete range. Punitive damages, on the other hand, tend to be more unpredictable, despite the boundaries applied by the United States Supreme Court.¹⁹⁴ Thus, it is far more difficult for a corporation to weigh the costs and benefits of a polluting activity if the potential cost is a completely unknown factor. Especially when that unknown factor could potentially be much larger than any civil or criminal penalty. Although civil and criminal penalties can amount to millions of dollars,¹⁹⁵ punitive damages can amount to *billions*.¹⁹⁶ As a consequence, the threat of punitive damages is obviously a more potent deterrent than the possibility of civil or criminal penalties.

Moreover, unlike civil or criminal penalties, punitive damages allow the community to express its disapproval of a defendant's outrageous misconduct. For this reason, they are superior to penalties alone, which consist of predetermined ranges formulated by legislators or regulatory agencies.

¹⁹⁴ See *supra* notes 90-103 and accompanying text.

¹⁹⁵ For example, in March of 2000, Koch Petroleum Group, L.P. was ordered to pay \$8 million dollars in criminal penalties and remediation costs for allowing up to 600,000 gallons of aviation fuel to escape and reach groundwater. Environmental Protection Agency, Enforcement Action Summary, FY 2000 March, Region 5, *available at* <http://www.epa.gov/region5/orc/enfactions/enfactions2000/week-0300.htm>.

¹⁹⁶ For example, Exxon was ordered to pay \$4.5 billion in punitive damages for the Exxon Valdez oil spill. Liptak, *supra* note 72.

The availability of punitive damages can also provide useful leverage for environmental groups in negotiations aimed at pressuring companies to cease polluting. For instance, Earth Island Institute Inc. was able to convince Southern California Edison (“SCE”) to enter into a consent decree, in which SCE agreed to establish an environmental trust fund and pay attorneys’ fees and costs in exchange for Earth Institute’s foregoing their nuisance and Clean Water Act suits,¹⁹⁷ which carried the potential of punitive damages arising from defendant’s operation of the San Onofre Nuclear Generating Station.¹⁹⁸ The settlement provided that SCE would acquire and restore specific wetlands property (spending \$7.5 million).¹⁹⁹ In the absence of the potential to sue for punitive damages, it is unlikely that such a settlement would have occurred. The availability of punitive damages may have compelled SCE to take the environmental group seriously and bought them a seat at the negotiating table. If only penalties had been available, it is not likely that SCE would have been willing to agree to as generous a settlement.

Additionally, unlike civil or criminal penalties, the availability of punitive damages provides an additional incentive for plaintiffs and attorneys to sue defendants for outrageous misconduct. Because of the high initial outlays of money and effort which environmental cases often demand, plaintiffs will often require additional encouragement to file suits. It has been suggested that the availability of punitive damages allows individual plaintiffs to “serve a qui tam-like function [by encouraging them to bring] claims which might benefit society.”²⁰⁰ When punitive damages are available, there is an increase in the chance that a polluter will be sued for its conduct and greater potential that the punishment will deter both specifically and generally.

¹⁹⁷ Earth Island Inst., Inc. v. S. Cal. Edison Co., 838 F. Supp. 458, 460 (S.D. Cal. 1993).

¹⁹⁸ Earth Island Inst., Inc. v. S. Cal. Edison Co., 166 F. Supp. 2d 1304, 1305 (D. Cal., 2001)

¹⁹⁹ *Id.*

²⁰⁰ In re Simon II Litig., 2002 U.S. Dist. LEXIS 25632, 216-217 (D.N.Y. 2002).

Big sticks are needed in order to combat and deter environmental crimes. Although rarely sought, when punitive damages are awarded in the environmental context, they are richly deserved. Our current environmental law framework of overlapping federal and state regulations as well as common law remedies may allow some offenders to escape all liability for knowingly harming the environment. Deterrence is especially necessary in the environmental context because, due to the nature of most environmental injuries, offenders often either escape detection or prevail in court because of what may be characterized as an insurmountable burden on the plaintiff to prove causation. Today, some companies are choosing to pollute because they consider the penalties, which are predictable and relatively modest, to be a cost of doing business.²⁰¹ If tort reform is successful, it will undermine a citizen's ability to deter outrageous corporate misconduct and will erode our protections for public health and the environment. If anything, tort remedies should be strengthened, not weakened.

D. Bankruptcy Reform, not Tort Reform

At a time when Republican politicians are actively restricting the rights of ordinary Americans to legitimately seek shelter in the bankruptcy system,²⁰² it is nothing short of hypocritical for them to allow corporations to continue to *abuse* the protections of that system. If proponents for tort "reform" are sincere in their aim to safeguard the health of Americans, their goals would be better served by shifting their focus from reform of the tort system to reform of the Bankruptcy Code. In fact, a "reform" of the tort system would actually hinder any goal to improve public health because it would reduce or eliminate an effective means of deterring harmful and outrageous corporate misconduct – the threat of punitive damages. Conversely, a reform of the Bankruptcy Code would strengthen public health by eliminating the ability of

²⁰¹ See, e.g., *infra* note 206 and accompanying text.

²⁰² David Broder, *A Bankrupt 'Reform,'* WASH. POST, Mar. 13, 2005, at B7.

corporate entities to escape liability for their deliberate, outrageous conduct through Chapter 11 bankruptcy proceedings, thus amplifying the deterrent potential of punitive damages.

Proponents of tort “reform” disingenuously suggest that many health catastrophes can be averted by infringing a plaintiff’s ability to seek redress for their injuries. For instance, tort reformers assert that if pharmaceutical companies are not shielded from consumer lawsuits based on harm resulting from an FDA-approved drug, the development of life-saving drugs will be adversely affected. Similarly, tort reformers suggest that access to adequate healthcare will be diminished if punitive damages in medical malpractice cases are not capped because doctors will be unable to afford the increasing insurance premiums.²⁰³ Both appeals are insincere. Shielding drug companies who have knowingly allowed a dangerous product to reach the marketplace, simply because the drug was approved by the FDA, will not make consumers safer – it will subject them to more danger.²⁰⁴ Currently, consumers are protected by two means: regulatory approval by the FDA and the tort system. If tort actions are eliminated, then only the regulatory protections will remain. Although this protection might have sufficed at one point in history, today, the FDA is no longer able to safeguard citizen safety due to budget reductions, decreases in their enforcement staff, and stronger political ties between the current administration and the pharmaceutical industry which compels the FDA to “fast-track” certain drugs.²⁰⁵ Likewise, the suggestion that a reduction in punitive damages awards would stem rising insurance premiums for doctors and ensure continued access to adequate healthcare, is also insincere. According to data from Weiss Ratings, Inc., in many states which have voluntarily adopted caps on punitive damages in medical malpractice cases, contrary to expectations, the insurance premiums have

²⁰³ *Medical Liability Reform*, *supra* note 79 and accompanying text.

²⁰⁴ Robert B. Reich, *A Suitable Remedy*, WASH. POST, Jan. 9, 2005, at B5.

²⁰⁵ *Id.*

actually *increased*.²⁰⁶ In fact, by infringing the ability of a patient to sue for outrageous misconduct by a doctor, tort reform makes patients less safe because it not only reduces a patient's ability to be adequately compensated for harm, but it also diminishes or eliminates the only effective financial deterrent against reckless, intentional conduct – the award of punitive damages. A far more effective prophylactic for public health would be a reform of the Bankruptcy Code. Such reform would protect public health by ensuring that entities bear full responsibility for their actions, thus deterring outrageous misconduct that endangers public health.

Currently, Chapter 11 Bankruptcy operates as a loophole through which corporate entities can evade the sting of compensatory and punitive damages which were awarded as punishment for their outrageous misconduct. Upon filing for bankruptcy, the petitioner is protected by an automatic stay provision, which provides temporary insulation against creditor demands, including those by tort claim holders, for the duration of the bankruptcy proceedings.²⁰⁷ Additionally, after the bankruptcy has been adjudicated, the debts of the corporation may be fully discharged, including all claims which arose prior to the filing of bankruptcy.²⁰⁸ In other words, any claim that arose from the actor's pre-bankruptcy conduct, including claims that have already been adjudicated as well as future claims which involve a latency period in discovering the harm, will not have to be paid by debtor. Once again, the asbestos cases provide an excellent example of how corporations are able to manipulate the legal system, in this case the Bankruptcy Code, in order to avoid responsibility for their misdeeds. In 1982, Johns-Manville, an asbestos

²⁰⁶ See e.g., *Medical Malpractice Caps: The Impact of Non-Economic Damage Caps on Physician Premiums, Claims Payout Levels, and Availability of Coverage*, Weiss Ratings, Inc., (Revised June 3, 2003) available at <http://www.weissratings.com/malpractice.asp>. Martin D. Weiss, chairman of Weiss Ratings, Inc., stated that, based on the study, “[t]ort reform has failed to address the problem of surging medical malpractice premiums, despite the fact that insurers have benefited from a slowdown in the growth of claims.”

²⁰⁷ 11 USCS § 362 (2005).

²⁰⁸ 11 USCS § 1141(d)(1)(A) (2005).

manufacturer with assets totaling over \$2 billion, became the wealthiest corporation to file for Chapter 11 bankruptcy.²⁰⁹ After announcing its impending bankruptcy proceedings, Johns-Manville characterized itself as a victim of a tort system which allowed thousands of unmeritorious suits to be sought against it – although punitive damages, which had been awarded for their reckless and outrageous misconduct, argued the contrary.²¹⁰ The company suggested that Congress enact a “statutory compensation program for asbestos injuries.”²¹¹

This was a clever move on the part of Johns-Manville, because unlike Chapter 7 which would have required a full liquidation of all of the company’s assets, Chapter 11 allowed the company to retain its assets as long as the bankruptcy court approved its company reorganization plan, which had to make sufficient provisions for all of its creditors, including both current and future tort claimants.²¹² In order for such a wealthy company to qualify for Chapter 11 bankruptcy, it had to demonstrate that the aggregation of all current and future claims against it were sufficiently large enough to threaten the company’s well-being, but not so large as to necessitate a Chapter 7 liquidation.²¹³ This was a delicate balancing act that Johns-Manville was able to accomplish by persuading its epidemiology experts to “adjust” their estimates of future incidences of asbestos disease.²¹⁴ Additionally, in order to meet but not exceed this critical threshold, the company employed a low figure of \$40,600 as the hypothetical disposition cost for each current and future case, with a total dispensation of all claims projected to be \$1.9 billion.²¹⁵ This figure failed to account for the very real prospect of punitive damages awards.

²⁰⁹ BRODEUR, *supra* note 1 at 278-83.

²¹⁰ *Id.* at 283.

²¹¹ *Id.*

²¹² 11 USCS § 1141(b) (2005).

²¹³ BRODEUR, *supra* note 1 at 265.

²¹⁴ *Id.* at 264.

²¹⁵ *Id.* at 268.

After nearly three years, during which time no asbestos claimants were able to recover damages from Johns-Manville, a corporate reorganization plan was finally agreed upon.²¹⁶ Through the corporate reorganization, the company was able to insulate its operating arm from asbestos claims and create a limited fund that would compensate claimants.²¹⁷ Despite the fact that over \$6 million dollars in punitive damages had been awarded by juries in the prior two years, Johns-Manville was able to successfully set aside a mere \$5 million to pay for any current or future punitive damages awards.²¹⁸ Chapter 11 bankruptcy proved so successful a means to limit Johns-Manville's liability to the victims of its products, that other asbestos manufacturers soon followed suit.²¹⁹

This clever maneuver was not confined to the asbestos arena. Three years after Johns-Manville filed its bankruptcy petition, A.H. Robins, a wealthy pharmaceutical firm, also filed under Chapter 11 in order to avoid paying thousands of lawsuits filed by those injured by the company's Dalkon Shield product.²²⁰

To some extent, the courts appear to be cognizant of the connection between a bankruptcy loophole and the undermining of the ability of punitive damages to deter conduct which may endanger the public. In response to this concern, in *United States v. Mattiace Industries, Inc.*, the United States District Court for the Eastern District of New York held that punitive damages awarded as a component of a CERCLA suit, were not subject to the automatic

²¹⁶ *Id.* at 345-46.

²¹⁷ Johns-Manville agreed to pay approximately \$2.5 billion to settle current and future claims over 25 years. BRODEUR, *supra* note 1 at 347.

²¹⁸ *Id.*

²¹⁹ *Id.* at 279.

²²⁰ Charles P. Alexander, *Robins Runs for Shelter: The Drugmaker Files for Bankruptcy to Cope with the Dalkon Shield Disaster*, TIME, Sept. 2, 1985, at 32. As part of the reorganization, A.H. Robins established a trust fund which provided less compensation than would have been awarded if the claims had gone to trial. See Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 88, n.216 (1992).

stay provision of the Bankruptcy Code.²²¹ In support of its holding, the court reasoned that “government actions under CERCLA, [e]ven where the United States seeks punitive damages or reimbursement of Superfund cleanup costs in addition to or in lieu of injunctive relief, thereby arguably protecting its own pecuniary interest, *the deterrence function of the relief sought will render the action one to protect the public health, safety, and welfare. ...*”²²²

To the extent that the bankruptcy option is available to corporations seeking to evade responsibility for their misconduct, it should be either completely eliminated or severely restricted. Bankruptcy allows companies to escape paying punitive damages for their misconduct as well as full compensatory damages to their victims. Although it is less likely that a corporation as large as Exxon would choose to take such a drastic step as filing for bankruptcy, it remains an attractive option for smaller – though by no means insignificant – entities, such as Johns-Manville. By eliminating the bankruptcy loophole, the deterrent ability of punitive damages will be amplified to its intended strength. Consequently, outrageous corporate misconduct will undoubtedly be better deterred. Tort reform, on the other hand, will only encourage such misconduct.

III. Conclusion

Suppose that a wealthy company has just discovered that its brand-new, wildly popular product, a substance which regenerates lush hair growth in men, also causes inoperable brain cancer in 10% of the product’s users. Suppose also that the brain cancer will not manifest itself for at least twenty years after initial exposure to the product and that, over that twenty-year period, the company will stand to lose \$80 billion in profit if it voluntarily recalls its product or warns the public of the dangers. The company is also assured that, should it choose to conceal

²²¹ 73 B.R. 816, 819 (E.D.N.Y. 1987).

²²² *Id.*

its knowledge and leave the product on the market, its misconduct will not be discovered for at least twenty years – if then. At this juncture, the company’s course of action will depend on numerous factors including professional integrity, the size of any applicable criminal or civil penalty, and, most saliently, the availability of unfettered punitive damages. In a world where the punitive damages remedy has been reduced or eliminated, there would be nothing to deter the company from allowing its product to remain in the marketplace because it could no longer be adequately punished for any outrageous misconduct. Instead, the company would only be liable for compensatory damages, which would likely be diminished due to the long-latency period associated with the product. During the interim (which would be decades, at least), while the company waits for the public to learn that its product is dangerous, hundreds of thousands of additional consumers will be indifferently exposed to the deadly substance.

Although the full negative impact of tort “reform” on public health and the environment is incalculable, common sense tells us that it will be significant. Punitive damages are uniquely able to expose outrageous misconduct, punish the transgressors, compensate the victims, and deter others from engaging in similar misconduct. When a citizen’s ability to seek punitive damages is restricted or eliminated, corporations may freely engage in intentional harmful practices for the sake of profit margins. Therefore, citizens who wish to protect public health and the environment must not support tort “reform.” Instead, they should lobby their representatives for bankruptcy reform – not the type that Republican lawmakers have in mind, but a real reform that improves the health and safety of our nation, has no hidden agenda, and no hidden costs.

Particularly for larger entities, such as the Exxons of the world, only the threat of punitive damages are capable of deterring misconduct because these corporations tend to view smaller

compensatory awards or penalties as costs of doing business. The horror of this situation is compounded by the fact that these larger entities are capable of even more destruction than their smaller counterparts. As evidenced by their intense effort to evade payment of the \$5 billion in punitive damages awarded in *In Re Exxon*, and their extensive involvement in the tort “reform” movement, punitive damages *do* frighten Exxon. If that is the case, then punitive damages must be protected and reinforced because fear is what deters and deterrence is what will best protect us from outrageous misconduct.